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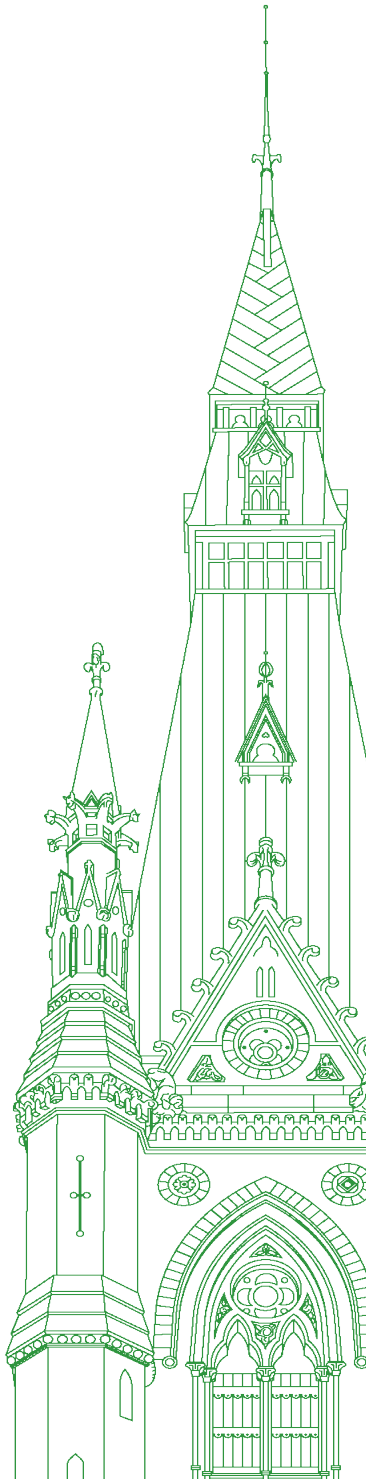

Chair: Mr. Randeep Sarai

Standing Committee on Justice and Human Rights

Wednesday, February 8, 2023

● (1635)

[*English*]

The Chair (Mr. Randeep Sarai (Surrey Centre, Lib.)): I call this meeting to order.

Welcome to meeting number 48 of the House of Commons Standing Committee on Justice and Human Rights.

Pursuant to Standing Order 108(2) and the motion adopted on January 30, 2023, the committee is beginning its study on extradition law reform.

Today's meeting is taking place in a hybrid format, pursuant to the House order of June 23, 2022. Members are attending in person in the room and remotely by using the Zoom application.

I'd like to make a few comment for the benefit of witnesses and members.

Please wait until I recognize you by name before speaking. For those participating by video conference, click on the microphone icon to activate your mike, and please mute yourself when you are not speaking.

With regard to interpretation services, those on Zoom have the choice at the bottom of your screen of either floor, English or French. Those in the room can use the earpiece and select the desired channel.

As a reminder, all comments should be addressed through the chair.

For members in the room, if you wish to speak, please raise your hand. For members on Zoom, please use the “raise hand” function. The clerk and I will manage the speaking order as best we can. We appreciate your patience and understanding in this regard.

I have cue cards, so try to pay attention to me, even though sometimes on a large screen it's hard to see. When you're closing in on your 30-second mark, I will raise the yellow card. When you're out of time, I will raise the red card. I ask you to be respectful of the time and wrap things up on your own so that I don't have to interrupt you.

For the first hour as we continue our study on extradition, we have Don Bayne, who is appearing as an individual. We also have Timothy McSorely, the national coordinator of the International Civil Liberties Monitoring Group. Welcome to you both. I believe you're in person in the committee room today. Thank you for accepting our invitation.

I have some administrative info to deal with quickly before we begin.

I'd like to inform you of this letter sent by the clerk earlier today regarding mandatory headsets and microphones for witnesses. That letter was sent to all committee chairs. I strongly invite you all to take a moment to read it. As the operations related to organizing witnesses' appearances are vital, I would encourage you to keep in mind the letter's content when you send your witness lists, in order to facilitate them. I thank you for your usual collaboration.

Without further delay, you have the floor for five minutes each. As usual, that will be followed by a round of questions from the members of the committee.

Go ahead, Monsieur Fortin.

[*Translation*]

Mr. Rhéal Fortin (Rivière-du-Nord, BQ): Mr. Chair, I will ask the usual questions, with your permission.

Have the sound checks been carried out with the witnesses who will be attending the meeting by videoconference, and were the results satisfactory?

[*English*]

The Chair: Yes, they were. Both have been tested. We trust that interpretation services will be able to commence accordingly.

We'll go to our first witness for five minutes.

Mr. Timothy McSorley (National Coordinator, International Civil Liberties Monitoring Group): Thank you, Mr. Chair, and thank you to the members of the committee for inviting me to speak with you today on behalf of the International Civil Liberties Monitoring Group regarding the urgent need to reform Canada's extradition laws.

The ICLMG is a Canadian coalition of 45 national civil society organizations with a mandate to defend civil liberties from the impact of anti-terrorism laws and policies, both in Canada and internationally.

We have been deeply involved in the campaign for justice for Dr. Hassan Diab, whose devastating case you have heard about at length. This has led us to closely examine the need to reform Canada's extradition laws in order to prevent abuses of civil liberties and human rights committed in the name of countering terrorism.

As you are aware, Dr. Diab was arrested by the RCMP in 2008 for extradition to France on accusations of carrying out a terrorist attack in Paris in 1980. While Dr. Diab was accused of committing a crime 30 years earlier, his arrest, hearings and eventual extradition took place squarely in the political and social context of the so-called “war on terror” that led to the severe rights violations in Canada.

This same context applied to France. In the same year as Dr. Diab's arrest, Human Rights Watch issued a damning report that found that “French counterterrorism laws and procedures undermine the right of those facing charges of terrorism to a fair trial.” The report documented that it was common practice for those held on suspicion of terrorism to face psychological pressure during custody. This sadly reflects Dr. Diab's experience of prolonged solitary confinement, the length of which amounted to torture and violation of international human rights law.

The report also raised concerns that judges in France had allowed the introduction of unsourced intelligence without sufficiently probing the validity of the information. This includes judges allowing for the inclusion of testimony obtained under torture in foreign countries, in violation of the convention against torture, to which France was and is a signatory. Once again we saw the use of unsourced intelligence used in the case of Dr. Diab.

All this was known before Dr. Diab's extradition to France, yet he was still extradited and faced the consequences of France's unfair anti-terrorism regime.

An extradition process that appropriately considers human rights, civil liberties and the right to a fair trial would have taken all these elements into account. Instead, given France's status as an ally and extradition partner, the detailed and serious problems of the country's anti-terrorism system were not appropriately considered.

Others have spoken about extradition cases in which human rights have been violated. You have also heard how Canada has an extradition agreement with India, despite reports of torture and India not being a signatory to the convention against torture. Importantly, India also justifies their grave human rights abuses as necessary in their self-defined fight against terrorism.

Our own research has found that at least 10 countries with which Canada has extradition treaties have been singled out in just the past three years by the UN special rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism. They were singled out for introducing or adopting rights-violating counterterrorism laws. This includes France.

Under Canada's current extradition system we continue to run the risk of extraditing individuals to face unjust, rights-violating legal systems under murky and politicized accusations of terrorism. Indeed, there is the real risk that France could seek a second extradition of Dr. Diab and that our flawed system would grant it, despite all we now know and all that Dr. Diab has been through.

Given all this, we join others in calling for reforms to Canada's extradition laws. We have publicly endorsed the recommendations of the Halifax colloquium, as was shared with you earlier this week.

Given the time restraints, I'd just like to share five very key points that we would like to highlight and emphasize in terms of reforms.

First, the committal process must be modified to ensure it is not as heavily weighted in favour of the requesting state. This includes allowing the disclosure of relevant evidence to the individual sought for extradition and allowing the individual to be able to bring their own evidence.

Second, Canada's domestic and international human rights and civil liberties obligations must be explicitly taken into account.

Third, there must be a rebalancing to increase the role for judges in weighing factors such as fairness, civil liberties and human rights, among others, in the final decision for extradition.

Fourth, there must be increased transparency regarding extraditions in Canada, including annual reporting.

Finally, fifth, Canada's extradition arrangements with foreign countries should be reviewed on an ongoing basis. As a starting point, Canada should not have extradition treaties with countries that have records of human rights abuses or have failed to ratify human rights treaties.

Thank you very much for your time, and I really look forward to your questions.

I am very happy to be appearing with Mr. Don Bayne, who I am sure will speak a lot more about the intricacies of the extradition system in Canada.

● (1640)

Thank you.

The Chair: Thank you, Mr. McSorley.

Now we'll go to Don Bayne, please, for five minutes.

Mr. Donald Bayne (As an Individual): Thank you.

Members of the committee, as a guy who's been 51 years in the criminal justice system in this country, my perspective is that this is the most unfair process and law that I've encountered in that half century. I am also Hassan Diab's lawyer.

On the first day of Dr. Diab's extradition hearing, counsel for the Department of Justice from their international assistance group that represented France came up to me, introduced himself and said, “Hello. I am so-and-so. I have never lost a case.” I didn't say anything to that. There was nothing I could say to that. Good counsels lose cases. Sometimes the other side is better than you; sometimes they have a better case than you do. You don't always win if the system is fair. If you always win, something is seriously wrong in the process. He said it all proudly and unwittingly.

I've submitted to the committee two documents. The first is a May 31, 2018, letter sent to the Prime Minister, and the other is a memo on the French court of appeal decision.

The first document sets out key serious flaws in the Canadian act and extradition process. The second reveals the tragically—you could almost say comically, but it's tragic—unreasonable decision of the French court of appeal to order a trial of this man when their own professional investigative judges had already ruled that there was no evidence to justify putting this man on trial. Indeed, the evidence of innocence was so compelling that he shouldn't be subjected—he and his family—to further prosecution.

I'm happy to answer questions about these documents.

M views of the lack of balance and the critical shortcomings of this law and process aren't just my own. You may recall the former Justice La Forest of the Supreme Court of Canada. His daughter, Anne Warner La Forest, when she wrote this in 2002 as dean of the law school at UNB, said this about this act. She was writing this in 2002, so she had 10 years of experience with the act. It's only gotten worse since then. She said, “My view is that this new approach gives undue weight to the law of the requesting state as against the liberty of the [person].” That's really the consistent message. What's happened here is out of bounds.

I'll continue with some of her other comments: “The reality is that Canada has gone further than virtually any other country in facilitating extradition.” We serve up our people. “It has done so in the absence of strong empirical support for the view that such an incursion on the liberty of the [individual] was needed and in circumstances where Canada extradites its nationals.” Canadians are subject to this. We don't protect our own citizens in the way that other countries do.

She goes on to conclude as follows: “The new Act adopts a 'record of the case' approach that allows for second and third hand hearsay evidence with no assurance of reliability.” That happened in spades in the Diab case.

Finally, “I submit that the provisions applicable to admissibility and sufficiency in the new Extradition Act are contrary to fundamental justice unless the courts interpret the evidentiary provisions of the new Act so as to re-establish an appropriate balance”—that word again—“that allows the extradition judge to protect the liberty of the fugitive by assessing the weight and reliability of the evidence”.

Members of the committee, under this act, the judge is not allowed to assess weight at all.

● (1645)

Justice Maranger, who heard the long extradition proceeding, said that this evidence was “suspect”, that it made no sense, but he was duty bound. He said that it was so “weak” that he was compelled to say there was no reasonable prospect of a conviction in a fair trial but was compelled by the law to extradite, and that led to three and a half years in France.

That's all I have to say.

The Chair: That's perfect timing. Thank you, Mr. Bayne.

Now we'll go to our first round of questioning, with rounds of six minutes each. We begin with Mr. Brock from the Conservatives.

Mr. Larry Brock (Brantford—Brant, CPC): Mr. Chair, before my time starts, may I ask a question of the chair?

The witness, Mr. Bayne, made reference to two documents that were submitted to the committee that did not find their way to my inbox. Is there an explanation for that?

● (1650)

The Chair: I can look into it. I'll find out.

Mr. Clerk, have we received that? Would you be able to provide clarity on that?

The Clerk of the Committee (Mr. Jean-François Lafleur): Sure, Mr. Chair.

The documents are still in translation. They were a bit voluminous. That's the reason they're not available now, but they will be as soon as possible.

The Chair: Hopefully that answers your question, Mr. Brock. We'll have them to you as soon as they're translated.

Mr. Larry Brock: Thank you.

The Chair: You're welcome.

Mr. Larry Brock: Thank you so much, gentlemen, for your introductions and your willingness to participate in this important study. I have so many questions, but I have a limited amount of time, so I'll do my best.

On the documentation you referenced, Mr. Bayne, there was a purpose that you wanted this committee to review it. One I recall you mentioning was a letter that you specifically drafted to the Prime Minister. What year was that?

Mr. Donald Bayne: The year was 2018. The day was May 31.

Mr. Larry Brock: Okay.

I note that in some of the briefing notes my office provided to me, you're quoted in May of 2021 referencing that the Prime Minister publicly stated on June 20, 2018, that “we have to recognize first of all that what happened to him”—referencing the Diab case—“never should have happened...and make sure that it never happens again”. That was June 20, 2018. Your letter is in May of 2018.

Can you share with us details as to what you asked the Prime Minister to consider?

Mr. Donald Bayne: I think the first two pages were dealing with the type of review that the government was going to mandate, but what will interest this committee is the following.

I write, “And what, sir, is so very wrong with the current Extradition Act?” Then there are numbered paragraphs. The first is: “1.The Act unfairly deprives liberty” and goes on to explain how, and, “2. The unsworn allegation of the foreign official is “presumed” to be “reliable evidence”.

The Diab case showed the folly of such a presumption. For example, in Diab, the foreign official said, even though he knew it was untrue because he was in charge of the file, that there was no fingerprint that the French had found on the bomber's hotel sign-in card. He wrote the record of the case in late 2008 and early 2009. In 2007, the French had located an identifiable print on that card. They had excluded Hassan Diab as the source, so not only is it folly to, as Dean La Forest says in her extensive assessment of this act, rely on second and third hand hearsay; we can't even trust a long-time ally to tell us the truth.

That wasn't the only thing we weren't told. There were multiple other fingerprints that excluded this man. When the bomber was arrested, in almost a cartoon event, shoplifting pliers before the bombing, he was taken to the police station. The police didn't take a photograph of him. They took a statement from him. He filled out the statement and signed it. They found 16 fingerprints on that. Ten of them were identified as those of the police who handled the document. Of the six unidentified, none match Hassan Diab.

All of that did not appear in the record of the case. This invites this system whereby some foreign official who can't be cross-examined and doesn't have to swear that this is true. He simply certifies that this is evidence we have, but he doesn't tell the truth and he doesn't tell the whole truth.

Mr. Larry Brock: Did the Prime Minister or his office respond to that letter?

Mr. Donald Bayne: It was in a kind of a generic way: “Thank you, Mr. Bayne, for your letter.”

Mr. Larry Brock: Have you ever had a chance to write a similar letter to the justice minister?

● (1655)

Mr. Donald Bayne: The justice minister, I believe, has this letter. I met him. I had a face-to-face meeting with him and asked him—because of all of this—to undertake a review of the current law.

Mr. Larry Brock: When did you do that, sir?

Mr. Donald Bayne: This is 2023. Dr. Diab came back to Canada in 2018, so I would say it was that year or the next year.

Mr. Larry Brock: Okay.

There was some reference as well in my briefing notes from the Library of Parliament that the government may have made certain amendments or were prepared to look at certain reforms to the Extradition Act. To your knowledge, since you defended Mr. Diab, have there been any changes to any parts of the current Extradition Act?

Mr. Donald Bayne: No.

Mr. Larry Brock: My briefing notes also have a reference that the Extradition Act was meant to modernize the system, simplify the system, reduce the delays, but it still had to be compliant with the charter. Given your opening, and given what I know about this case, it can't be further from the truth. Can you specifically outline the deficiencies, in terms of the charter violations, that currently exist with respect to our Extradition Act?

Mr. Donald Bayne: This letter does that. It talks about the folly of basing a system, when the liberty of Canadians is involved, on unsworn material that is presumed to be reliable but can't be tested and when there is no obligation by the requesting state to show exculpatory evidence.

Let me add this: There's no full disclosure made here. They can pick and choose foreign states. We just trust them to be as honourable as Canadians would be.

Mr. Larry Brock: These are section 7, section 9, section 11 violations.

Mr. Donald Bayne: Absolutely, and even on the question—

The Chair: Mr. Bayne, I'm going to have to end it there. We're a little bit over time.

Thank you, Mr. Brock.

We'll go over to you, Mr. Naqvi, for six minutes.

Mr. Yasir Naqvi (Ottawa Centre, Lib.): Thank you, Chair.

It's good to see you again, Mr. Bayne. Thank you for being present and thank you for all the advocacy work you do in the legal community. Mr. McSorley, welcome.

I'm very sympathetic to the Diab matter, as I've said to the committee before. I know Mr. Diab and the family quite well. However, I'm also a little hesitant to relitigate that particular matter at this committee.

Of course, the case is instructive to us from a policy perspective as to what lessons were learned. I want to maybe move away from the actual and precise aspects of that case to some of the policies you may be advocating as we look at recommendations in this particular report.

To that, Mr. McSorley, towards the end of your presentation, I believe there were about five different points that you raised that we should be considering.

Do you want to take some time to at least highlight two or three of those recommendations that you think are important and explain why they are important and why we should be considering them?

Mr. Timothy McSorley: I'll focus on the ones that I think more closely relate to the mandate of ICLMG and perhaps leave some of the others to Mr. Bayne.

As I mentioned in my opening, it's incredibly important that the system be modified so that international human rights and civil liberties obligations are explicitly taken into account. As I noted, the review of France's anti-terrorism laws clearly presented violations and concerns around the convention against torture and Canada's commitment to fighting torture, and yet that was not adequately considered by the court at the time.

There was a more recent case that we weren't involved in, the Boily decision. Essentially an individual was extradited to Mexico, where he would face torture. He raised those concerns, and that was ignored when he was extradited. In fact, he was just awarded $500,000 from the Canadian government in a civil suit because of the fact that his rights were violated. We believe that should be a key point of consideration.

On Monday, Professor Harrington spoke at length about the need for increased transparency, and we agree with that as well. We believe there needs to be greater transparency in reporting from the government on the number of extraditions, the types of extraditions and the cases there are, because there's a lack of clarity and a lack of understanding among the public.

Even in our advocacy work, it's difficult to ascertain exactly how many extradition cases happen and on what grounds. There was a CBC article that demonstrated, through access to information, that in Canada close to 99% of extraditions—at least to the United States—are agreed to. That was pieced together only through their diligent research. It's not information that's easily accessible.

Finally, as has been brought up, countries often give their assurances that they will move forward—for example, in the case of Dr. Diab—with cases on a timely basis, that they won't violate rights and that their systems are compatible with Canada's, but we find that Canada has dropped the ball in terms of ensuring from our own perspective that states are upholding civil liberties and human rights in their justice systems. As I mentioned, there have been findings by the special rapporteur on counter-terrorism and human rights at the UN that several of Canada's extradition partners have introduced and adopted anti-terrorism laws that violate fundamental rights.

A fundamental review needs to be done of Canada's extradition agreement. It should be put in law, we think, that Canada will not enter into extradition treaties with countries that are found to be violating human rights, both domestically and internationally, in human rights law.

● (1700)

Mr. Yasir Naqvi: Thank you.

Are these recommendations aligned with the so-called Halifax proposals?

Mr. Timothy McSorley: In general, yes. We've worked closely with Professor Currie, and I believe they're all in line with the recommendations of the Halifax colloquium too.

Mr. Yasir Naqvi: Mr. Bayne, do you have some specific suggestions, in light of your experience not only in the Diab matter but in other extradition matters, that would be a significant improvement to our extradition laws?

Mr. Donald Bayne: I do, Mr. Naqvi. There are four, I would say, to redress the imbalance.

The first is the most important, and that's to do away with this unreasonable presumption of reliability of third hand hearsay, and instead put the onus on the requesting state rather than on the individual Canadian to prove the reliability of the evidence on which it relies, at least on a balance of probabilities—not beyond a reasonable doubt, just on a balance of probabilities.

The system now has a reverse onus on the Canadian, the person sought, and they have to prove it to what has become to be interpreted in the courts as an unattainable standard called “manifest unreliability”. The Diab case didn't achieve that, even though the judge said this handwriting evidence, which the whole case ultimately hung on, was clearly unreliable. Every leading expert in the world said so. France has now said so, in a separate analysis of their own report. Their own experts now say on that report that got him extradited, “We agree entirely”—that's the quote—with the defence experts who gave evidence.

They create a catch-22: That reverse onus and the presumption of reliability create a catch-22 for citizens in this country, for people in this country, that can't be met. It's simply a crazy situation.

The other three are these: When you're relying on expert evidence, there should be full disclosure of that, full disclosure of exculpatory evidence and full disclosure of all evidence sourced in Canada. That didn't happen in the Diab case.

The Chair: Thank you.

Mr. Donald Bayne: There are two more, but—

The Chair: Thank you.

Hopefully we'll be able to get that out of you in the next questioning.

Monsieur Fortin, you have six minutes.

[*Translation*]

Mr. Rhéal Fortin: Thank you, Mr. Chair.

Mr. McSorley and Mr. Bayne, thank you for being here with us today.

Mr. Bayne, please finish the answer that you were giving to my colleague, Mr. Naqvi. I believe you were saying that you had four specific recommendations aimed at amending the current act. I would like to hear what you have to say on the subject.

● (1705)

[*English*]

Mr. Donald Bayne: Thank you, Mr. Fortin.

I wouldn't say there are only four, but these are four that are, to me, critical if the system is going to work.

Number three is that if the requesting state, such as France, does not in fact reciprocate with Canada by extraditing requested citizens to Canada, Canada should not extradite its nationals to such a requesting state.

I give the example of the French priest—you may recall this case recently—wanted for multiple sexual assaults against young people in Canada years ago. France refused to participate in that process, saying, “Oh, that's too old.” That case was no older than Diab's case.

That's the third one, true reciprocity. Extradition is said to rely on comity, but there is no comity or reciprocity with France on extradition of nationals.

The last one, Mr. Fortin, is extradition only for a trial that is ready to proceed within a reasonable time, not for further investigation. We thought that was the law. We pointed that out to the court of appeal and the Supreme Court of Canada, and they still let this happen. Of course, three-plus years in solitary confinement resulted.

[*Translation*]

Mr. Rhéal Fortin: Thank you, Mr. Bayne.

I understand that your first condition dealt with the burden of proof and the requirement, from the get-go, for sufficient evidence on the balance of probabilities. The third condition was one of reciprocity. The fourth condition was to hold a trial within a reasonable timeframe. The second condition escapes me, however. Could you repeat it, please?

[*English*]

Mr. Donald Bayne: I meant by the final one that there be extradition only for a trial that is ready to proceed within a reasonable time—

Mr. Rhéal Fortin: That's the fourth one.

Mr. Donald Bayne: —and not for any further investigation. That's the fourth one. That's what happened here.

[*Translation*]

Mr. Rhéal Fortin: Yes, but what was the second condition?

[*English*]

Mr. Donald Bayne: The second one was full disclosure, to the person sought, of any expert evidence the requesting state requires. Any exculpatory evidence—evidence showing innocence—should be disclosed; and certainly all evidence that is produced in Canada and doesn't come from abroad, whatever that evidence is, should be subject to the normal constitutional Stinchcombe rules of disclosure in Canada.

[*Translation*]

Mr. Rhéal Fortin: Thank you.

Have you held any discussions with lawyers from other states to see if these conditions would be acceptable or not? I am thinking of France and Mr. Diab's case.

[*English*]

Mr. Donald Bayne: I discussed it with Jacqueline Hodgson, who is the leading British expert. She teaches at the University of Warwick. I went to England and went up to Warwick to meet her in preparation for the Diab case. She was hired by the Tony Blair government when it was considering mimicking French anti-terrorism law and the use of intelligence as if it were evidence, which was going on in the Diab case. She has taught French law in France. She's fluently bilingual.

She made a study for the Blair government and the Home Office in the U.K. about the provisions that we, for example, have in our act permitting reliance on this unsourced, unidentified intelligence evidence. She found it would be in violation of.... I can't remember whether it's article 5 or article 6 of the European Convention on Human Rights.

That's as far as I went, Mr. Fortin.

● (1710)

[*Translation*]

Mr. Rhéal Fortin: Have you had any discussions on this issue with the French authorities?

[*English*]

Mr. Donald Bayne: No.

[*Translation*]

Mr. Rhéal Fortin: Mr. McSorley, I will put the same question to you.

Have you held any discussions with foreign authorities or with lawyers from other countries that are working on extradition cases about the conditions or the amendments proposed by Mr. Bayne?

Mr. Timothy McSorley: Unfortunately, we haven't had any discussions with either of those stakeholders from other countries.

Mr. Rhéal Fortin: Alright.

I understand that these conditions seem quite sensible at first blush, but they are not necessarily acceptable to foreign states.

Mr. Timothy McSorley: It is possible.

I would say then that it is incumbent upon Canada to ensure that its citizens are protected and it is important that our laws reflect this.

If for example, the French counterterrorism system is not sufficient in our eyes in terms of protecting human rights and civil liberties, then it is up to us to guarantee that protection.

Mr. Rhéal Fortin: Thank you.

Do you know of other states that apply these conditions?

[*English*]

The Chair: Thank you, Mr. Fortin. Unfortunately, time is up. We're actually a little over.

Next we'll go to Mr. Garrison for six minutes.

Mr. Randall Garrison (Esquimalt—Saanich—Sooke, NDP): Thank you very much, Mr. Chair.

I too thank the witnesses, not just for being here today but also for their long-time advocacy on this issue. It has, of course, taken our committee some time to get to this study. I'm hoping—and I trust you can see it around the table—that there's good engagement on this issue by all committee members so that we can get a good report completed soon.

I'm going to start with Mr. McSorley.

In your fifth key point, you talked about the review of treaties. I presume you're talking about a review not just of the treaties but also of the human rights records and performance of our treaty partners.

Is that correct?

Mr. Timothy McSorley: Yes, that's correct.

There should be a comprehensive review, immediately, of all treaty partners, and then ongoing review to see changes in their laws. We looked particularly at where some of those countries are at in terms of their counterterrorism laws and found that they're lacking.

That could perhaps provide a starting point. In general, that should be done.

Mr. Randall Garrison: I think someone suggested we shouldn't have treaties with those who haven't signed the convention against torture, but what you're saying to us is that this not sufficient. Merely signing the convention against torture wouldn't qualify someone to have a treaty with us.

Mr. Timothy McSorley: Yes, exactly.

We would hope a country that has signed the convention against torture would respect its obligations, but, as we know, there are multiple countries, including.... There have been questions about whether Canada fully respects its obligations to that convention, as well, so we think there needs to be further review, instead of just accepting it at face value.

Mr. Randall Garrison: You mentioned there were 10 countries with whom, I presume, we have treaties. You cited them as frequent violators of rights in this context. Can you speak a bit about the context, or that idea of frequent violators, and perhaps say what the 10 countries are, if you have that?

Mr. Timothy McSorley: Certainly. I have a list, but unfortunately the highlighting didn't print out, so I can't say the 10 exactly. I might be able to identify some of them. You may be surprised to hear the countries that are included. Off the top of my head, I know that France is included and Austria is included. I'm trying to identify some. I'll send the list to the committee, because I have it.

What was identified, and I think it's important, is that in the current context, there are multiple countries that have been cited by the UN for expanding counterterrorism laws that violate human rights, often in the pursuit of their critics. We have seen some countries that have more populist governments bringing in these kinds of laws in order to, as I said, silence critics and target minorities.

There's a rise that we've been seeing that is perhaps.... For a period after 9/11, there was a rise in these types of laws, and then a decrease. In the last few years, we've seen a new increase in countries that wouldn't necessarily, at first glance, be on our list of countries whose counterterrorism laws we would have to be worried about, but they are bringing in new laws that engage in indefinite detention, that allow for the use of intelligence and unsourced information and that engage in activities that would be considered tantamount to torture.

● (1715)

Mr. Randall Garrison: Thank you.

Mr. Bayne, you were very clear in outlining four key changes to the law, but I want to ask you something that we've heard a bit more about, which is the role of the international assistance group in the Department of Justice. We have heard some testimony questioning whether one part of a department can be an advocate for the country that's making the request while, at the same time, another part of that same group is supposed to be defending the rights of those who have the extradition request against them.

Can you speak to that question, based on your experience?

Mr. Donald Bayne: I think it's not only an apparent conflict of interest; it's a real conflict of interest.

That's not all that the IAG does. When you come to the ministerial stage, the minister turns to the same people who were very ardent and aggressive advocates in the courtroom for advice on whether, ministerially, he should surrender the fugitive. There's clearly a bias there too.

It's been recommended. It's not among my four, because I didn't come with a vast shopping list, but the truth is that it puts those people, however well-meaning.... It would put any of us in an apparent conflict of interest, and likely a real one.

Mr. Randall Garrison: The other thing we've heard a lot about is the number of things that are assigned to the minister at the surrender phase that might be better considered by the judge in the extradition hearing.

Can you comment on the kinds of things we're leaving to the minister as a political decision that are actually legal decisions?

Mr. Donald Bayne: At the end of the day, it's virtually everything.

If you examine the role of the judge—and the judges have at least privately, if not publicly, lamented this—you see that they are rubber stamps. They don't have a judicial function. They don't weigh the evidence. They don't make determinations of reliability.

I know of very few ministerial decisions—perhaps one or two—in which the minister declined to surrender after a decision was made on extradition. Maybe I'm being too general in that answer.

Mr. Randall Garrison: No, that's exactly what I was getting at. Judges aren't really allowed to judge in the extradition cases.

Mr. Donald Bayne: Interestingly enough, more than a decade ago, two decades ago, that's exactly what—

The Chair: I'm going to have to intercept you there, Mr. Bayne. Hopefully one of the other witnesses will give you a bit of time on that.

I have to go to the next round of five minutes, and that's going to Mr. Caputo.

Mr. Frank Caputo (Kamloops—Thompson—Cariboo, CPC): Thank you.

Go ahead, Mr. Bayne. Finish up, please.

Mr. Donald Bayne: Anne Warner La Forest questioned why Canada even has judges involved in the process when so little is given to the judge to do. She was very prescient about how we were going off the rails with this act, and as I say, it's only gotten worse because the judges sit there....

There's a culture now, a judicial culture, that has grown up that extradition is inevitable. We will go through the charade of a hearing, but in the end, it will always happen. The judge, no matter.... We witnessed Justice Maranger wringing his hands about the nature of this material they were putting in front of him, but he couldn't do anything about it. He said, at one point, “You know what I would do, Mr. Bayne, if this was a trial in Canada.”

The judges are so overawed by the concept of international relations and the idea that they're not supposed to tread on damaging relations with France or somebody else if they refuse this request. They really have no role. They don't make legal decisions.

● (1720)

Mr. Frank Caputo: Well, that's.... I'm a bit of a nerd, so I'm going to ask you a question about this.

Something I find interesting—and I apologize if you've covered this point—is the tension between what is a legal decision and what is a political decision. That's something that I don't think we often turn our minds to.

I'd like you to comment on something, whether this is the case. In some countries, as I understand it, you have the attorney general, who is your legal officer. Then you have a minister of justice, which is a political position, so there's going to be some partisanship there.

Does having those two titles reside in the same person impact extradition at all?

Mr. Donald Bayne: That sounds like a dangerous invitation to go down a debate that was held in this country not long ago. I don't think I'm the person qualified to resolve that. I think you people are.

Mr. Frank Caputo: I'm just asking for your opinion. I certainly don't know.

Voices: Oh, oh!

Mr. Donald Bayne: It's not what strikes me as being at the heart of what's wrong here.

Mr. Frank Caputo: Okay. That's what I'm getting at.

I find this issue of disclosure interesting and troubling. How is it that what is produced in a Canadian investigation is not disclosable? Can you walk us through that? To me, it doesn't feel right.

Mr. Donald Bayne: I think the way to answer that is to read to you the provisions of the Extradition Act. Subsection 32(2), “Exception—Canadian evidence”, provides that you don't need to disclose to the requesting state all of the evidence.

> Evidence gathered in Canada must satisfy the rules of evidence under Canadian law

—that would include the Stinchcombe law of disclosure—

> in order to be admitted.

That is the catch. The Department of Justice can decide not to put it in. “We won't tell them about it. We're not trying to admit it, so we don't have to disclose it.” That's the problem.

Mr. Frank Caputo: That's interesting, in that the threshold for disclosure lies exclusively with the state—and by that I mean the government and the government lawyer—and if the government lawyer chooses to not rely on that information.... It's not an issue of whether it may be relevant; it's actually an issue of whether it will be admitted or tendered.

Do I have that right?

Mr. Donald Bayne: That's right.

What's the cost? The prosecutor makes a cost-effective analysis: “Is it worth more to me if I disclose it and try to have it admitted, or is it actually going to harm my case?” In that case, you don't disclose it because you're not going to rely on it.

Mr. Frank Caputo: This is interesting. I don't know if you used the term “prosecutor” there. Is that the term you used just a second ago?

Mr. Donald Bayne: It is.

Mr. Frank Caputo: Some of us here have done prosecutions, myself included. A prosecutor is supposed to be an independent minister of justice who seeks truth rather than a conviction or a certain outcome. To me, there is certainly a tension between seeking the truth and choosing not to disclose something that may otherwise be exculpatory.

You probably have no time to.... I leave you with that.

Mr. Donald Bayne: I agree with you. Crown attorneys who adopt that approach are valuable and do a wonderful service in our justice system.

The Chair: Thank you, Mr. Bayne. Thank you, Mr. Caputo.

The next five-minute round goes to Mr. Anandasangaree.

Mr. Gary Anandasangaree (Scarborough—Rouge Park, Lib.): Thank you, Mr. Chair.

Let me thank both witnesses for the enormous work they have done.

There was a lot of discussion here on Dr. Diab's case, and you've outlined many of the concerns that can be drawn from that.

I'm wondering if you could both comment on the Meng Wanzhou case. I know there was a case of extradition as well in that regard. I'm wondering if there are any lessons that can be drawn from there that may be relevant to the discussion we're having today.

● (1725)

Mr. Timothy McSorley: In the course of our work, we haven't analyzed the Meng Wanzhou case because it doesn't deal with counterterrorism issues.

I'll leave it to Mr. Bayne.

Mr. Donald Bayne: Meng is an interesting case that you raised. The argument is always made by the Department of Justice lawyers who work in this field that, “Oh, we need to cut down these rights”, or “These won't be expeditious hearings.”

They are not expeditious hearings. They're not expeditious because there is so much argument all the time about what exactly a judge is allowed to assess here.

Look at the Meng case. How long did that go on? It went on forever, because China could pay for interminable arguments about reliability and so on. I say “China” because I know a little more about that case.

If we had a clear-cut system with a clear-cut onus on the requesting state to establish reliability on a balance of probabilities, judges know how to deal with that. They do it all the time. That's the judicial function. A judge would control that kind of hearing. It would move more expeditiously than the way they're unravelling now, with lawyers desperate to find something to argue in the current system. They are not expeditious hearings. That's a lesson from the Meng case.

Mr. Gary Anandasangaree: Going on to the issue of treaties with a number of countries that we have—I think it's over 51—I noticed, for example, that Haiti is on the list. Haiti is going through some severe challenges right now.

To follow up from Mr. Garrison's comments, what is the test for us to determine whether a country is equipped to have a fair trial in their country? Even if we have a treaty, what are the benchmarks we need to keep in mind for us to proceed with an extradition?

Mr. Timothy McSorley: A key indicator could be looking at reviews such as what Human Rights Watch puts out, and Freedom House, Amnesty International and the international reports of human rights organizations. Global Affairs Canada regularly does assessments of the rights situations in various countries. I think we could be looking at and analyzing those to see, beyond the counterterrorism issues, problems within the judicial system and whether there are reports on whether individuals are facing fair trials or are facing abuse or rights violations while in custody. That's a big question.

As we heard, Dr. Diab spent three years in custody, and others have spent time in custody after being extradited to places where their rights were violated. It's not just in the judicial system: Canada has standards, ostensibly in the Extradition Act, that the laws of the country we're extraditing to must also meet the standard of our own laws. We should be looking at that more closely.

You mentioned Haiti, which is one of two countries, along with India, with which Canada has extradition agreements. It has signed but not ratified the convention against torture. Looking at which human rights treaties they have signed on to and what their record is would provide a tangible analysis of their system.

Mr. Gary Anandasangaree: How about the systems that they have in place?

The Chair: Mr. Anandasangaree, unfortunately, we're out of time.

We're going into the last round. We'll begin with Monsieur Fortin for two and a half minutes.

● (1730)

[*Translation*]

Mr. Rhéal Fortin: Thank you, Mr. Chair.

Mr. McSorley, I found your answer to the last question very interesting.

You stated earlier that 10 or so countries do not respect human rights, including France and Austria. I did not quite understand your position on the criteria that would allow us to determine if a state guaranteed or not a minimum threshold for fair proceedings.

In your opinion, are there criteria that we should use to evaluate a situation in a foreign country?

Mr. Timothy McSorley: I don't have a list with me now, but I would say that at the very least, we should check if there have been abuses within the criminal justice system.

I will continue my answer in English, because that will be quicker and I know that we haven't got much time.

[*English*]

It's looking for violations while people are in custody. It's looking for issues around allegations and reports of torture while in custody. It's looking at issues around what kind of evidence can be introduced in court, including unsourced evidence or evidence that's obtained under torture. It's also looking at whether or not the laws being used are used in a way that respects the international covenant on the protection of civil liberties.

[*Translation*]

Mr. Rhéal Fortin: In the case of France, why do you believe that this is not a state that respects human rights? What are the conditions that France does not meet?

[*English*]

Mr. Timothy McSorley: Very specifically, it was around France's counterterrorism laws. For example, there's the ability to use unsourced information that could be derived from torture. It's been demonstrated that French counterterrorism judges allow that to be introduced into evidence and don't appropriately probe the validity of that information.

We know that it's a violation of the convention against torture, and it demonstrates one of the criteria that we think should exclude extraditions on the basis of counterterrorism prosecutions.

[*Translation*]

Mr. Rhéal Fortin: Should the same rules and processes used for extraditing a Canadian citizen be used when it comes to extraditing a foreign citizen?

[*English*]

Mr. Timothy McSorley: I would say, first and foremost, that the protection is for Canadian citizens. Canada has a duty, for example, under the convention against torture, to not deport or extradite a single person to torture or to situations in which they would be faced with evidence obtained under torture. I believe that it should apply to non-citizens as well.

The Chair: Thank you, Monsieur Fortin.

We'll go to Mr. Garrison for two and a half minutes.

Mr. Randall Garrison: Thank you, Mr. Chair.

I want to go back to Mr. Bayne.

You told us that the first of your points that you said were the most important is doing away with the presumption of reliability of the record of the case.

Mr. Donald Bayne: That's combined with the reverse onus on the individual to demonstrate what's called manifest unreliability. Together, that produces an inherently inevitable extradition.

Mr. Randall Garrison: Do we find those two things in the extradition law, or is that more in the case law that's developed?

Mr. Donald Bayne: No, it's in the act.

Mr. Randall Garrison: It's in the act.

Mr. Donald Bayne: It's right in the act.

The first part of it, the creation of a statutory presumption of reliability of unsworn hearsay evidence, is in the act.

In 2006, on a constitutional challenge to the regime in a case called Ferras, the Supreme Court tried to save the system, saying that they have to equip judges to be able to assess reliability. The problem is that since 2006, Ferras has proven to be a false promise, because this mountain of a wall that is demonstrable manifest unreliability has never been achieved. You can't do it.

If Diab did not, with all the experts in the world.... Let me explain.

With the first two alleged handwriting samples used by France against Dr. Diab, it turned out that the two supposed experts in France relied on the wrong person's known handwriting. They were not comparing Dr. Diab's handwriting. They were comparing his wife's handwriting. They identified her as that 40- to 45-year-old male bomber who signed in at the hotel.

When that came out through expert evidence by the international experts, who recognized that they weren't even comparing Dr. Diab's handwriting.... This was another person's handwriting. They got another person. That person did not follow accepted methodology.

The Swiss experts said it's totally unreliable. The leading Americans said it was unreliable. The leading U.K. authorities said it was unreliable. The leading Canadians said it was unreliable.

That has grown up in the case law, but it should be clear that if you don't have this presumption, you haven't put a reverse onus on the person.

● (1735)

Mr. Randall Garrison: Thank you.

The Chair: Thank you, Mr. Garrison.

Thank you, Mr. Bayne and Mr. McSorley, for your very informative and very insightful testimony today.

That concludes the first panel. We'll suspend for a quick five minutes while we have the next panel set up. If anyone needs to do a health break, they can do that.

I will suspend for five minutes. We'll see you back at 5:40.

● (1735)

(Pause)

● (1735)

The Chair: We'll resume our meeting. I want to welcome everyone back. We now go to the second hour of our study of extradition law reform.

With us now to complete their appearance of February 1, from the Department of Justice, we have Janet Henchey, director general and senior general counsel, international assistance group, national litigation sector, and Erin McKey, director and general counsel, criminal law policy section.

Thank you for being with us again, and welcome to the committee.

If the officials have anything to add, please do so.

If not, we adjourned at Monsieur Fortin's round, so we can commence from there, but I'll leave that to you. If you want to comment or want to add anything before resuming a round of questions, I'll leave that to you, Ms. Henchey and Ms. McKey.

● (1740)

Ms. Janet Henchey (Director General and Senior General Counsel, International Assistance Group, National Litigation Sector, Department of Justice): It's hard to ask a lawyer if they want to add something and have them say no.

Voices: Oh, oh!

Ms. Janet Henchey: I'll just make a few comments, because I've had the opportunity to review some of the testimony from previous days and a little bit from this afternoon.

I think we never got a chance to talk about this the last time: the really important principle of extradition that doesn't seem to be accepted by most of the witnesses that you've heard, which is that extradition is not a trial. The reason it's not a trial is that the whole premise of extradition is that a person is going to have a trial wherever they're being extradited to. To turn an extradition hearing into a trial, first of all, delays the opportunity for that person to face justice in the jurisdiction where they're headed. It delays access to the witnesses and the process in the foreign jurisdiction, which under the Canadian system, as you know, is something we try to avoid. We try to get people to trial as quickly as possible.

Most of the recommendations that have been put forward by many of the witnesses seem to have ignored that point, the point that these people who are being sought for extradition will have a trial. It's built into the system that this is what's intended. By calling witnesses and cross-examining witnesses and turning the extradition process into a trial, we are actually delaying the person from accessing justice in the country that's seeking their extradition.

I could go on and on, but I'll stop there and let you ask questions.

The Chair: Thank you.

We will begin our round with Monsieur Fortin for six minutes, as I don't believe any of his minutes were able to be optimally used.

[*Translation*]

Mr. Rhéal Fortin: Thank you, Mr. Chair.

Thank you, Ms. Henchey and Ms. McKey. I do apologize for the inconvenience caused by the interpretation problems at your last appearance.

We have just heard two witnesses, Mr. Bayne and Mr. McSorley. Mr. Bayne submitted four proposals aimed at improving the Extradition Act. I will quickly go through them.

The first recommendation would be to require that the requesting state bears the burden of proof, not beyond all reasonable doubt, but on the balance of probabilities.

The second proposal is to require complete disclosure of the evidence, even exculpatory evidence, much like we do in the course of a normal criminal investigation in Canada.

The third proposal is to demand that the requesting state enter into a reciprocity agreement with Canada in matters of extradition.

The fourth criteria is to make sure that the trial will be held within a reasonable timeframe, in order to avoid what happened in the Diab case, when the accused was detained for years before the trial because the requesting state was not able to proceed quickly.

I would like to know what you think about these four conditions.

[*English*]

Ms. Janet Henchey: Thank you.

I'll go through the first two, and then I'm going to ask you to clarify the third one, because I didn't fully understand what that third point was.

The burden of proof is always on the requesting state, or Canada, in the sense that we have to establish there is a prima facie case that would constitute an offence in Canada if that evidence took place in Canada, if that conduct took place in Canada. All this comment about the burden of proof being—

[*Translation*]

Mr. Rhéal Fortin: I do apologize for interrupting you, but I don't want us to stray too much. I understand that you would presume that it was a prima facie case with sufficient evidence. I did not hear you say that the evidence would be examined, but I may have got that wrong end.

[*English*]

Ms. Janet Henchey: It's kind of conflating the two things, as I think previous witnesses may have done.

Yes, there is no requirement to determine whether the evidence is admissible in the sense that it's put into a record of the case. It's a summary of the evidence that the requesting state is relying on, but the sufficiency of that evidence.... Once the court receives that evidence and looks at it, it's for the court to determine its sufficiency. It's not determined in advance. The person sought doesn't have to prove that it's not sufficient; the requesting state has to argue the sufficiency of the evidence that they're relying upon.

You've heard some comment about how all the evidence hasn't gone forward. I think that's part of one of your questions. It's to the detriment of the requesting state if they don't put enough evidence forward. They provide us with a document that outlines the evidence they're relying on.

It's similar to a preliminary inquiry in Canada. The concept is that we're not having a real trial; we're just establishing that there's some evidence that would justify having a trial. It's the same test we have in preliminary inquiries in Canada so that you don't waste the court's time with a trial if there's no evidence to justify going forward.

It's the same test and it's a similar process. It's the same in a domestic criminal preliminary inquiry. The Crown decides what they are relying on, but they don't necessarily put the whole case in front of the court.

With respect to extradition, just to clarify, it's the requesting state that decides what's going in front of the court, not what's been referred to as the prosecutor or the lawyer for the Attorney General of Canada who is appearing in front of the court. They're putting forward the case provided to them by the requesting state. It's not a question of deciding how much of this we will put forward; it's there, and we put it forward. That's what they've asked us to rely on. If it's not enough, that's to their detriment.

That sort of answers the first question, I think.

I don't think it makes sense to build up the level of proof to a higher level. It's a level that we're familiar with in the criminal justice system, the prima facie case that's used in a preliminary inquiry. It wouldn't make sense to make it “beyond a reasonable doubt”, because that's the trial standard. The standard that's being proposed is what you use at a civil trial.

● (1745)

[*Translation*]

Mr. Rhéal Fortin: We were talking about the balance of probabilities and not the criteria being one of beyond reasonable doubt.

[*English*]

Ms. Janet Henchey: Again, in the criminal context this is a very known standard. It's the standard we use in preliminary inquiries. The balance of probability is not a standard that's used in the criminal context, so it would actually not be what the criminal courts would be familiar with in the context of a criminal proceeding.

As far as the disclosure of the proof goes, we disclose what we're provided by the requesting state. They don't have to give us everything they have, but if we were in possession of something that was actually exculpatory, we would disclose it. On the statement that's been made repeatedly that we hang on to exculpatory evidence, we don't have the whole case, because it's in the foreign state, but if we have something, we're disclosing it. If it's exculpatory, we would certainly be disclosing it.

[*Translation*]

Mr. Rhéal Fortin: Could we not ask for it?

[*English*]

Ms. Janet Henchey: Can you ask for disclosure? Well, we don't have to—

[*Translation*]

Mr. Rhéal Fortin: Could we not ask for complete disclosure from the foreign state?

[*English*]

Ms. Janet Henchey: No. The reason is that it's not a trial. The idea is that we're doing this as though it were a preliminary inquiry. Is there enough evidence to justify having a trial? If the person is extradited, the evidence will then be provided according to the laws of the requesting state.

[*Translation*]

Mr. Rhéal Fortin: What do you think about the third condition, which would be to require a reciprocity agreement between Canada and the foreign state? Would that be a good idea?

[*English*]

Ms. Janet Henchey: I'm sorry. We're out of time, but I—

The Chair: Please be very brief.

Ms. Janet Henchey: Yes, there's always reciprocity. There always is. That's the principle of extradition.

[*Translation*]

Mr. Rhéal Fortin: I will talk about the fourth condition during the next round of questions.

Thank you, Mr. Chair.

[*English*]

The Chair: Thank you, Monsieur Fortin.

We'll now go to Mr. Garrison for six minutes.

Mr. Randall Garrison: Thank you very much.

Thank you to the witnesses. I know it's an inconvenience to be dismissed for technical reasons and have to come back, so we thank you for that.

I want to ask about the reporting function.

What we hear, and what we've heard through testimony, is that there isn't reporting on the extradition process. Was it a conscious decision to not publicly report on the extradition process, or is it simply the practice?

Ms. Janet Henchey: There's a combination of things that go into that.

I'm not even sure what's meant by “reporting on the process”. Because it's a public process, it's reported on, in the sense that it's in the courts. When an extradition case goes forward, it's public and takes place in a courthouse. All the materials are open to the public. That makes it public.

We have statistics, some of which are placed on our website. There is no issue with that. We put forward statistics. We're asked by the media, on a regular basis, for statistics, which we provide. Statistics aren't really an issue.

Again, I'm not sure what you mean by “reporting”, but when it comes to whether we have an actual reason for reporting.... We get requests for extradition. At that point, they're confidential unless we move forward with them. We receive quite a few requests for extradition that never see the light of day, because we don't authorize them.

The problem with necessarily disclosing all of that is that we're identifying a case that is at an investigative stage, potentially, in the sense that it's still ongoing in the foreign state. If we say we received a request and refused it, we identify that for a person who's potentially still subject to a prosecution at some point in the future. There's a process, even in Canada, whereby you don't identify, for example, that you're investigating someone before you proceed to trial. However, once a person is charged, it becomes public knowledge.

● (1750)

Mr. Randall Garrison: Are you saying it would be easy for us to go to the website and discover how many extradition cases there were, and from which countries, and the rate of people being extradited?

Ms. Janet Henchey: No. It depends on the country.

Mr. Randall Garrison: It doesn't seem to be possible to do that.

Ms. Janet Henchey: It depends on the country. You would be able to find that, for example, for the United States.

The reason we don't disclose it for every country is that whole issue of identifying the existence of a request. There are a lot of countries with which we don't deal very often. We might have one request in five years from a particular country. If we identify that, we could potentially identify a request we didn't execute.

Honestly, we could do a better job at disclosing some of our statistics. However, there are some we simply can't, because it would reveal confidential information. We disclose it with the United States because the quantity of requests is so large that we're not going to identify a particular request by providing statistics.

Mr. Randall Garrison: Is it safe to say the bulk of requests for extradition, and the bulk of proceedings, involve the United States?

Ms. Janet Henchey: Yes, that's right.

Mr. Randall Garrison: I guess I have a question about that.

We have an agreement with the United States, but there are wildly different criminal justice provisions state by state in the U.S. How do we deal with that question?

Ms. Janet Henchey: Yes, that is a good point.

The requests are coming to us centrally, so they all come through the federal Department of Justice and they have to regulate that they're consistent with the requirements of the treaty with Canada. In any particular case, there might be an issue that would arise because it's from one jurisdiction versus another, and those would be addressed on a case-by-case basis.

For example, some jurisdictions have the death penalty and some don't, so if there's a death penalty, we would be seeking an assurance about the death penalty from that particular jurisdiction.

There are other issues that come up that are specific to particular jurisdictions, and we go back and seek information in relation to the circumstances in that particular case so that we're able to address whether or not it would be fair in those circumstances to extradite.

I should say in response to something I heard earlier that there are cases the minister doesn't surrender, but we don't advertise those as much because the decisions of the minister are sent to the person sought, and they're personal. When the person is discharged, they don't advertise the fact that they were discharged, whereas when they go to court and it's overturned by the courts, of course it's public and everyone can see it.

I can tell you, for example, in the last five years or so.... We go by fiscal years. In 2021-22, the minister discharged on three occasions. The year before that, there were two occasions. The year before that, there were four. Before that, there were five, so he discharges.

Quite apart from that, there are quite a number of cases for which we receive requests, but we do not issue an authority to proceed, an ATP. Again, last year, we refused to issue an ATP on 18 requests that we received.

Usually we do not authorize about 25% of the requests that we receive. Most of those are not with the United States, because the United States has a system that's considerably similar to ours, so in most instances we would go forward, but not always. It depends on the evidence that they've provided.

Mr. Randall Garrison: In the case when assurances are asked for, is there systematic monitoring of the performance on assurances by the IAG, or do you have the resources to do that?

Ms. Janet Henchey: We don't actually have the role to do that. Monitoring of assurances would be handled by Global Affairs, because once the person is outside of the country, we don't have any control over what goes on with them. Global Affairs is responsible for dealing with—

Mr. Randall Garrison: Do they report back to the Minister of Justice? I have trouble seeing how that works, because the Minister of Justice is the one who's made decisions and asked for assurances. Where's the reporting on that performance?

Ms. Janet Henchey: If there was an issue, they would be responsible for following up with the foreign state to say, "You're not abiding by the condition in these instances", so they're—

● (1755)

Mr. Randall Garrison: It's no longer the responsibility of the Minister of Justice once someone's extradited.

Ms. Janet Henchey: Only insofar as there's nothing the minister could do when the person is already in another country. The minister who has influence over things that happen in other countries would be the Minister of Foreign Affairs, so that's why—

Mr. Randall Garrison: We don't ever do assurances that are conditional, saying—

Ms. Janet Henchey: Assurances are conditional.

Mr. Randall Garrison: If you're saying that a trial would proceed within a reasonable time period and it doesn't, we simply say, "Well, that's too bad. We didn't get what we asked for."

Ms. Janet Henchey: We wouldn't ask for something like that—

The Chair: Thank you, Mr. Garrison. We're out of time.

I'm going to go to Mr. Brock for the next round of questions for five minutes.

Mr. Larry Brock: Actually, Mr. Chair, it would be Mr. Van Popta.

The Chair: Okay. Go ahead, Mr. Van Popta.

Mr. Tako Van Popta (Langley—Aldergrove, CPC): Thank you, Chair. Thank you, witnesses, for being here.

Ms. Henchey, I'm going to ask you about a British Columbia case. It's the case of Jassi Sidhu, who was murdered in India in a so-called honour killing. The people alleged to have committed the murder were her very own mother and her maternal uncle. Those two people made it back to Canada, and they were successfully extradited back to India, but it took 17 years.

In that case, the two accused people argued in Canadian court that they would likely be mistreated in an Indian prison. You were quoted in CBC News. I'll give them the benefit of the doubt that they quoted you correctly. You said:

> It undermines the entire concept of extradition and sending people to the country where they have allegedly committed a crime if we refuse to surrender based on imperfections in our treaty partners, even sometimes large imperfections....

First of all, do you remember saying that? Would you mind expanding on that?

Ms. Janet Henchey: I argued that case in the Supreme Court. I don't remember everything I said. Like you, I'll assume that I'm properly quoted.

I was trying to express that a principle of extradition is that we accept that every country is not going to be the same as us. They're not going to conduct a trial the same way in a foreign country as we conduct a trial here in Canada. Although we expect certain fundamental safeguards, we cannot expect exactly the same system.

Our system is also not perfect. When we're seeking extradition from other countries, they also criticize us. That's part of the back-and-forth that you have with respect to the extradition system. What is important is that we're ensuring that the imperfections are not contrary to fundamental justice. We're looking at ensuring that a person is going to have a fair trial and that a person is going to be treated properly while in prison.

In fact, in the Badesha and Sidhu case, which was the Jassi Sidhu murder case, we extradited subject to a number of assurances that they would be treated properly while in India. This included that we would have access to their trials— people from the Ministry of Foreign Affairs would have sat in on their trials—that they would have access to consular services, that they would be treated properly while in prison and that they would be granted proper medical care. These are the kinds of assurances that sometimes are necessary when a country is significantly different from ours in the way that it conducts its judicial and correctional systems.

It's just basic little differences or issues. There's no such thing as a perfect system. I think that's what I was trying to say.

Mr. Tako Van Popta: That's fair enough. Thank you very much for that.

You heard Mr. Bayne give evidence in the earlier panel. He made reference to the Rivoire case. In this case, we sought extradition from France for a person who is accused here in Canada of sexual assault many years ago. France turned down that extradition request based on the facts being so old.

We don't have a statute of limitations on sexual assault cases. Mr. Bayne said there's a lack of reciprocity with France—this being evidence of that situation—and that should certainly inform any treaty that we have with France.

Do you have a comment on that?

Ms. Janet Henchey: I think one reason that France didn't extradite in the Rivoire case was that Mr. Rivoire is a French national. That's one topic that's come up quite a bit, about whether some countries extradite their nationals. Canada does; others don't.

That really is a difference that exists in the extradition world. Our like partners—the United States, Australia and the United Kingdom—all extradite their nationals. It's a characteristic of common law countries. The reason is that we don't have jurisdiction to prosecute for offences that occur extraterritorially, for the most part. There are some exceptions. In order to ensure that there's not impunity, we extradite our nationals so that they will face prosecution when charged with serious offences.

Countries like France do not extradite their nationals. For France in particular, it's part of their constitution. That's a policy difference that we probably disagree with, because we think that you should be prosecuted in the location where the offence took place, it that's a legitimate policy choice that was made by France and a few other civil law countries.

The end result of that is you either extradite or prosecute. That's kind of the policy, so if you're not going to extradite, then you have to consider prosecution in your jurisdiction.

● (1800)

Mr. Tako Van Popta: I'm out of time. Thank you.

The Chair: Thank you, Mr. Van Popta.

Next I'll go to Mr. Naqvi for five minutes.

Mr. Yasir Naqvi: Thank you very much.

I think you were present when Mr. McSorley and Mr. Bayne were making their deputation. They presented five recommendations. Actually, Mr. McSorley made five and I think Mr. Bayne had about four different recommendations.

By memory, are you able to comment on at least some of the key elements so that we get the Department of Justice's perspective on those recommendations?

Ms. Janet Henchey: I wasn't actually here, except for the last five minutes of their testimony, so I don't know what the five were. I know that your colleague mentioned some things.

He mentioned that the requesting state should have a burden of proof of balance of probabilities. I already addressed that.

Mr. Yasir Naqvi: Reciprocity was the other one.

Ms. Janet Henchey: I addressed the disclosure.

The reciprocity is where we stopped, but I think that's what I was talking about with the last question.

Reciprocity does not necessarily mean identical. It means that when we make a request to France or they make a request to us in this context of extradition of nationals, you have to either extradite or prosecute. The idea behind it is that we will ensure that justice is done and that the person is not getting safe haven from prosecution by not being extradited.

The treaty actually specifies that we are not obliged to extradite nationals, but our law provides that we do extradite nationals because we don't want them to not be prosecuted just because we don't have jurisdiction to prosecute for a lot of basic criminal offences, like murder and sexual assault, etc.

That's all I have.

What were the other two?

Mr. Yasir Naqvi: There was another one—I'm going by memory as well, so pardon me—around timing of extradition, which was around when a trial would be starting in the requested country.

I think that relates to Mr. Diab's case. For example, I think he was in prison for three years before the trial came about in France.

Ms. Janet Henchey: I have to very careful about talking about specific cases. That one is ongoing, in a number of different ways.

However, when somebody is extradited, there has to be evidence that they've been charged with an offence. There was argument before the courts—I think I can mention it because it was before the courts—that the Diab case didn't constitute being charged, because he was under what they call “a form of investigation”. It was found to be the equivalent to being at the preliminary inquiry stage in Canada.

It is such a different system that they have in France. Again, that's where we have to be very careful not to superimpose our particular approach on the foreign country. The courts in Canada, and also courts in the U.K., have found that the approach in France, whereby they bring the person in front of an investigating magistrate, which is kind of the long version of the preliminary inquiry, is the equivalent of being charged.

We have a requirement that a person has to be charged; it's a question of what that means in a particular country.

Mr. Yasir Naqvi: Let me ask you this question. I'm mindful, in asking you this, of the fact that it may be an unfair question.

Ms. Janet Henchey: I don't like unfair questions.

Mr. Yasir Naqvi: Then pardon me.

We have an advantage of also sitting in front of two experts on extradition law. You obviously know this piece of legislation and the application of it quite well. In your view, is there room for improvement in the current legislation? If so, do you have a wish list of things that you think need to be modernized or amended? That's the unfair part.

This may be a good opportunity to share this with a group of legislators who are looking at how the bill could serve Canadians better.

● (1805)

Ms. Janet Henchey: I'm happy you knew in advance that it was an unfair question. I can't really answer most of that, other than to say that there's no such thing as a perfect piece of legislation, just like there's no such thing as a perfect system in any country.

Obviously there are ways that it could be improved. We would never say otherwise. It does not necessarily mean that we would endorse all of the ways that people are proposing. It's important that changes to legislation are not made just because of one particular case in which somebody didn't like the outcome; you have to look at the entire system and the principles behind it.

When we look at some of the proposals that have come forward from some of the other witnesses, I would ask that we remember that the proposals come from a particular perspective. We also have to look at the perspective of the administration of justice generally. We have to look at the perspective of our international partners. We have to look at the general system of extradition as a whole and the principles behind it, and the fact that without extradition, we are creating a system of impunity whereby criminals can just hide wherever they want to avoid being prosecuted.

The Chair: Thank you, Mr. Naqvi.

Next we'll go for a two-and-a-half-minute round, beginning with Monsieur Fortin.

You have two and a half minutes.

[*Translation*]

Mr. Rhéal Fortin: Thank you, Mr. Chair.

Ms. Henchey, you quickly went to the fourth condition with my colleague, Mr. Naqvi, in relation to what Mr. Bayne told us. We have to make sure that the trial will be held within a reasonable timeframe, which would avoid situations like that of Mr. Diab, who spent three years in a foreign prison without trial or anything else. Personally, this condition seems perfectly reasonable to me, but perhaps I'm not seeing the whole picture.

Don't you think that it would be important to amend the Extradition Act so that Canada, before extraditing someone, would require a foreign state to guarantee that the trial would be held within a maximum timeframe, say six months, or that the state would provide some sort of guarantee that it is ready to hold such a trial?

[*English*]

Ms. Janet Henchey: I'll bring you back to the question before that, about reciprocity.

Remember that whatever—

[*Translation*]

Mr. Rhéal Fortin: Ms. Henchey, I do apologize for interrupting you, but I only have a minute and a half left. I would like to talk about delays.

[*English*]

Ms. Janet Henchey: I am answering about delays.

If we seek to insist upon a six-month delay in another country, then that reciprocity would require the same delay for us. We would not even be able to abide by that. You need to look at the criminal justice system generally in Canada. There are all sorts of things that happen to cause things to be delayed that are outside of the control of—

[*Translation*]

Mr. Rhéal Fortin: However, if the country is not able to hold a trial for the foreign national and there is a delay, it could wait before extraditing the person.

[*English*]

Ms. Janet Henchey: It's “reasonable delay”, yes.

[*Translation*]

Mr. Rhéal Fortin: When the case is prepared and the state is ready to hold the trial, it can request the transfer of the foreign national. Personally, that seems reasonable, but perhaps I'm missing something.

Do you believe this is reasonable?

[*English*]

Ms. Janet Henchey: I think that the word “reasonable” is reasonable. I agree with that point. It is not unheard of that someone would argue, “You can't send me to this country because I'm not going to get tried within a reasonable time.” We would go back to the country and ask, “Do you have laws about ensuring that somebody is tried within a reasonable time?” For example, the United States has speedy trial laws, and we refer to this pretty regularly when people raise concerns about that.

I think it would be unduly restrictive to insist upon a particular time period, because there are so many things that you cannot predict about how a trial is going to unfold.

[*Translation*]

Mr. Rhéal Fortin: Do you believe that Mr. Diab's case was reasonable?

[*English*]

Ms. Janet Henchey: I can't really respond to that.

[*Translation*]

Mr. Rhéal Fortin: Thank you.

[*English*]

The Chair: Thank you.

Next we will go to a two-and-a-half-minute round with Mr. Garrison.

Mr. Randall Garrison: Thank you, Mr. Chair.

Of course, I'd like about two more hours, so I'm going to have to choose the questions I would like to ask.

I do want to say, Ms. Henchey, that with regard to your opening statement that other witnesses were suggesting that it should be a trial, I don't think that fairly characterizes their suggestions.

I want to ask about the surrender process.

In the law, there are certain things the minister is required to consider, and there are other things that are left to the minister's discretion. One of the concerns I have is that the list of required considerations doesn't match the Canadian human rights code. In other words, in the Canadian human rights code, we have things like gender identity and gender expression that you might expect to be included in things the minister must consider before a surrender decision.

Can you tell me how that operates this time, since that list is different?

● (1810)

Ms. Janet Henchey: Yes, I can.

As you can imagine, that's the case with a lot of Canadian laws. At a particular point in time, there's an enumerated list of grounds of discrimination. As time progresses, that changes and expands. There are a great many different laws and agreements that don't list everything that we would consider to be a ground of discrimination in today's day and age. However, that's covered by the fact that extradition has to be in compliance with the Canadian Charter of Rights and Freedoms. Even though it's not listed in the Extradition Act, the minister is bound by the Canadian charter.

One of the provisions that is mandatory is that the surrender cannot be “unjust or oppressive”. “Unjust or oppressive” has been found to be contrary to section 7 of the charter, so it's contrary to fundamental justice. Those extra provisions that are not specifically listed in the Extradition Act would be covered by the charter.

Mr. Randall Garrison: If someone felt that hadn't been considered but should have been—and I'm going to stick to gender identity, because I think that's one area where people are at great risk outside Canada—is that omission reviewable?

Ms. Janet Henchey: Yes.

A person generally raises the concerns they have. For example, there was a case that took place in Mexico some years ago. The individual was gay, and he was concerned about how he would be treated in prison in Mexico. We ultimately ended up getting an assurance from Mexico about his treatment, and he was not mistreated when surrendered.

A person raises the concern. The minister takes it into account. The minister has to issue written reasons. If his written reasons don't sufficiently address that concern, it can be judicially reviewed—and often a minister's decision is judicially reviewed—and the court would address that. If the court was unsatisfied with the minister's failure to address a fundamental right under the charter, then it would be returned back to the minister for him or her to reconsider that and explain the circumstances.

Mr. Randall Garrison: Thank you.

The Chair: Thank you.

Mr. Randall Garrison: When the chair is virtual, it's tempting just to not look at the screen and to continue.

Ms. Janet Henchey: I'm sorry. I didn't notice.

Mr. Randall Garrison: No, it's tempting for me not to look.

The Chair: Thank you, Mr. Garrison.

I will now go to the last five-minute round. We'll begin with Mr. Caputo.

Mr. Frank Caputo: Thank you, Mr. Chair.

I really want to put this issue to bed.

This is for the two witnesses: Do you have an obligation to disclose any exculpatory evidence?

Ms. Janet Henchey: I would say yes, but the reality is that we're not.... It's a weird question, because this isn't a trial and we don't possess all the evidence. We get what we receive from the foreign state and we disclose it.

Mr. Frank Caputo: Okay, what I'm getting at is this. If you have exculpatory evidence in your possession or within your control, do you have a duty to disclose that?

Ms. Janet Henchey: I would say we have an ethical duty to disclose it, so yes.

Mr. Frank Caputo: Okay, that's what I was 100% getting at, and that would be in accord with my understanding.

You've heard a lot here. It sounds like you've listened to testimony and all that, and obviously you bring a fresh set of eyes to this. Is there anything you've heard thus far that you think you'd really like to clarify?

The floor is yours at this point.

Ms. Janet Henchey: I wasn't ready for that question.

Mr. Frank Caputo: Well, frankly, you know this area better than I do, so I would prefer to hear from you if there's anything you want to clarify, because you're the one who knows this area. I can ask you a specific question if you'd like, but, to me, it's important to hear your perspective.

Ms. Janet Henchey: One thing I wanted to mention is that extradition is an area that's very heavily litigated, so the thought that somehow people's rights are being ignored ignores the fact that it's very heavily litigated. It's also gone to the Supreme Court of Canada for a subject matter opinion more often than lots of other areas of the law, so we have a lot of guidance from the Supreme Court of Canada. To suggest that the Minister of Justice is running wild, doing whatever he wants to do, and can get away with it because he has this massive discretion....The discretion is to operate within the realm of the law. If he's stepping outside of what the law requires, then he's going to be overturned by the courts.

On many occasions we have been given guidance by the Supreme Court on how to deal with particular aspects of extradition, so although the law sets out the terms, we've had the standard of review determined by the Supreme Court and we've had how to deal with defences in foreign countries determined by the Supreme Court. The Supreme Court explained how we are to address determining double criminality, what the rules are with respect to surrendering a Canadian citizen in the event that they're sought for extradition, what we do with refugees. Not the Supreme Court, but the Ontario Court of Appeal provided us with guidance on how to deal with indigenous persons who are sought for extradition. This is not some wild free-for-all. There's considerable judicial oversight, and we've been given a lot of guidance by the Supreme Court that has helped to put in place this system in a way that protects the rights of others.

I also want to mention, because it seems to have been suggested that we have a system in Canada that provides for no rights for anybody compared to other systems, that Canada has one of the most rigorous extradition systems in the world, if not the most rigorous, and we're familiar with this because we deal with all these other countries. Lots of countries have a very pro forma approach to extradition. You just say, “We want this person for this particular offence. They've been charged, and we have a treaty”, and off you go. Among European countries, there's a “no evidence” rule, so they just extradite among each other without any requirement for any evidence to support extradition. I'm not sitting here telling you we should do it that way; I'm just telling you that it would be wrong to suggest that the Canadian extradition system is some kind of Wild West of extradition and that around the world everyone else has greater rights. We have one of the most robust extradition systems in the world.

● (1815)

Mr. Frank Caputo: Thank you. That's very helpful.

When we talk about different ways of doing things, in law one of the biggest issues you have is the clock. Things take time. You just mentioned that you have a decision, you have a review, you have an appeal, you have an appeal of the minister's decision, and potentially appeals of that appeal. How long does the average extradition take? Is that an issue we have to consider, especially when we consider deterioration of evidence, such as people dying?

Ms. Janet Henchey: Yes, it is an issue, and that's one of the reasons we want extradition to move on a expeditious basis. If we were to change the law to require witnesses to be heard and cross-examined, we would never finish our extradition hearings in any kind of reasonable time frame. An average extradition in which the person goes through all of those stages takes 18 months to two years. In a very litigious case, it can go on for 10 years. That's not the average, but it's happened.

Mr. Frank Caputo: You're saying an average case will typically be 18 months to two years, but it can go on for 10 years. I imagine that also depends on funding and things like that.

Ms. Janet Henchey: That's right, yes.

The big red sign is up.

The Chair: Thank you, Mr. Caputo.

We'll go to our final round of questions and Ms. Diab. You have five minutes.

Ms. Lena Metlege Diab (Halifax West, Lib.): Thank you very much, Mr. Chair.

Thanks to the witnesses. I think this has been the second or third day that we're hearing from you, so we appreciate your coming. I know you have a wealth of knowledge.

We've talked a lot about this, but can you tell me about the intersection of the Department of Justice and the Department of Foreign Affairs in the case of extradition? How do they work together, particularly when an individual's been extradited outside Canada?

Ms. Janet Henchey: I'm not sure if you're asking how we deal with a request from the beginning to end. Are you asking where the Department of Foreign Affairs comes in and where the Department of Justice comes in?

Ms. Lena Metlege Diab: Yes. Particularly, I guess, I'm concerned when there are human rights violations or there are things happening when the individual hasn't left yet. Do we investigate the country they're going to in terms of whether we should obtain conditions or what they're going to do when the person is there? As well, when they actually arrive in the other country, what happens there?

Ms. Janet Henchey: When we first receive a request, if it's not from a country that we're very comfortable with and used to dealing with, the first question we ask ourselves is, “Is this a country that we could send somebody safely to?” That will involve consulting with our partners at the Department of Foreign Affairs to ask them what information they have about the conditions in this particular country. If it's not obvious that there's a problem, that may lead us to move on to the next stage, but our first step is to consult with the Department of Foreign Affairs when we're dealing with a country that we're not 100% comfortable with.

Then, as the process goes on, if we don't put an end to it at the outset because of issues, we will, when we get to the ministerial stage, again consult with the Department of Foreign Affairs and consult some of the reports that Mr. McSorley was referring to—human rights reports—to get a sense of what the circumstances would be for this person in the foreign country. The Department of Foreign Affairs is very much involved in that discussion.

Then, if the person is extradited, sometimes they're extradited conditionally, pursuant to assurances. As I mentioned earlier, the Department of Foreign Affairs is responsible for basically dealing with those assurances. If we ask for oversight over the trial, it would be somebody who would be in our mission in that country who would attend the trial to observe, to make sure. Consular affairs are handled by the Department of Foreign Affairs, and Canadian citizens have the right to consular services while they're serving a sentence in another country, so once they're moved to the other country, the Department of Foreign Affairs has the lead.

● (1820)

Ms. Lena Metlege Diab: Thank you.

Are you familiar with the Halifax proposals for law reform that were done at the end of 2021?

Ms. Janet Henchey: Yes.

Ms. Lena Metlege Diab: Can you comment on those from your perspective? Are there any that you believe we should be adopting? Can you help this committee to see how we can make our laws better in this country?

Ms. Janet Henchey: First of all, it wouldn't be appropriate for me to comment directly on the Halifax proposal.

I have reviewed it and I am familiar with some of the things they're proposing. What I would say is that it's one perspective. I'm not saying that it's not valid, but it's not the only perspective. It's coming from a particular viewpoint, and in order to make any determinations about what would need to be done and whether anything needs to be done to change our law, we'd want to look at a broader range of views. We'd look to foreign partners. We'd look to prosecution services and police as well as the viewpoint they have put forward in this particular report.

There are a lot of different things that are raised. One thing I note in the report that I found somewhat surprising is that there's an emphasis on the need for us to put more things before the courts. As I mentioned, the courts are very much involved in extradition cases, but at the same time, it's saying that the courts should have a greater role. The report disagreed with a great many decisions out of the Supreme Court of Canada and suggests that we should legislate differently from what the Supreme Court has said. That's a surprising aspect of the report, from my perspective.

There are a number of things I've mentioned that are not consistent with what I understand to be the principles of extradition. The presumption of good faith is a fundamental presumption of extradition. We refer to it as “comity”. Without it, you can't have extradition: It means that you don't trust anybody else.

Ms. Lena Metlege Diab: Further to that, I guess, what happens in our country in our system when there is a presumption on our part that what we're presented with is reliable and then at one point we find out that it's not?

Ms. Janet Henchey: Any presumption is just that. It doesn't mean that it can't be set aside. It doesn't even necessarily need to be set aside by an argument from the other side. We could review something that we presume is reliable, but if we look at it and think, “I don't quite understand that, and that's problematic”, we go back to the foreign state and ask them for input.

It's a very give-and-take process. Saying that there's a presumption of reliability is a starting point, but it's not the end point by any means.

The Chair: Thank you.

Thank you, Ms. Diab.

Thank you to all of the witnesses for once again coming back because of our technical difficulties last time. You are now dismissed, as we have some committee business.

Committee members, a budget for witness claims for our current study should have been sent to your inboxes to be adopted. Does anyone have any questions in this regard?

Mr. Clerk, are we all okay with the budget?

The Clerk: It seems so, Mr. Chair, as far as I can see.

The Chair: We're all good. The budget is passed. We will see you next week. Thank you. The meeting is now adjourned.