Court File No.: 35838

IN THE SUPREME COURT OF CANADA
(ON APPEAL FROM THE COURT OF APPEAL FOR THE PROVINCE OF QUEBEC)

B E T W E E N :

M.M.

Appellant

- and -

MINISTER OF JUSTICE CANADA
on behalf of THE UNITED STATES OF AMERICA

Respondent

- and –

CRIMINAL LAWYERS' ASSOCIATION (ONTARIO)

- and -

BRITISH COLUMBIA CIVIL LIBERTIES ASSOCIATION

Interveners

FACTUM OF THE INTERVENER, CRIMINAL LAWYERS' ASSOCIATION

[Pursuant to Rule 44 of the *Rules of the Supreme Court of Canada*]

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FACTUM OF THE CRIMINAL LAWYERS' ASSOCIATION (ONTARIO)

PART I – OVERVIEW

1. By the order of Rothstein J. dated February 11, 2015, the Criminal Lawyers' Association (Ontario) ("the CLA") has been granted leave to intervene in the within matter.

2. The CLA submits that the double criminality requirement is a necessary precondition to surrender on an extradition request. The potential application of section 285 of the *Criminal Code* to the Appellant's case had she been charged in Canada for conduct similar to that with which she is charged in the United States bears directly on whether the double criminality requirement is satisfied. Before ordering surrender, the Minister of Justice must determine whether an equivalent defence is available in the jurisdiction seeking to prosecute the Appellant. If an equivalent defence is not available in the requesting state, the Minister is obliged to refuse surrender under section 44(1)(a) of the *Extradition Act* (S.C. 1999, c.18), as well as under s. 7 of the *Canadian Charter of Rights and Freedoms*.

3. The CLA takes no position on the facts as summarized by the parties.

PART II – QUESTIONS IN ISSUE

4. The CLA limits its submissions to the questions stated by the parties in relation to the Minister's surrender decision as they pertain to the double criminality requirement. The CLA takes no position on the other questions.

PART III – ARGUMENT

5. The double criminality requirement is one of the fundamental principles of extradition law. Simply put, before the extradition of an individual may be ordered, it must be the case that the underlying conduct is a criminal offence in the requesting state and, further, that the conduct would constitute a criminal offence in the requested state had it occurred there. The double criminality requirement is an essential part of Canadian

extradition law. It is found in section 3(1) of the *Extradition Act*.[1] It is also set out in Canada's extradition agreements. It is found, for example, in Article 2(1) of the *Treaty on Extradition between Canada and the United States*.[2] The double criminality requirement is internationally recognized as central to extradition law.[3] While this question is not before the Court on this appeal, there could be little doubt that the double criminality requirement is a principle of fundamental justice.

6. The double criminality requirement ensures that a person will not be extradited from Canada for conduct that is not a crime under the laws of this country. Its rationale is described by I.A. Shearer in *Extradition in International Law* (1971) as follows:

> The validity of the double criminality rule has never been seriously contested, resting as it does in part on the basic principle of reciprocity, which underlies the whole structure of extradition, and in part on the maxim *nulla poena sine lege*. For the double criminality rule serves the most important function of ensuring that a person's liberty is not restricted as a consequence of offences not recognized as criminal by the requested State. The social conscience of a state is also not embarrassed by an obligation to extradite a person who would not, according to its own standards, be guilty of acts deserving punishment. So far as the principle of reciprocity is concerned, the rule ensures that a State is not required to extradite categories of offenders for which it, in return, would never have occasion to make demand. The point is by no means an academic one even in these days of growing uniformity of standards; in Western Europe alone sharp variations are

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[1] This provision further stipulates that, subject to a relevant extradition agreement, the offence in respect of which extradition is sought must be punishable by the requesting State by imprisonment for a maximum term of imprisonment of two years or more, or a more severe punishment. Similarly, the corresponding Canadian offence must also be punishable by imprisonment for a maximum term of imprisonment of at least two years (or, in the case of specific agreement under s. 10 of the Act, a maximum term of imprisonment of at least five years).

[2] *Treaty on Extradition between Canada and the United States*, United States and Canada, 3 December 1971, CTS 1976 No. 3 (as amended 22 November 1991) [Intervener CLA's Book of Authorities, Tab 2]: "Extradition shall be granted for conduct which constitutes an offense punishable by the laws of both Contracting Parties by imprisonment or other form of detention for a term exceeding one year or any greater punishment." Canada's modern extradition treaty with the United States was signed on December 3, 1971. Like many treaties of its day, it contained a schedule listing offences for which extradition could be requested by the High Contracting Parties. In 1991, the treaty was amended by deleting the schedule and adding the conduct and punishability test contained in the current Article 2(1) (CTS 1991 No. 37). See Anne W. La Forest, *La Forest's Extradition to and from Canada*, 3d ed. (Aurora: Canada Law Book Inc., 1991), at pp. 25-26 [Intervener CLA's Book of Authorities, Tab 15].

[3] *Canada (Justice) v. Fischbacher*, 2009 SCC 46, [2009] 3 S.C.R. 170 at para. 26 [Respondent's Book of Authorities, Volume I, Tab 12]; See also Article 2 of the *Model Treaty on Extradition*, United Nations, 14 December 1990, A/RES/45/116 (subsequently amended 12 December 1997 by General Assembly resolution 52/88) [Intervener CLA's Book of Authorities, Tab 1].

> found among the criminal laws relating to such matters as abortion, adultery, euthanasia, homosexual behaviour, and suicide.[4]

7. As the majority of this Honourable Court held in *Kindler v. Canada (Minister of Justice)*, "[w]e will not extradite for acts which are not offences in this country."[5] La Forest J. held in *United States of America v. Lépine* that the underlying reason for the principle of double criminality is "that no one in Canada shall be surrendered for prosecution outside this country for behaviour that does not amount to a crime in this country."[6] As Charron J. observed in *Canada (Justice) v. Fischbacher*: "The purpose of double criminality is to safeguard the liberty of an individual whose extradition is sought by ensuring that he or she is not surrendered to face prosecution in another country for conduct that would not amount to a criminal offence in the country of refuge."[7]

8. Extradition proceedings in Canada consist of three phases: first, the Minister of Justice makes certain initial *ex parte* determinations in response to an extradition request; second, there is a judicial phase dealing with committal; and third, if the person has been ordered committed for surrender, the matter reverts to the Minister of Justice for a decision on surrender.[8] In *United States of America v. Drysdale*, Dambrot J. described the respective roles of the Minister and the extradition judge with respect to the rule of double criminality as follows:

> It is the task of the minister, by virtue of s. 15(1), after receiving an extradition request, to determine compliance with s. 3(1)(a), or s. 3(3) where applicable, and then to determine what offences under Canadian law correspond to the conduct alleged against the person in the requesting state, as distinct from the question of the sufficiency of the evidence. Sections 32 and 33 of the Act then contemplate that evidence, which is available for use in the foreign prosecution, will be placed before the extradition judge in the form of affidavits or a record of the case. The

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[4] I.A. Shearer, *Extradition in International Law* (Manchester: The University Press, 1971), at pp. 137-138 [Intervener CLA's Book of Authorities, Tab 16].

[5] *Kindler v. Canada (Minister of Justice)*, [1991] 2 S.C.R. 779 at 845 [Respondent's Book of Authorities, Volume I, Tab 36].

[6] *United States of America v. Lépine*, [1994], 1 S.C.R. 286 at 297 [Intervener CLA's Book of Authorities, Tab 13].

[7] *Canada (Justice) v. Fischbacher, supra*, at para. 26.

[8] *Németh v. Canada (Justice)*, [2010] 3 S.C.R. 281, at paras. 62-64 [Appellant's Book of Authorities, Volume I, Tab 5].

> judge then determines whether the conduct of the person sought, as disclosed in the evidence placed before him or her, satisfies the requirement of s. 3(1)(b). Finally, armed with the judge's order of committal and report under s. 38, the minister must decide, subject to review by the Court of Appeal of the relevant province pursuant to s. 57, whether surrender should be ordered. As will be seen, while the rule of double criminality is preserved by the new Act, the extradition judge is not its sole guardian. The extradition judge has but a modest role to play in ensuring that the rule is respected. The minister has a significant role. In the end, the appellate courts have the final word.[9]

This discussion was quoted with approval by Goudge J.A., writing for the Court of Appeal for Ontario in *United States of America v. Manningham*.[10]

9. Thus, responsibility for ensuring that the double criminality requirement is met rests with both the extradition judge and the Minister of Justice. Pursuant to s. 29(1)(a) of the *Extradition Act,* the extradition judge must determine whether there is sufficient evidence with respect to each essential element of the offence(s) set out in the Authority to Proceed to warrant committal. It is submitted that while this is a partial expression of the domestic aspect of the principle of double criminality, it does not exhaust the question of whether the person sought is charged with conduct which by Canadian standards would be deserving of punishment. This is a determination the Minister must make in accordance with the rationale underlying the double criminality requirement before surrender may be ordered.

10. Section 7 of the *Extradition Act* provides that the Minister of Justice "is responsible for the implementation of extradition agreements, the administration of this Act and dealing with requests for extradition made under them." The Minister's surrender decision is a discretionary one and is "primarily political in nature."[11] However, the *Charter* and the *Extradition Act* structure and, in some fundamental respects, constrain the Minister's power to order surrender on an extradition request, defining considerations (including fundamental rights) that the Minister must weigh in rendering

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[9] *United States of America v. Drysdale*, [2000] O.J. No. 214 (S.C.J.), at para. 78 [Intervener CLA's Book of Authorities, Tab 12].

[10] *United States of America v. Manningham*, [2004] O.J. No. 1189 (C.A.), at para. 43 [Intervener CLA's Book of Authorities, Tab 14].

[11] *Idziak v. Canada (Minister of Justice),* [1992] 3 S.C.R. 631 at 659 [Respondent's Book of Authorities, Volume I, Tab 33].

his decision.[12] The Minister's discretion under s. 40 of the Act must be exercised in accordance with the dictates of the *Charter*, including the principles of fundamental justice.[13] A balancing of the applicable *Charter* rights on the facts of each case is required.[14]

11. There is no issue that the foreign aspect of the double criminal requirement is met in the case at bar: the Appellant is charged with criminal offences in the United States.[15] With respect to the domestic aspect of double criminality, no issue can be taken with the Minister's identification of the corresponding Canadian offences in the Authority to Proceed: they are criminal offences under Canadian law that capture the allegations underlying the request.[16] The Court of Appeal found the evidence sufficient to warrant committal on these offences.[17] The more difficult question arises at the surrender stage.

12. Sections 44 through 47 of the *Extradition Act* set out various grounds upon which the Minister either must or may refuse surrender.[18] Under s. 44(1)(a) of the Act, the Minister must refuse to make a surrender order if he is satisfied that "the surrender would be unjust or oppressive having regard to all the relevant circumstances." This provision leaves the Minister no discretion to depart from statutory language to give effect to a treaty obligation.[19] It is concerned with at least some of the same considerations as s.7 of the *Charter*, where surrender would be contrary to the principles of fundamental justice,

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[12] *Németh v. Canada (Justice)*, *supra*, at para. 65[Appellant's Book of Authorities, Volume I, Tab 5]

[13] *United States v. Burns*, [2001] 1 S.C.R. 283, at para. 32 (dealing with the predecessor to s. 40 in the former *Extradition Act*) [Intervener CLA's Book of Authorities, Tab 11].

[14] *United States v.* Burns, *supra*, at para. 32; see also para. 59. See also *Divito v. Canada (Public Safety and Emergency Preparedness)*, [2013] 3 S.C.R. 157, at paras. 49 (per Abella J.) and 85-86 (per LeBel and Fish JJ.) [Intervener CLA's Book of Authorities, Tab 11].

[15] Memorandum to the Minister dated September 11, 2012, p. 1 [Appellant's Record, Volume III, p. 114]; Memorandum to the Minister dated November 14, 2012, pp. 1-2 [Respondent's Record, pp. 1-2].

[16] Authority to Proceed dated February 23, 2011 [Appellant's Record, Volume III, p. 95].

[17] Judgment of the Court of Appeal dated June 15, 2012, para. 15 [Appellant's Record, Volume I, p. 63].

[18] Some of these grounds may be superseded by the terms of extradition agreements: see *Extradition Act*, s-s. 45(1) and (2).

[19] *Németh v. Canada (Justice)*, *supra*, at para. 69[Appellant's Book of Authorities, Volume I, Tab 5]

it would also be unjust and oppressive under s. 44(1)(a) of the Act.[20] Section 44(1)(a) is, however, also of potentially greater ambit than s. 7 of the *Charter* in a given case. This Honourable Court held in *Fischbacher v. Canada (Minister of Justice)*:

> Section 44(1)(a) entitles the Minister to refuse surrender even where no *Charter* breach is alleged or where an alleged breach is not established. Where a surrender is constitutional, the Minister retains "a residual discretion to refuse surrender as being unjust or oppressive in view of the totality of the relevant circumstances, including, but not limited to, the circumstances alleged to make surrender inconsistent with the principles of the *Charter*."[21]

13. It is submitted that following the extradition hearing, and before surrender may lawfully be ordered, the Minister must ensure that the statutory and treaty prerequisites for surrender are met and that there is no basis to refuse to order surrender under the Act, the applicable extradition agreement, or the *Charter*. It is submitted that in making this determination, the Minister must have regard, *inter alia*, to section 3(1)(b) of the *Extradition Act*, the applicable agreement (in this case Article 2(1) of the *Treaty on Extradition between the Government of Canada and the Government of the United States of America*) and the principles underlying the double criminality requirement. It is submitted that this distinct determination must be made by the Minister on the basis of the record before him and having regard to all relevant circumstances. Even if the formalities of the domestic aspect of the double criminality requirement are satisfied (there is sufficient evidence to warrant committal on the offences set out in the Authority to Proceed), the Minister must also look to the substance of the matter to satisfy himself that the fundamental principles that underlie the double criminality requirement are met. If they are not, the Minister is obliged to refuse to order surrender under s. 44(1)(a) (and under s. 7 of the *Charter* as well) because surrender would be "unjust or oppressive" in view of the totality of relevant circumstances. It is submitted that this is a broader inquiry than that required under s. 29 of the *Extradition Act*, and the Minister errs if he concludes simply on the basis of the order of committal that double criminality is therefore satisfied in all respects.

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[20] *Németh v. Canada (Justice)*, *supra*, at para. 71 [Appellant's Book of Authorities, Volume I, Tab 5]

[21] *Canada (Justice) v. Fischbacher*, *supra*, at para. 39, quoting *United States of America v. Bonamie*, [2001] A.J. No. 1334, at para. 47 (Alta. C.A.) [Intervener CLA's Book of Authorities, Tab 10]. See also *Németh v. Canada (Justice)*, *supra*, at paras. 71-73 [Appellant's Book of Authorities, Volume I, Tab 5].

14. Relying on s. 285 of the *Criminal Code,* the Appellant raises the issue of whether she has committed any act deserving of punishment by Canadian lights. The Authority to Proceed identifies two offences as corresponding to the Appellant's alleged conduct: abduction in contravention of a custody order, contrary to s. 282 of the *Criminal Code;* and abduction of a person under sixteen, contrary to s. 280 of the *Criminal Code.* Section 285 of the *Criminal Code* provides as follows:

> No one shall be found guilty of an offence under sections 280 to 283 if the court is satisfied that the taking, enticing away, concealing, detaining, receiving or harbouring of any young person was necessary to protect the young person from danger of imminent harm or if the person charged with the offence was escaping from danger of imminent harm.

15. Section 285 is a statutory defence of qualified necessity, where "the qualification is that the taking must be a response to the perceived danger of imminent harm."[22] Its relevance to the double criminality requirement arises in either (or both) of two ways. If s. 285 functions as an excuse, it is animated by the principle of fundamental justice that normative voluntariness is an essential precondition for criminal liability. One who would otherwise be guilty of an offence under ss. 280, 281 or 282 but who acts under the conditions specified in s. 285 is excused from criminal liability because their actions were normatively involuntary – because there was "no legal way out" of the predicament in which they found themselves.[23] As a matter of fundamental justice, criminal liability cannot be imposed on someone when realistically he or she had no choice but to commit the otherwise wrongful act. In *R. v. Ruzic,* this Honourable Court held: "It is a principle of fundamental justice that only voluntary conduct – behaviour that is the product of a free will and controlled body, unhindered by external constraints – should attract the penalty and stigma of criminal liability."[24] If, on the other hand, actions under the circumstances stipulated in s. 285 are justified, then they are not wrongful at all and it

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[22] See, for example, *R. v. Adams* (1993), 79 C.C.C. (3d) 193 at 203 (Ont. C.A.) [Respondent's Book of Authorities, Volume II, Tab 46].

[23] Cf. *R. v. Hibbert,* [1995] 2 S.C.R. 973, at para. 55 [Intervener CLA's Book of Authorities, Tab 7] and *Perka v. The Queen,* [1984] 2 S.C.R. 232, at pp. 246-48 [Intervener CLA's Book of Authorities, Tab 4]; see also Respondent's Book of Authorities, Volume II, Tab 44].

[24] *R. v. Ruzic,* [2001] 1 S.C.R. 687, at para. 47 [Intervener CLA's Book of Authorities, Tab 8]. See also *R. v. Ryan,* [2013] 1 S.C.R. 14, at paras. 15-23 [Intervener CLA's Book of Authorities, Tab 9].

would be contrary to the principles of fundamental justice to impose a criminal sanction in the absence of any blameworthy conduct.

16. In the extradition context, ordinarily defences ought to be considered only by the trial court in the requesting state.[25] It is submitted, however, that an exception to this general rule must be made for circumstances (such as those that engage s. 285 of the *Criminal Code*) which negate the very wrongfulness of the alleged conduct. Even if "defences" cannot be considered by the extradition judge,[26] circumstances which would engage s. 285 must be considered by the Minister of Justice at the surrender stage. As noted in *La Forest's Extradition to and from Canada* in connection with *Re Anderson* (an early case involving a request for the extradition of an escaping American slave who was alleged to have killed someone who had attempted to prevent him from escaping), if a strict view of the judicial function in extradition law seems to lead to harsh results, "it is for the political authorities to decide whether they will comply with [the treaty obligation to surrender] where matters offend against public policy."[27] An inquiry into whether surrender would be consistent with Canadian conceptions of justice is an essential aspect of the Minister's responsibilities under s. 44(1)(a) of the Act as well as s. 7 of the *Charter*. A failure to make such an inquiry provides grounds for judicial review.

17. In cases where the person sought for extradition could avail him or herself of s. 285 of the *Criminal Code* had he or she been charged in Canada with the offences set out in the Authority to Proceed, it is incumbent upon the Minister to satisfy himself that an equivalent defence is available in the requesting state. This is an aspect of "the manner in which the foreign state will deal with the fugitive on surrender."[28] As La Forest J. held in *Canada v. Schmidt,* this is a matter bearing on the exercise of executive discretion (subject, of course, to judicial review should that discretion be exercised in favour of

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[25] *Canada v. Schmidt,* [1987] 1 S.C.R. 500 at p. 515-16 [Respondent's Book of Authorities, Volume I, Tab 18]; *Argentina v. Mellino,* [1987] 1 S.C.R. 536 at p. 539 and 555-58 [Respondent's Book of Authorities, Volume I, Tab 6].

[26] *Ibid.*

[27] *La Forest's Extradition to and from Canada, supra,* at p. 70 [Intervener CLA's Book of Authorities, Tab 15].

[28] *Canada v. Schmidt, supra,* at p. 522 [Respondent's Book of Authorities, Volume I, Tab 18]

surrender).[29] If an equivalent defence is available, no principle of fundamental justice would be violated by surrender. On the other hand, if no such defence is available in the requesting state, surrender would expose the individual to the risk of a criminal sanction being imposed in circumstances where fundamental justice prohibits this. In such a case, the Minister is obliged to refuse surrender under s. 44(1)(a) of the *Extradition Act* and s. 7 of the *Charter* because to do otherwise would be unjust and oppressive and contrary to the principles of fundamental justice.

18. In the case at bar, the Minister did not undertake such an examination of the particular circumstances of the Appellant's case. Rather, he framed the issue before him much more narrowly:

> In considering that [Ms. M.] might not be afforded the same defences to the charges in the United States that she might be afforded in Canada, I am mindful that surrender to an extradition partner whose criminal justice system does not have all the procedural safeguards of the Canadian criminal justice system does not violate the principles of fundamental justice (*United States v. Yang* [citation omitted]; *Canada v. Schmidt, supra; Argentina v. Mellino, supra*). Even if [Ms. M.] is not afforded a defence analogous to section 285 of the *Criminal Code*, this does not lead to a conclusion that she will not receive a fair trial in the United States.
>
> [Ms. M.] will have the opportunity to challenge the strength of the prosecution's case, present relevant available defences and evidence at her trial in the United States. A fair adjudication of this matter would require a full evidentiary hearing, before the trier of fact in the United States who will be best placed to hear and consider all of the relevant evidence.[30]

On judicial review, the Court of Appeal found nothing problematic in the Minister's analysis.[31]

19. It is submitted that the Minister limited his assessment to whether the Appellant's trial in Georgia would be procedurally fair, as opposed to whether it would be consistent with the principles of fundamental justice in a substantive sense. By way of comparison, consider, for example, an extradition request from a state whose legal system did not

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[29] *Ibid.* See also *Argentina v. Mellino,* [1987] 1 S.C.R. 536 at p. 539 and 555-58 [Respondent's Book of Authorities, Volume I, Tab 6].

[30] Minister's Reasons for Surrender dated November 28, 2012, p. 5 [Appellant's Record, Volume I, p. 71].

[31] Judgment of the Court of Appeal dated April 4, 2014 [Appellant's Record, Volume I, pp. 80-84].

recognize the diminished moral blameworthiness of young persons,[32] or which did not exempt individuals from criminal liability on the basis of mental disorder.[33] It is submitted that surrender in such circumstances would offend Canadian principles of fundamental justice in a substantive sense in the same way as surrender to face the death penalty would.[34] The Minister cannot ignore such fundamental differences between the Canadian legal system and the foreign legal system simply on the basis that the foreign system is otherwise procedurally fair.

20. It is submitted that circumstances like those of the Appellant's case raise the same issue as these other examples. Surrender to a legal system which does not provide for a defence that is required by the principles of fundamental justice would be unjust and oppressive. It would violate the principles of fundamental justice. It would shock the conscience and be simply unacceptable. It would, in short, not be lawful under Canadian law. Before ordering surrender, the Minister must be satisfied that these conditions do not obtain. Should he conclude otherwise, it falls to the Court of Appeal to assess his decision on judicial review.

PART IV – COSTS

31. The CLA seeks no costs and asks that no costs be awarded against it.

PART V – ORDER SOUGHT

32. The CLA respectfully requests leave to present oral argument at the hearing of this appeal. It takes no position on the ultimate disposition of the appeal.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 2nd day of March, 2015

JOHN NORRIS
MEARA CONWAY

Counsel for the Intervener, CLA

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[32] *R. v. D.B.*, [2008] 2 S.C.R. 3, at paras. 45-69 [Intervener CLA's Book of Authorities, Tab 6].

[33] *R. v. Chaulk*, [1990] 3 S.C.R. 1303, at 1321 [Intervener CLA's Book of Authorities, Tab 5]

[34] *U.S. v. Burns, supra*, at paras. 124-32 [Appellant's Book of Authorities, Volume II, Tab 11].

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