bc civil liberties association
L'Association des libertés civiles de la Colombie-Britannique

October 5, 2010

The Honourable Robert Nicholson
Minister of Justice and Attorney General of Canada
Department of Justice Canada
284 Wellington Street
Ottawa, Ontario
K1A 0H8

Dear Minister Nicholson:

Re: Hassan Diab

On behalf of the British Columbia Civil Liberties Association, I write to address a serious and important legal issue concerning extradition processes and the use of evidence derived from torture. Put simply, Canadian law prohibits use of evidence derived from torture in legal proceedings here. We should ensure that in cases where a foreign state seeks extradition of someone in Canada that same standard applies both in Canadian extradition proceedings and in the proceedings that ensue in the foreign jurisdiction.

This issue arises from the extradition proceedings undertaken at the behest of the French government in relation to Hassan Diab, a Canadian citizen, and the potential use of evidence derived from torture in substantiating his extradition. We call on you to ensure that Canadian citizens be protected against foreign prosecutions relying on evidence derived from torture and that such evidence stays out of Canadian courts and proceedings.

The BCCLA is the oldest and most active civil liberties organization in Canada. We have spent almost 50 years working to preserve, defend, maintain and extend civil liberties and human rights in British Columbia and across Canada. We have longstanding and extensive involvement in working to ensure that security concerns are balanced with respect for the rule of law and the rights of individuals.

As you are aware, Mr. Diab's extradition is being sought by the French government on charges arising from his alleged involvement with a bombing in Paris on October 3, 1980. Mr. Diab has no criminal record in Canada. He

has taught at Carleton University and the University of Ottawa. At the time of his arrest at the request of the French government in November 2008, he was a lecturer at Carleton University. Mr. Diab has been released on bail since March 2009, though he is subject to very strict conditions: he cannot leave his home unless accompanied by a surety; he is required to wear a GPS monitoring device that he pays for himself, at the cost of over $2000 per month; and he is not permitted to leave Ottawa.

Since Mr. Diab's arrest, he has been involved in protracted extradition hearings. While the purpose of an extradition hearing is simply to evaluate whether the requesting state's evidence sets out a *prima facie* case of conduct that would constitute a criminal act in Canada, the Canadian court must nonetheless satisfy itself that there is sufficient evidence to support the extradition request, and that the evidence provided is reliable. The application judge in Mr. Diab's case has issued several decisions on various procedural issues in his case, and in his most recent decision, Maranger J. makes clear the extradition court's obligations, quoting McLachlin C.J.'s decision in *United States v. Ferras*, 2006 SCC 33:

> I take as axiomatic that a person could not be committed for trial for an offence in Canada if the evidence is so manifestly unreliable that it would be unsafe to rest a verdict upon it. It follows that if a judge on an extradition hearing concludes that the evidence is manifestly unreliable, the judge should not order extradition under s. 29(1) [of the *Extradition Act*].

Canada v. Diab, 2010 ONSC 401 at para. 40.

It is our understanding that the key evidence being offered in support of Mr. Diab's extradition is "intelligence" information from unidentified sources, and that neither the application judge in Mr. Diab's extradition hearing nor the Crown counsel making the extradition application on France's behalf knows the source of this intelligence. They do not know whether it comes from human sources or technical sources. They do not know where and how France obtained this information.

That this information is unsourced is extraordinarily troubling. As a threshold matter, the reliability of unsourced evidence is virtually untestable and unchallengeable. This alone should disqualify its use in judicial proceedings. With Mr. Diab's case, however, there is the added concern that the unsourced intelligence may be information derived from torture, given France's willingness to receive in evidence and rely upon evidence derived from torture.

France's use of evidence derived from torture in terrorism proceedings is documented. In July 2008, Human Rights Watch ("HRW") issued a report which was highly critical of France's use of evidence derived from torture. HRW's recent June 2010 report on the use of torture evidence in Europe

reiterates those concerns, stating that the French judiciary uses foreign intelligence derived from torture in terrorism prosecutions, both in the investigative phase and at trial. To our knowledge, the French government has made no assurances that the unsourced intelligence being offered against Mr. Diab is *not* derived from torture. Nor has France, to our knowledge, offered any assurances to Canada that if Mr. Diab is extradited, he would not be prosecuted based on evidence derived from torture. If unsourced intelligence is the result of torture, then the reliability of such information is suspect. It is trite law in Canada that information obtained by torture or cruel, inhuman or degrading treatment is neither credible nor reliable. It is also plain that the use of such information in Canadian courts would put this country in breach of the universal prohibition against torture.

Canada's domestic laws and international legal obligations make clear that information derived from torture is inadmissible in our courts. The *Criminal Code of Canada*, R.S.C. 1985, c. C-46, provides that any statement obtained as a result of torture is inadmissible in evidence, except as evidence of the crime of torture itself. Section 269.1 of the *Criminal Code* sets out the criminal prohibition against torture, and states, in relevant part:

> (4) In any proceedings over which Parliament has jurisdiction, any statement obtained as a result of the commission of an offence under this section is inadmissible in evidence, except as evidence that the statement was so obtained.

The *Immigration and Refugee Protection Act*, S.C. 2001, c. 27, prohibits the use in immigration proceedings of information that is reasonably believed to have been derived from torture. While s. 83(1)(h) of the *Act* states that a judge "may receive into evidence anything that, in the judge's opinion, is reliable and appropriate, even if it is inadmissible in a court of law, and may base a decision on that evidence", s. 83(1.1) goes on to clarify that "for the purposes of paragraph (1)(h), reliable and appropriate evidence does not include information that is believed on reasonable grounds to have been obtained as a result of the use of torture within the meaning of section 269.1 of the *Criminal Code*, or cruel, inhuman or degrading treatment or punishment within the meaning of the Convention Against Torture."

In *R. v. Hape*, 2007 SCC 26, the Supreme Court of Canada recognized that with respect to "evidence gathered in a way that fails to meet certain minimum standards, its admission at trial in Canada may – regardless of where it was gathered – amount to a violation of either or both [sections 7 and 11] of the *Charter*." *Hape* at para. 108.

Likewise, the *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, to which Canada is a signatory, prohibits the use of evidence derived from torture in any proceeding, except as evidence of the torture itself. As per Article 15 of the *Convention*:

> Each State Party shall ensure that any statement which is established to have been made as a result of torture shall not be invoked as evidence in any proceedings, except against a person accused of torture as evidence that the statement was made.

Canada should neither be accepting unsourced intelligence in its courts, nor should it be permitting the Department of Justice to submit unsourced intelligence information to our courts, unless it can be satisfied that the intelligence information is not obtained as a result of torture or other cruel, inhuman and degrading treatment. Moreover, we submit that Canada should not extradite its citizens to foreign jurisdictions to be prosecuted based on secret intelligence evidence without prior written assurances from the foreign state that no evidence derived from torture will be admitted in evidence in the case.

Canada cannot rely on evidence derived from torture under any circumstances. We urge you to stop the use of unsourced intelligence in Mr. Diab's case, and in all other cases like his. The prohibition against torture requires that all incentive to commit torture be eliminated. Keeping torture evidence out of Canadian courts is crucial in upholding our commitment to this universal standard.

Yours truly,

Robert D. Holmes
President

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