IN THE MATTER OF THE COMMISSION OF INQUIRY INTO CERTAIN ALLEGATIONS RESPECTING BUSINESS AND FINANCIAL DEALINGS BETWEEN KARLHEINZ SCHREIBER AND THE RIGHT HONOURABLE BRIAN MULRONEY

SUPPLEMENTARY APPLICATION RECORD
Returnable Wednesday, June 3, 2009

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1. Letter dated April 20, 2009, to The Honourable Robert Nicholson from Edward L. Greenspan, Q.C.;

2. Letter dated May 1, 2009, to Edward L. Greenspan, Q.C. from Ms Janet Henchey, General Counsel and Associate Director, International Assistance Group, Litigation Branch, Criminal Law Division;

3. Letter dated May 11, 2009, to The Honourable Robert Nicholson from from Edward L. Greenspan, Q.C.;

4. Letter dated May 14, 2009, to The Honourable Robert Nicholson from Edward L. Greenspan, Q.C.;

5. Letter dated May 14, 2009, to Edward L. Greenspan, Q.C. from Ms Janet Henchey, General Counsel and Associate Director, International Assistance Group, Litigation Branch, Criminal Law Division;

6. Letter dated May 25, 2009, to The Honourable Robert Nicholson from Edward L. Greenspan, Q.C.;

7. Letter dated May 27, 2009, to Edward L Greenspan, Q.C. from Janet Henchey, General Counsel and Associate Director, International Assistance Group, Litigation Branch, Criminal Law Division.

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April 20, 2009

VIA COURIER AND FAX 1-613-990-7255

The Honourable Rob Nicholson, P.C., Q.C.
Minister of Justice and Attorney General of Canada
Department of Justice
284 Wellington Street, Room 2274
Ottawa, Ontario

Dear Mr. Minister:

Re: Federal Republic of Germany v. Schreiber

Please accept this letter as our Submissions to the Minister pursuant to Section 43(1) and (2) of the *Extradition Act*, on behalf of our client, Karlheinz Schreiber, a Canadian citizen, who faces extradition to Germany on counts of tax evasion, fraud, breach of trust and bribery. Section 43(2) permits submissions to be made to you on any ground relevant to your surrender decision even after the expiry of 30 days, as was recognized by the Ontario Court of Appeal in *Waldman v. Minister of Justice* when the court said that the Minister had carefully considered the matters raised in support of the request for reconsideration, as reflected in his reasons. (see **Tab 1** of the Document Brief). These new submissions have never been made in this case on any prior occasion.

Section 40(1) of the *Act* makes it clear that you may "*personally* order that the person be surrendered to the extradition partner." You are therefore not bound by your predecessors' decisions. As was made clear in *United States of America v. Ferras* (2006) (see **Tab 2**) the Minister's surrender decision is "of a political or diplomatic nature." In exercising his discretion, said the Chief Justice, the Minister of Justice has an obligation flowing from section 6(1) of the Charter to assure himself that prosecution in Canada is not a real option. She did not address the question of what happens when Canadian legislation, rather than the situation at hand, removes that option. Does section 6(2) of the *Criminal Code* violate the *Charter*, in that it does not allow prosecution of Canadian nationals as a viable option to extradition, as is implied in at least ten extradition treaties?

It is therefore to you personally, Mr. Nicholson, that we make these new submissions, which for the sake of your convenience will take the form of numbered pleadings, following the format suggested in *Canadian Extradition Law Practice* (**Tab 3**).

*Also of the Alberta Bar **Also of the Illinois Bar

As you are aware, a great deal of publicity has surrounded Mr. Schreiber's cooperation in the national interest in connection with his testifying at various Inquiries for the sake of demystifying Canadians as to what occurred with former Prime Minister Mulroney and the Airbus Affair. A Google search of Brian Mulroney's name cross-referenced with Karlheinz Schreiber's name instantly produces more than 500,000 "hits." Cross-referencing your name with Mr. Mulroney's name produces more than 1,500 "hits." Many of these hits are in headline stories of the Canadian mega-media: The *National Post*, *The Globe and Mail*, CBC News, CTV News, and syndicated news services. (A sampler of these news stories is to be found in **Tab 4.**) You are unavoidably aware of this controversy, since to an extent you have been in the middle of it.

It will no doubt be difficult for you, under these circumstances, to completely disabuse yourself of all of the controversy surrounding your previous Leader and his dealings with Mr. Schreiber, especially as you now contemplate the opportunity of permanently removing Mr. Schreiber from his adopted country. To this end, on behalf of Mr. Schreiber, we respectfully request you to ask yourself whether you can honestly say that you can be objective in this matter; and if not, whether it would not be appropriate for you to recuse yourself from considering or acting upon Germany's extradition request in your personal capacity, and in particular for you to delay making a surrender decision until your successor has an opportunity to review the file.

These submissions are arranged under two separate headings:

A. Request for Disclosure of Documents preliminary to making final submissions
B. The Fettered "Option" of Extradition or Prosecution of Nationals

These submissions are new issues which have never been raised with you in the past. In order to properly present these arguments to you, we have retained Dr. Gary Botting, author of *Canadian Extradition Law Practice 2007*, to assist us with these submissions. Dr. Gary Botting's *curriculum vitae* is attached at **Tab A.**

A. Request for Disclosure of Documents Preliminary to Making Final Submissions

a. Absence of Proof of Ratification of the Canada-Germany Extradition Treaty
b. Absence of Proof of Amendment to Domestic Legislation
c. The Role of the Minister of Foreign Affairs/Secretary of State for External Affairs
d. Mr. Schreiber as Third Party to the Treaty
e. Interpretation of Treaties
f. Obfuscating Practices of the Department of Justice

Part A requests that you and the Government of Canada disclose any documents that can shed light on whether the Canada-Germany Extradition Treaty was ever ratified, and if so whether amending legislation was ever introduced to accommodate the demands of the treaty, as the Minister of External Affairs of the day was required to do, with the cooperation of the Minister of Justice. It is our position that Mr. Schreiber has standing to request and receive these missing documents since he is a "third party" whose liberty interests are directly affected by the Treaty. It is our position that until this question is resolved, the Treaty is *ultra vires* and unenforceable. It is further submitted that the interpretation of the treaty has been obfuscated by the practices of the Department of Justice, which have served further to fetter the Minister's discretion. It is submitted that you should not order the surrender of Mr. Schreiber until the legal question of the validity of the Treaty is decided, and section 6(2) of the Criminal Code is amended to give you the genuine option of extraditing or prosecuting Canadian nationals in Canada.

B. The Fettered "Option" of Extradition or Prosecution of Nationals

a. "Options" of Reciprocity and a Double Standard
b. Section 6 of the Charter
c. Section 1 of the Charter
d. The "Option" of Prosecution in Canada

Part B requests that you unfetter your discretion from the double standard imposed by the combination of Article V of the Treaty and section 6(2) of the *Criminal Code*. It asks that you reexamine sections 1, 6 and 7 of the Charter to determine whether in fact the legislation and treaty are measures that are "prescribed by law." It especially asks you to consider whether prosecution in Canada is not a viable option.

A. Request for Disclosure of Documents Preliminary to Making Final Submissions

a. Absence of Proof of Ratification of the Canada-Germany Extradition Treaty

1. Mr. Schreiber respectfully requests that you, on behalf of the Government of Canada, disclose any documents that may shed light on whether the Canada-Germany Extradition Treaty was ever ratified, and if so whether amending legislation was ever introduced to accommodate the demands of the treaty – as the Minister of External Affairs of the day was required to do, with the cooperation of the Minister of Justice. It is Mr. Schreiber's position that he has standing to request and receive these missing documents since he is a "third party" whose liberty interests are directly affected by the Treaty.

2. It is Mr. Schreiber's position that until this question is resolved, the Treaty is *ultra vires* and unenforceable, and that you should not order the surrender of Mr. Schreiber until the legal question of the validity of the Treaty is decided, and section 6(2) of the *Criminal Code* is amended to give you the genuine option of extraditing or prosecuting Canadian nationals in Canada.

3. Denial of disclosure rights of a person facing extradition has greater negative constitutional implications than the limited judicial discretion to keep evidence from a Canadian jury, since in the case of extradition the subject can only take advantage of his or her constitutional rights "*before* the subject is sent out of the country and loses his or her liberty." (*United States of America v. Ferras*, **Tab 2** [2006] S.C.J. No. 33, [2006] 2 S.C.R. 77 (emphasis in original)

4. The *Treaty Between Canada and the Federal Republic of Germany Concerning Extradition* (hereinafter the *Canada Germany Extradition Treaty* (**Tab 5**)), signed 11 July 1977, entered into force on 30 September 1979 and was tabled in the House on 10 July 1980. A search for documents surrounding ratification of the Treaty proved unfruitful.

5. Nor is there any indication that enabling legislation was introduced in Parliament between 1977 and 1979, or amending legislation to existing statutes, in particular amendment to the *Criminal Code*, to allow Parliament to legitimize the option negotiated in the Treaty for prosecution in Canada for extraditable crimes rather than extraditing, as implied in Article V of the Treaty.

6. If documents surrounding the ratification of the Treaty do exist, we respectfully request that you and your department search for those documents and disclose them to Mr. Schreiber so that he can advance the argument that the Canada-Germany Extradition Treaty, while valid on its face as an international bilateral

agreement, is *ultra vires* and beyond enforcement in Canada because it conflicts with the central provision of the Canadian *Criminal Code* that disallows conviction in Canada for criminal offences committed elsewhere (section 6(2) of the Code (**Tab 6**)). *Francis v. The Queen*, [1956] S.C.R. 618 (refusal to enforce treaty granting customs exception to Indians) **Tab 7**; *Capital Cities Communications v. C.R.T.C.*, [1978] 2 S.C.R. 141, 173 (refusal to enforce radio communications convention) (**Tab 8**).

7. Mr. Schreiber has sound reason to believe that the enabling or amending legislation was never introduced to the House according to policy and the common law doctrine of enabling Treaties as set down by Lord Atkin in *Canada (Attorney-General) v. Ontario (Attorney-General)* [1937] AC 326, at 357 (**Tab 9**).

8. It is reasonable to conclude that, caught between Liberal and Conservative administrations between the 1977 signing and the 1980 tabling, the Canada-Germany Extradition Treaty became lost in the shuffle and was never ratified.

9. It is further reasonable to conclude that the Treaty is invalid because your predecessor Ministers of Justice and successive Secretaries of State for External Affairs failed to bring the signed Treaty before the House in order to effect necessary, in fact essential, legislative changes in accordance with policy and the common law.

10. If the Treaty was not ratified, then it is *ultra vires* and is not binding on Mr. Schreiber.

11. To the extent that Mr. Schreiber is able to demonstrate that the Treaty was not ratified or fails for want of adoption of supporting legislation, Section 8(3) of the *Extradition Act* S.C. 1999, c. 18 ("Agreements and provisions published in the *Canada Gazette* or the *Canada Treaty Series* are to be judicially noticed") violates section 7 of the *Canadian Charter of Rights and Freedoms*, unless it is read down to mean that such agreements and provisions merely exist and are not necessarily valid, and may indeed be unenforceable.

b. Absence of Proof of Amendment to Domestic Legislation

12. The existence of a treaty does not of itself authorize the executive to extradite. Treaties are not enforceable without the existence of domestic legislation that authorizes the executive to act. "A treaty does not alter the law of the land. A statute is required to implement it. From the standpoint of domestic law, therefore, extradition is a creature of statute" (*McVey v. United States of America*, [1992] S.C.J. No. 95, [1992] 3 S.C.R. 475, 77 C.C.C. (3d) 1, at 6-7 (S.C.C.), per LaForest J. (**Tab 10**)).

13. Lord Atkin stated in *A.-G. Canada v. A.-G. Ontario* (**Tab 9**): "Within the British Empire there is a well-established rule that the making of a treaty is an executive act, while the performance of its obligations, if they entail alteration of the domestic law, requires legislative action." Thus an international agreement has no effect in municipal law unless it has been incorporated by legislation. (See also *Policy on Tabling of Treaties in Parliament*, Treaty Section, http://www.treaty-accord.gc.ca/Tabling.asp (**Tab 11**)).

14. When a State knowingly signs and ratifies a treaty that is at odds with its domestic law, it has an obligation to change the domestic law so that it conforms to the terms of the treaty. In Canada, this principle of common law was expressed by Lord Atkin in *A.-G. Canada v A.-G. Ontario* (**Tab 9**).

15. The principle was adopted by the Federal Government as a statement of policy:

> In cases requiring amendments to Canadian legislation, the treaty is not ratified until such amendments or new legislation have been passed....Where amendments must be made to Canadian legislation in order for a treaty to be implemented, the ministers concerned give instructions for an implementation bill to be drafted. After receiving Cabinet approval, the bill is tabled in Parliament and goes through the parliamentary legislative process....
>
> Where the treaty requires amendments to Canadian legislation, the implementing Act usually contains a provision under which the treaty is approved [citing four examples].... Although it is rare for an implementing Act not to be passed by Parliament, this can happen [citing the fall of the government with the defeat by the Senate in 1988 of Bill C-130, the *Canada-United States Free Trade Agreement Implementation Act*].... *Where a bill that must be passed in order to implement a treaty is not passed, Canada cannot ratify that treaty.*
>
> (Daniel Dupras, "International Treaties: Canadian Practice," Ottawa: Government of Canada, Law and Government Division, 3 April 2000, p. 3, emphasis added) (**Tab 12**).

> See also *Policy on Tabling of Treaties in Parliament*, Treaty Section, http://www.treaty-accord.gc.ca/Tabling.asp, Annex 1., heading 7 (Legislation) (**Tab 11**).

16. It follows that since Canada had not passed legislation amending the legislation with which the Treaty was decidedly at odds, the Canada-Germany Extradition Treaty could not have been legally ratified. (*Attorney-General for Canada v. Attorney-General for Ontario*, [1937] AC 326, at 357 (**Tab 9**)).

17. The Canada-Germany Extradition Treaty was tabled in the House of Commons with two other extradition treaties on 10 July 1980, despite the fact that the framers and other Canadian officials sponsoring the tabling of the Treaty knew or ought to have known that Article V(3) of the Treaty – in which Canada misleadingly purports to have the power and option to prosecute its nationals – is expressly countermanded by exercise of Section 6(2) (then Section 5(2)) of the *Criminal Code*, which states: "Subject to this Act or any other Act of Parliament, no person shall be convicted ... of an offence committed outside Canada." (**Tab 5** and **Tab 6**).

18. Article V(3) must be read in context with the rest of Article V (**Tab 5**):

> ARTICLE V
>
> Extradition of Nationals
>
> (1) Neither of the Contracting Parties shall be bound to extradite its own Nationals.
>
> (2) The requested state shall suspend any proceedings for the naturalization of the person claimed until a decision on the request for extradition has been reached and, if extradition is granted, until his surrender.
>
> (3) If a request for extradition is refused only on the ground that the person claimed is a national of the requested state, that state shall, if asked to do so by the requesting state, take *all possible measures in accordance with its own law* to prosecute the person claimed. For this purpose, the files, documents and exhibits relating to the offence shall be transmitted to that state. All expenses incurred in connection with such prosecution shall be borne by the requested state. The requesting state shall be informed of the result of the prosecution. (Emphasis added)

19. Canada represented to Germany and to Canadians that it had the power to exercise a legitimate option with respect its own citizens: to extradite or to prosecute its nationals. Its negotiating officials in the Departments of Justice and External Affairs undoubtedly knew that Canada had no such power by virtue of

Section 5.(now 6) of the *Criminal Code*. Therefore until legislation was passed amending Section 5 (now Section 6) of the *Criminal Code*, Canada had fettered its own discretion, to the detriment and prejudice of Canadian citizens facing extradition, including Mr. Schreiber.

20. Canada adopted Article V of the Treaty without any attempt to amend its domestic legislation to bring the *Criminal Code* in line with the *Treaty* as required by the common law principle set down by Lord Atkin in *A.-G. Canada v. A.-G. Ontario*. It therefore did not conform to its own stated policy and practice of not ratifying a treaty until the necessary changes to the domestic legislation have been made.

21. Peter W. Hogg, in *Constitutional Law of Canada* (Scarborough: Carswell, 1992 (**Tab 13**)) noted, "A treaty of a more formal character will often provide that it does not come into force until it has been 'ratified' by the states that have signed it" (p. 284). The Canada-German Extradition Treaty was of a formal character.

22. Professor Hogg added:

> Despite the absence of any constitutional obligation to obtain parliamentary approval, it has been the practice of Canadian governments to obtain parliamentary approval of the most important treaties in the interval between signing and ratification. The government will lay the treaty before Parliament and move a resolution in each House approving the treaty. The resolution is not in statutory form, and does not receive royal assent. Of all the treaties which Canada ratified between 1946 and 1966, approximately one quarter were submitted to Parliament for approval. (**Tab 13**, at p. 285)

23. The Canada-Germany Treaty was a "most important treaty" in that it was the first to incorporate a clause (Article V) allowing Canada to refuse to extradite its citizens, and to prosecute them instead.

24. As to amendment of domestic legislation to conform to the Treaty, Professor Hogg stated,

> A treaty which requires a change in the internal law of Canada can only be implemented by the enactment of a statute which makes the required change in the law. Many treaties do not require a change in the internal law of the states which are parties. This is true of treaties which do not impinge on individual rights, nor contravene existing laws, nor require action outside the executive powers of the government which made the treaty.... But many treaties cannot be implemented without an alteration in the internal law of Canada. For example, treaties between Canada and other states relating to ... extradition ...can often be implemented only by the enactment of legislation to alter the internal law of Canada. (**Tab 13**, at

pp. 285-286. See also R. Macdonald, "International Treaty Law and the Domestic Law of Canada" (1975) 2 Dal. L.J. 307 (**Tab 14**)).

25. "In Canada, where there is no constitutional requirement of parliamentary approval prior to the making of a treaty, it would offend against the basic principle of parliamentary supremacy if the executive could alter the law of the land merely by making a treaty....

> It follows that the courts of Canada ... will not give effect to a treaty unless it has been enacted into law by the appropriate legislative body; or, to put the same proposition in another way, the courts will apply the law laid down by statute or common law, even if it is inconsistent with a treaty which is binding upon Canada. ....In a case where Canada's internal law is not in conformity with a treaty binding upon Canada, then Canada is in breach of its international obligations (Hogg, **Tab 13,** at p. 286).

26. If the Treaty was ratified, as implied by a declaration that it came into force on 30 September 1979, then it was ratified contrary to the policy and practice of the day, without necessary legislation, and like any contract with a deceptive clause, the offending provision "seriously offends law or public policy" and is void *ab initio* as it applies to Canadian citizens subject to this provision – including Mr Schreiber (*Black's Law Dictionary,* 5th Edition, *s.v.* "void ab initio" (St. Paul, Minn.: West Publishing, 1979), p. 1411 (at **Tab 15**).

27. A treaty is primarily an executive act establishing relations between two or more independent sovereign states. Its implementation may call for both legislative and judicial action. "The interpretation is according to the rules that govern that of instruments generally; from the entire circumstantial background, the nature of the matters dealt with and the objects in view, we gather the intention of the parties as expressed in the language used. When such matters touch individuals, the judicial organ must act." *Francis v. The Queen*, [1956] S.C.R. 618, per Rand J. (refusal to enforce treaty granting customs exception to Indians) **Tab 7.**

28. "Treaty provisions affecting matters within the scope of municipal law, that is, which purport to change existing law or restrict the future action of the legislature, including, under our constitution, the participation of the Crown, ...must be supplemented by statutory action." *Francis v. The Queen*, **Tab 7**, per Rand, J.

29. Where implementation of the provisions of a treaty by the contracting Governments is contemplated in the treaty, domestic force can be given to those provisions only if there has in fact been such implementation by the Government. *Capital Cities Communications v. C.R.T.C.*, [1978] 2 S.C.R. 141, 173 (refusal to enforce radio communications convention) (**Tab 8**).

30. Mr. Schreiber, as a third party to the Treaty, requires disclosure pursuant to Article 31 and 32 of the *Vienna Convention* (**Tab 16**) of all documents relating to the missing legislation, including any discussion as to whether such legislation was deemed necessary by any member of the Cabinet or their advisors.

c. The Role of the Minister of Foreign Affairs/ Secretary of State for External Affairs

31. Under section 10 (1) of the *Department of Foreign Affairs and International Trade Act*, R.S., 1985, c. E-22, s. 10 (**Tab 17**), the powers, duties and functions of the Minister of Foreign Affairs (formerly the Secretary of State for External Affairs) "extend to and include all matters over which Parliament has jurisdiction, not by law assigned to any other department, board or agency of the Government of Canada, relating to the conduct of the external affairs of Canada."

32. Under section 10(2) of the *Department of Foreign Affairs and International Trade Act* (**Tab 17**), the Minister of Foreign Affairs (formerly the Secretary of State for External Affairs) has the responsibility, *inter alia*, to (*a*) conduct all diplomatic and consular relations on behalf of the Government of Canada ...; (*c*) conduct and manage international negotiations as they relate to Canada ...; (*j*) foster the development of international law and its application in Canada's external relations; and (*k*) carry out such other duties and functions as are by law assigned to him.

33. According to the practice statement of the Law and Government Division of the Federal Government, "[T]he legislative implementation of certain treaties gives Parliament its only opportunity to have decision-making power over the coming into force of a treaty in Canada" (Dupras, **Tab 12**, at page 4). If, contrary to policy, the Secretary of State for External Affairs suggested no required amendments to the legislation in effect and no new legislation was passed by Parliament, then Parliament was denied legitimate input into the legislative process surrounding an important developing area of foreign policy and international law.

34. In failing to bring the Treaty and the need for amendment of legislation to the attention of Parliament, the Secretary of State for External Affairs and the Minister of Justice (who was responsible for determining the need for the legislation) declined or refused to exercise their jurisdiction or were negligent in their duty.

35. By representing that the Treaty had been properly ratified by ordering the exchange of instruments of ratification, the Secretary of State for External Affairs acted both without jurisdiction and beyond his jurisdiction.

36. By tabling the treaty months after it was purportedly ratified, the Secretary of State for External Affairs and the Cabinet, including the Minister of Justice,

prevented Parliament from having any input into how Canadian domestic law could and should be amended to conform to Canada's emerging foreign policy.

37. The Ministers' actions or inaction, which have only just come to light, are sufficient grounds for judicial review under section 18.1(3) and (4) of the *Federal Courts Act*, R.S., 1985, c. F-7, s. 18.1(3) and (4) (**Tab 18**).

38. By negotiating a treaty with Germany that in ordinary language requires Canada to exercise the legitimate option of prosecuting rather than extraditing its nationals, Canada expressly agreed that it would put its legislation in order by instituting and maintaining the legitimate option of prosecuting rather than extraditing its nationals. The two-year delay in signing gave false assurances to Germany (and to the Canadian public) that Canada had spent the time putting its domestic legislation in order to accommodate the provisions of the *Treaty*, pursuant to Articles 26 and 27 of the *Vienna Convention.*

39. The end run around Parliament accomplished by the Secretary of State for External Affairs, the Minister of Justice and the rest of the Cabinet by exchanging instruments of ratification without introducing legislation to accommodate the major changes in foreign policy denied Parliament the opportunity to amend the legislation to allow for prosecution of Canadian nationals for foreign offences in accordance with its treaty obligations, as implied by Article V(3). It also denied Canadian citizens the option of being prosecuted at home – an option employed by Germany and several other free and democratic nations – in contravention of their rights under section 6 of the *Canadian Charter of Rights and Freedoms* (**Tab 19**).

d. Mr. Schreiber as Third Party to the Treaty

40. As a third party to the Treaty whose liberty interests are at stake, Mr. Schreiber has the right to disclosure of information surrounding the purported ratification of the Canada-Germany Extradition Treaty in order that he may examine all documents exchanged between the parties in the course of making the Treaty, and make representations with respect to the interpretation of the Treaty by applying the principles of interpretation set down in the *Vienna Convention.*

41. "Where a State has entered into a treaty on behalf of an individual, or a group of individuals, it is self-evident that those individuals have an interest in its performance or non-performance." Chinkin, *Third Parties in International Law*, **Tab 20**, page 14).

42. Mr. Schreiber, as an individual third party to the treaty, has the right to know it is a legitimate treaty, and the Respondent has the responsibility to prove that, since exercising the provisions of the treaty entails the removal of a Canadian

national from his country in violation of his section 6 Charter right to remain in Canada. As a third party to the Treaty Mr. Schreiber also has the right to know whether legislation was contemplated to activate and legitimize parts of the Treaty that conflict with domestic law, and what steps to legitimize the process were or were not taken. As a third party to the Treaty, Mr. Schreiber also has standing to demand any and all documents that will resolve these issues, especially since he has a major liberty interest directly arising from a former Minister's order of surrender.

43. Bilateral Extradition Treaties are entered into on behalf of individuals who are alleged to have committed crimes in foreign jurisdictions in order to ensure that they are extradited, if necessary, in accordance with negotiated rules of procedure and human and political rights. Despite current Canadian practice by the International Assistance Group, extradition treaties are designed not just for the efficient surgical removal of persons requested for alleged crimes in other countries, but also to protect the human, civil and political rights of such persons. Therefore every bilateral extradition treaty is in part an international instrument for the preservation of human rights.

44. Each extradition treaty limits the power of the contracting states and protects the rights of the individual. Limiting clauses favouring the individual are to be found in the Germany-Canada Extradition Treaty at Articles II (1) and (2), Article III(1), Article IV, Article V(1), Article VI (1) and (2), Article VIII(1), Article XI, Article XII, and Article XXII (**Tab 5**). Indeed, Article III(1)(b) enunciates standard human rights: "Extradition may be refused if ... (b) the requested state considers that the request for extradition has been made for the purpose of prosecuting or punishing a person on account of his race, religion, nationality or political opinion or that his position would be prejudiced for any of those reasons." Since every extradition treaty contains a similar clause, every bilateral extradition treaty is also in part a human rights treaty.

45. Since the State has entered into a treaty which in part protects individual and human rights and allows for both mandatory and discretionary exceptions to extradition, and it is self-evident that individuals named in an extradition proceeding have an interest in the performance or non-performance of the treaty, individuals subject to extradition proceedings, such as Mr. Schreiber, are third parties to the applicable extradition treaty:

> Individuals remain third parties to treaties guaranteeing the protection of human rights, although some such treaties grant individual procedural rights in international arenas. Most commonly the relationship between individuals and territorial legal persons is governed by municipal law and procedure. Examples are plentiful: *an individual defending an extradition application in a municipal court is a third party to the extradition treaty between the requesting State and the State of detention*.... In municipal arenas the focus becomes the incorporation of norms of international law

> into municipal law, and the forum's jurisdiction over the individual before it. This obscures the fact that *although States act as their representatives in international arenas, individuals remain third parties*. (Chinkin, *Third Parties in International Law*, **Tab 20**, at pages 13-14, emphasis added.)

46. A third party may assert that he has more than a mere interest in a certain subject, since he has a legal right in the subject matter of the dispute, or a right granted under a treaty between the parties: "An individual may not accept that the State has represented his or her interests adequately in a claim of State responsibility. Indeed, the State's interest may not coincide with those of the individual" (Chinkin, **Tab 20** at 13, 15, 18). Nonetheless, "The bestowal of a right upon a third party gives rise to expectations on the part of that third party that the parties will act in conformity with the treaty in their relations with itself; without necessarily having made any commitment of its own it will see itself as the beneficiary of the exchange of promises between the parties" (Chinkin, **Tab 20**, at 20).

e. Interpretation of Treaties

47. The "General rule of interpretation" outlined in Article 31 of the *Vienna Convention* specifies: "A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose" (Art. 31(1)). The "context" for this purpose includes the given treaty's preamble and annexes, including the Schedule. The "object and purpose" is the possible extradition of individuals. The context of the Canada-Germany Extradition Treaty must be considered in light of, and cannot be separated from, the individual caught up in the mechanisms of extradition and his rights. Therefore Mr. Schreiber, as a person involved in extradition proceedings, has standing to apply for and receive disclosure of documents that question the authenticity and integrity of the treaty that is being used by the Minister to effect his extradition (*Vienna Convention*, Article 31(1), **(Tab 16)**).

48. The Permanent Delegate to the Vienna Conference for the United States of America remarked of the interpretation sections of the draft *Vienna Convention*, "All the available sources of evidence must be open for the purposes of interpretation." He added in a *note verbale*:

> What guides can be more helpful in deciding the effect a particular clause in a treaty was intended to produce than the official records of the negotiations in which the language was agreed and the documents relating to the clauses which were submitted or produced in the course of negotiations as well as the other circumstances of its conclusion? This is the most invariable practice of Foreign Offices in the interpretation and

application of treaties.... There should be free access to all pertinent sources of information.

> *Note verbale* of 2 October 1967 from the Permanent Representative to the United Nations (A/6827/Add. 2, pp. 5-6), in *Analytical Compilation of the Comments and Observations Made in 1966 and 1967 with Respect to the Final Draft Articles on the Law of Treaties*, Vol. 1, United Nations Conference on the Law of Treaties, U.N. General Assembly, A/CONF. 39/5 (10 February 1968), McKearney, XXIInd Session, 977th Meeting,. Para. 19 (**Tab 21**).

49. Article 32(1) of the *Vienna Convention* ("Supplementary means of interpretation") states yet another rule of treaty interpretation at international law:

> "Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31." (**Tab 16**).

Thus a request by the Applicant for disclosure of documents surrounding the preparation and ratification of the Canada-Germany Extradition Treaty is not unreasonable.

50. Disclosure of these documents is made necessary by the Convention's own compulsion to follow principles of good faith, fundamental freedoms, and other binding rules of international law (Article 31(3)(c)) – including disclosure of supplementary treaty documents, as codified by Article 32(1). (*Vienna Convention*, Articles 31, 32 (**Tab 16**))

f. Obfuscating Practices of the Department of Justice

51. The longstanding practice of the Minister of Justice and the Department of Justice, especially the International Assistance Group, 1) always to extradite and never to prosecute whenever that option arises in an extradition treaty, and 2) to apply Article II of the Treaty and its Schedule to offences not listed in the Schedule, necessitates a *Vienna Convention* Article 31(b) (**Tab 16**) interpretation of Articles II and V and the Schedule of the Canada-Germany Extradition Treaty (**Tab 5**) – and similar provisions in other extradition treaties. This in turn necessitates disclosure of the underlying documents so that a proper interpretation of the Treaty may be made.

52. The interpretation of these provisions imported into the text as applied by the Minister and his staff – in preference to their "ordinary meaning" – makes the provisions ambiguous and obscure, and leads to a result which is manifestly

absurd and unreasonable, as demonstrated in the earlier Reasons for Surrender in this very case, and as set out in Parts B and C of these submissions, below. Therefore it is doubly necessary for the Minister to disclose documents surrounding the preparation and ratification of the Treaty, and any supportive legislation, in conformity with Article 32 of the *Vienna Convention* (**Tab 16**).

53. To quote Mr. Justice Rand, in determining a rule of international law to be applied to a doctrinal term of a domestic criminal statute, "the court must be free to draw upon all sources of international conventions, including reason and good sense" (*Reference re United States Forces*, [1943] S.C.R. 483 at 524 (**Tab 22**). By implication, Canada had the right to prosecute crimes deemed to have been committed overseas by virtue of the *United States of America (Visiting Forces) Act*, 1942 (U.K.), 5 & 6 Geo. Vi, c. 31, s. 1).

54. In *Libman v. R.* ([1985] 2 S.C.R. 178 (**Tab 23**), LaForest J. for the Supreme Court of Canada allowed Libman to be prosecuted in Canada despite the fact that the nexus of his offence (telemarketing) was outside the country. He reviewed many cases entailing extraterritorial prosecution in common law countries. To this day, *Libman* defines the limits of the effect of section 6(2) of the *Criminal Code* for domestic prosecution, as opposed to extraterritorial prosecution, in terms of the offence having a "real and substantial" connection to Canada.

55. The authority of the Minister to surrender a fugitive to a requesting state is predicated on the existence of a valid extradition treaty – a "condition precedent" to extradition. At international law, in the absence of a legitimate treaty, a government cannot and should not extradite a fugitive to a foreign land. *United States v. Burns*, [2001] S.C.J. No. 8, [2001] 1 S.C.R. 283, 151 C.C.C. (3d) 97 (S.C.C.) 7 (**Tab 24**), *Holmes v. Jennison*, 39 U.S. (14 Pet.) 538, at 541, 548-549, 554-555, 560, 574, 583, 597-598 (1840) (**Tab 25**), *Foster v. Neilson*, 27 U.S. (2 Pet.) 253 at 314 (1829), per Marshall U.S.C.J. (**Tab 26**). Mr. Schreiber has the right to prove, by reference to documents yet to be disclosed or by their absence, that the treaty is invalid.

g. Disclosure of Documents Surrounding the Adoption of Article V

56. Of central concern to Mr. Schreiber is the interpretation of Article V of the Canada-Germany Extradition Treaty to determine whether, as the Court of Appeal in his case assumed, the Minister in fact exercised his discretion to extradite or prosecute, and whether the Minister has any discretion to exercise. If the Treaty is interpreted to mean that the extradition partner has the option of either extraditing its citizens *as a matter of virtually unwavering law or policy* or not extraditing but prosecuting them *as a matter of virtually unwavering law or policy*, then the decision at the individual case level has already been made

before the Minister exercises his discretion: obviously, at the individual case level, the Minister has no discretion to exercise.

57. If this interpretation of Article V of the Treaty is a correct reading, then representations from counsel for the Attorney General that the Minister has exercised his discretion in this area in every case have not been and are not true, and the many courts (including the Court of Appeal in Mr. Schreiber's case) that have assumed or held that the Minister must have exercised his discretion and that his discretion must be given deference have been misled.

58. In the U.S. congressional study *Penal Codes of France, Germany, Belgium and Japan*, E. Jarno remarked: "The theory of extradition should therefore be combined with the extraterritorial authority accorded the penal law in every country to judge offences committed abroad, at least those committed by citizens. The two theories are mutually dependent" (House Doc. No. 489, 56th Cong., 2d Ses.), cited in Robert W. Rafuse, *Extradition of Nationals* (Urbana, Ill.: University of Illinois Press, 1939), **Tab 27**, at 134.

59. It has long been noted that the adoption of an "optional" clause satisfies both the State party who refuses to extradite its nationals yet is prepared to prosecute them in their personal capacity, and the State party which would be forced by its domestic law to see its nationals perform criminal acts with impunity since it could not extradite them. "The contracting states are not obliged to hand over their own nationals. The nation which declines to hand over one of its citizens must try him" - Draft General Convention of Private International Law, Title III, Article 345 – see *Amer. Jour. of Int. Law*, 1928, Supplement, vol. 22, p. 314, cited in Rafuse, **Tab 27** at 150). "None of the High Contracting Parties shall be obliged to extradite its own citizens or subjects, but the required party undertakes to bring such persons to trial where, but for this provision, extradition could have been accorded" (Article 3 of the Draft Convention on Extradition adopted at Warsaw on 15 August 1928 by the International Law Association, *Report of the Thirty-fifth Conference*, 1928, p. 321, in *Transactions of the Grotius Society* (London: 1929), vol. 14, pp. 103-112. (Cited in Rafuse, **Tab 27**, at 150.

60. An "either/or" approach to extradition/prosecution in terms of national policy has been advanced by international conferences for well over a century, beginning with the Resolutions of Oxford of the Institute of International Law in 1880. Other organizations that proposed or entertained such an approach included the American Institute of International Law, the International Commission of Jurists, the Pan American Union, the Committee of Experts for the Progressive Codification of International Law, the General Convention on Private International Law, the International Law Association, and the Third International Conference for the Unification of Criminal Law (Rafuse, **Tab 27**, pp. 149-150). However, Canada and Germany pointedly did not adopt such an

approach until 2004, some five years after Mr. Schreiber was arrested on an extradition warrant.

61. International strategy on the part of Secretaries of State, administrative officials and treaty negotiators attempted to structure the "extradite or prosecute" provision in many bilateral treaties so that one partner to a bilateral extradition treaty that is allowed under its domestic law to extradite its nationals may do so, while the other partner that is not allowed under its domestic law to extradite may prosecute instead. Without any announcement of its intention to do so, Canada may well have attempted to introduce this approach to its treaties beginning with the Canada-Germany Treaty of 1979, using the innocuous-sounding but deceptive phraseology of Article V, which appeared to reinforce the section 6 Charter rights of Canadians to stay in Canada, even as it took them away.

62. Interpreted this way, the "extradite or prosecute" option of Article V of the Canada-Germany Extradition Treaty is made, not at the case level, but at the national policy/ legislation level: Despite the apparently clear ordinary meaning of Article V that Canada is not obliged to extradite its nationals, Canada has opted, in conformity with section 6(2) of the *Criminal Code*, to extradite *all* its nationals wanted for extradition (unless there is some other reason for not extraditing them), while Germany has opted, in conformity with Article 16 of its Basic Law, not to extradite *any* of its otherwise extraditable nationals, but to prosecute them instead.

63. If it was the intention of the negotiators for Canada that Canada opted to extradite *all* its accused nationals for which there was no other reason to deny extradition (and the converse for Germany - that Germany opted to prosecute *all* its accused nationals) - the *apparent* "option" of Article V is no option at all. Thus, in all the cases that the Minister of Justice and the agents of the Attorney General have held forth in the courts as being founded upon "Ministerial discretion" (as reflected in the Court of Appeal decision in *Schreiber*), *absolutely no discretion was being exercised by the Minister.*

64. This removal of Ministerial discretion by clever – if not Machiavellian – turn of phrase in a treaty means that the dozens of cases saying that Ministerial discretion is paramount and cannot be disturbed have been decided on the wrong premise. If in the course of treaty negotiations the nation (unknowingly) opted for extradition over prosecution (as Germany opted for prosecution over extradition), then the Minister's discretion in this area not only has been and is fettered, it is non-existent. Such a major departure in foreign policy should have been brought to the attention of Parliament and to the attention of Canadian citizens, each of whom could be affected by it.

65. The absence of discretion in this case mutes the effect of legislation on section 1 of the Charter as it has been applied to neutralize section 6(1) of the *Canadian Charter of Rights and Freedoms* (**Tab 19**) which guarantees the right of citizens to remain in the country. If the Minister has no real discretion to determine whether to refuse extradition to citizens, the provision of the Act cannot be said to be "a reasonable limit prescribed by law as can be demonstrably justified in a free and democratic society."

66. The underlying documents surrounding the Canada-Germany Extradition Treaty requested by Mr. Schreiber should indicate whether this interpretation of Article V of the Treaty is correct and whether the Government of Canada has engaged in deceit in representing that Article V actually bestowed a legitimate option and discretion on the Minister, and added to rather than subtracted from the bundle of rights accorded all Canadians.

67. The as yet undisclosed documents will reveal whether the negotiators engaged in a deliberate and reasoned strategy to apply the *aut dedere aut judicare* (extradite or prosecute) principle at the national level – the extradition partners opting, as national policy, for either one position or the other; or whether the Minister is imbued with discretion beyond the academic notion of extradition always being a "political" decision.

68. If choosing the option of extradition over prosecution at the national policy level is what Canadian negotiators had in mind when they negotiated the Canada-Germany Extradition Treaty, there must be a record of discussions on the subject. Mr. Schreiber should be able to seek and receive disclosure of any discussion to that effect. Otherwise, the plain reading of the Treaty should stand, and Canada should be able to prosecute foreign cases by virtue of section 6(2) of the Code (which is made "[s]ubject to this Act or any other Act of Parliament") – by simple amendment of the *Extradition Act*, which could be drafted by the Department of Justice and introduced by you as Minister of Justice in tandem with the Minister of Foreign Affairs, in accordance with protocol and published procedure. (**Tabs 11, 12, 13**).

69. If the underlying strategy and meaning of Article V of the Treaty was its ordinary meaning – that is, to extend to the Minister the option to extradite or prosecute on a case-by-case basis – Mr. Schreiber should be able to seek and receive disclosure of any discussion to that effect. Clearly, Canada has no obligation under Article V to extradite Mr. Schreiber to Germany, just as Germany has no obligation to extradite any citizen to Canada. Furthermore, Canada only has an obligation "to take all possible measures in accordance with its own law to prosecute the person claimed." (**Tab 5**). Certainly there is no "obligation" here that would defeat a constitutional right as strong as section 6(1) of the *Charter*.

70. If the Minister never does truly exercise his discretion, as a matter of law and policy, this should be brought to the attention of the courts, many of which, following *Idziak v. Canada (Minister of Justice)*, [1992] S.C.J. No. 97, [1992] 3 S.C.R. 631 (**Tab 28**), have assumed that the Minister exercises his discretion honestly, and that the exercise of the Minister's "discretion" in surrendering a person for extradition deserves deference as long as the Minister does not violate the person's constitutional rights or otherwise errs in law, or does not violate the principle of procedural fairness, or act arbitrarily, in bad faith, or for improper motives. The intention of the negotiators of the Treaty can be brought to light, and to the attention of the courts, only by disclosure of the background documents. It behooves you, as Minister of Justice, to facilitate this disclosure. (Many cases have followed *Idziak*. See, for example, *Boily v. Canada (Minister of Justice)*, [2007] Q.J. No. 1223, 220 C.C.C. (3d) 384 (C.A.), application for leave to appeal dismissed [2007] C.S.C.R. no 192 (S.C.C.); *Kolitsidas v. Canada (Minister of Justice)*, [2005] A.Q. No. 11813 (C.A.), application for leave to appeal dismissed [2005] C.S.C.R. no 414 (S.C.C.))

B. The Fettered "Option" of Extradition or Prosecution of Nationals

a. Reciprocity and a Double Standard

71. In his Reasons for Surrender of 31 October 2004, Mr. Cotler stated, "Insisting on reciprocity *in given circumstances* may operate to undermine key objectives of extradition" (at page 20, emphasis added). However, this misses entirely the central issue that the lack of reciprocity complained of is contained in the very fabric of article V of the Canada-Germany Extradition Treaty, which contemplates two issues: 1) that neither of the Contracting Parties shall be bound to extradite its own nationals; and 2) that if either of the Contracting Parties decides not to extradite one of its own nationals, the requested country will, upon the request of the extradition partner, prosecute him or her to the best of its ability with the assistance of the requesting country. Canada-Germany Extradition Treaty, Article V(1) and (3) (**Tab 5**).

72. The essential character of extradition treaties "is reciprocity and equality between the contracting states. They always involve domestic legislation, e.g., the extradition act which demands a guarantee of reciprocity as a pre-condition for extradition....

> Extradition is generally based on international agreements. In the absence of a treaty of extradition, it may as a matter of exception be effected on the ground of comity of the states concerned. Whether it is based on treaties or not, the principle of equality and reciprocity is observed by the states

concerned, i.e. the requesting and requested states. It is extraordinary to extradite a fugitive if there is no reciprocity. The requirement of reciprocity has been criticized as a consequence of the "outdated conceptions of national sovereignty." Contrary to this criticism, the requirement can be viewed as an application of the principle of equality among states.

> (Lung-Fong Chen, *State Succession Relation to Unequal Treaties* (Hamden, Conn: Archon Books, 1974 (**Tab 29**)), at pp. 130-132, 135; see also I.A.Shearer, *Extradition in International Law* (Manchester: Manchester University Press, 1971 (**Tab 30**)) at pp. 31-32, 125-126..

73. Reciprocity is always considered essential to extradition agreements. Hence in the extradition case of *Re Westerling* (17 I.L.R. 82 *et seq* (1950); 1 Malayan L. Rep. 228 (1950); United Nations, *Materials on Succession of States, U.N. Doc* ST/LEG/Ser. B/14 (1967), at p.194, in which Indonesia tried to extradite Westerling from Singapore, the High Court of the Colony of Singapore held that British domestic legislation relating to the extradition treaty was ineffective vis-à-vis Indonesia since there was no reciprocity. It accordingly refused to grant extradition.

74. "Unequal treaties, which were a source of conflict and inherently invalid, could not serve the cause of peace and progress. As they conflicted with a peremptory rule of general international law, they should be expressly defined as void. Equality of the parties to treaties was, after all, a corollary of the sovereign equality of States." *Analytical Compilation of the Comments and Observations Made in 1966 and 1967 with Respect to the Final Draft Articles on the Law of Treaties*, Vol. 2, United Nations Conference on the Law of Treaties, U.N. General Assembly, A/CONF. 39/5 Mr. Haddad, XXIst Session, 908th Meeting, para. 33 (**Tab 21**).

75. The history of excepting citizens from extradition in extradition treaties began in 1852 with the extradition treaty between the United States and Prussia, Article 3 of which allowed each party to refuse to extradite its nationals. President Polk withheld the ratifications on this basis, "because it introduced a new provision into our treaties of extradition, to which he could not, under an imperative sense of duty, give his approbation." However, when the next administration came to power, President Pierce proclaimed a new draft of the treaty with Article 3 unchanged, adding a preamble reinforcing the importance of the principle of reciprocity:

> Whereas the laws and constitutions of Prussia and other German States, parties to this convention, forbid them to surrender their own citizens to a foreign jurisdiction, the Government of the United States, with a view to

making the convention strictly reciprocal, shall be held equally free from any obligation to surrender citizens of the United States. (William M. Malloy, ed. *Treaties, Conventions, International Acts, Protocols and Agreements, between the United States of America and Other Powers, 1789-1909* (Washington: United States [Government], 1910), p. 1501, cited in Rafuse, **Tab 27**, at 20).

76. By 1868, Secretary of State Seward stated in an official communiqué, "In some of the United States' treaties it is stipulated that the citizens or subjects of the parties shall not be surrendered." Given that only one treaty (that with Sicily) positively excepted citizens at that time, Seward must have regarded the treaty with Prussia and other States (including Mexico, whose treaty of 1861 had a similar excepting clause as Prussia's) as not being optional and discretionary in the sense of permitting the United States to extradite its citizens knowing that its extradition partners would not reciprocate. Rafuse, **Tab 27**, at 32-33.

77. In the following decades, Mexico consistently refused to extradite many accused Mexican citizens to the United States, and vice-versa, to the point that extradition between the two countries had been rendered, by lack of reciprocity, impossible. In *Ex parte McCabe*, 46 Fed. Rep. 378, 46 F. 363 (W.D. Tex. 1891) (**Tab 31**), Judge Maxey declared, "The overwhelming weight of American authority and practice of our government ... deny the existence of any obligation to surrender arising out the law of nations." Reviewing the provisions of the treaty with Mexico, he concluded that the obligation to extradite was not intended to extend to citizens of either country. *If there was no obligation to deliver, there was no authority to do so, either.* He concluded that surrender of McCabe was not authorized by the treaty, and ordered her released. The same argument should be applied to Article V of the Canada-Germany Exradition Treaty: *If there is no obligation to deliver, there is no authority to do so, either.*

78. In 1898, both Mexico and the United States began negotiations of a new treaty. In notifying Congress of this intention, President McKinley noted that "by an almost uniform course of decision in the United States it had been held that if a treaty negates the obligation to surrender the President is without legal authority to act." Rafuse, **Tab 27**, p. 45. The new treaty, proclaimed in 1899, modified the citizen exception by providing that the executive of each country had the power to deliver up its own citizens if in its own discretion it deemed it proper to do so. The United States promptly sent two of its citizens to Mexico upon extradition requests, but when Mexico did not reciprocate, reverted to its former policy of not extraditing its nationals.

79. Many other countries had adopted similar "optional clauses," including France, which in 1935 requested the extradition of U.S. citizens George W. and Aubrey Neidecker, bankers operating in Depression-era Paris who had closed up

shop leaving financial obligations of many millions of francs. On appeal of denial of a writ of habeas corpus to the Federal Circuit Court of Appeals for the Second Circuit in *U.S. v. Valentine ex rel. Neidecker* (81 F. 2d 32, 38 (2nd Cir., 1936) **Tab 32**), Judge Hand, for the majority, followed *McCabe*:

> An extradition treaty binds the parties, and as to matters in which it was not meant to bind them, it was natural to say that they should not "be bound"; from that it is not to be assumed that they meant in addition gratuitously to assert that they reserved the power to surrender their own nationals if they chose.

80. The *Neidecker* case was appealed to the Supreme Court of the United States, where Chief Justice Hughes, for the Court, affirmed the decision of the Circuit Court of Appeals. The Court ruled that in the absence of a statute or treaty provision authorizing him to do so, the President of the United States had no power to surrender U.S. citizens to a foreign government. The central question was whether the treaty with France granted authority to deliver up citizens. This question was not one of policy, but of "legal authority." *National policy favouring the extradition of its citizens, and its attempts to negotiate treaties permitting it to do so, were of no weight.* (*United States v. Valentine ex rel. Neidecker*, 299 U.S. 5, 80 L. ed., 624 (1936) **Tab 33**). Again, this principle should be applied in Mr. Schreiber's case.

81. The deciding factor in *Neidecker* was that the U.S.-France Treaty showed no definite intention to authorize the surrender of nationals. It therefore contained no express grant of power. The effect of Article I containing the general obligation to deliver up "persons" and Article V which states "Neither of the contract parties shall be bound to deliver up its own citizens," when read together, was the same as if Article I had provided that the two governments "mutually agree to deliver up persons except its own citizens or subjects." Given the existence of other treaties granting discretionary power, the omission of that specific grant from the treaty with France must be assumed to have been deliberate. History and administrative practice "furnish no warrant for reading into the treaty with France a grant which the parties failed to insert" (80 L. ed., 624 (1936) **Tab 33**).

82. Applying the same principles to the *Schreiber* case, Article 1 of the Canada-Germany Extradition Treaty states, "The contracting Parties undertake ... to extradite to each other any person found within the territory of the requested state who is subject to prosecution...," and Article V(1) states, "Neither of the Contracting Parties shall be bound to extradite its own nationals." Read together, this is the same as if Article I provides that the two governments "mutually agree to deliver up persons except its own citizens or subjects." Since other treaties grant discretionary power, the omission of that specific grant from the treaty of Germany must be assumed to have been deliberate. As the Canada-Germany

Extradition Treaty shows no definite intention to authorize surrender of citizens, it therefore contains no express grant of power.

83. Germany is bound by Article 16(2) of the *Basic Law of the Federal Republic of Germany* (**Tab 34**), which states, "No German may be extradited to a foreign country." This *Basic Law* is Germany's "internal law of fundamental importance" (in the words of Article 46(1) of the *Vienna Convention*). Pursuant to Article V of the *Treaty*, Germany will never extradite its nationals, and therefore if required by an extradition partner will always ask for and receive assistance in conducting the prosecution of a citizen who is the subject of an extradition proceeding for an offence committed elsewhere. That situation wholly meets the clear intention of Article V of the Treaty.

84. However, when the same provision of the Treaty is applied to Canada, it is duplicitous, in that courts in Canada are forbidden by section 6(2) of its *Criminal Code* from convicting anyone who has allegedly committed an offence elsewhere in the world *unless* a statute of Parliament permits such prosecution. Canada has therefore, on the face of the treaty, left itself no option but to extradite its nationals – despite the clear language and ordinary meaning of Article V of the Treaty that it retains the option of prosecuting rather than extraditing. Since it cannot fully meet the terms of the treaty, and has not amended its legislation so that it can do so, Canada cannot enforce the Treaty against a third party such as Mr. Schreiber, who has a right as a Canadian citizen to remain in Canada. (Shearer, **Tab 30**, 125-126).

85. The parallel provision to Article 16 of German's *Basic Law* in the Canadian Constitution is section 6(1) of the *Canadian Charter of Rights and Freedoms* (**Tab 19**) , which specifies that "Every citizen of Canada has the right to enter, remain in and leave Canada." Section 6(1) of the *Charter* is designed to protect Canadian citizens. The courts have consistently held, and the Minister has recognized, that section 6 (1) of the *Charter* applies to extradition.

b. Section 6 of the Charter

86. "It is settled law that extradition is *prima facie* an infringement of a Canadian citizen's right to remain in Canada pursuant to section 6(1) of the Charter (**Tab 19**). The real inquiry is whether the infringement is an unreasonable limitation not justifiable under section 1 of the Charter" (*Lau*). The Supreme Court of Canada in *Ferras* held that extradition to another country infringes the right of a Canadian citizen under section 6(1) of the Charter, and that it is first engaged at the surrender stage of the extradition process, not at the committal stage. *Lau v. Australia [No. 3]*, [2006] B.C.J. No. 2824, 232 B.C.A.C. 69, 213 C.C.C. (3d) 161 (B.C.C.A.), leave to appeal to S.C.C. refused 5 April 2007 (S.C.C.) (**Tab 35**);

United States of America v. Ferras, [2006] S.C.J. No. 33, 2006 SCC 33, [2006] 2 S.C.R. 77 (S.C.C.) (**Tab 2**).

87. The meaning of a right or freedom guaranteed by the Charter must be ascertained by an analysis of the purpose of the guarantee and the interests it was meant to protect. The interpretation should be generous rather than legalistic, aimed at fulfilling the purpose of the guarantee and securing the full benefit of Charter protection for the individual concerned. *R. v. Big M Drug Mart Ltd.*, [1985] S.C.J. No. 17, 18 C.C.C. (3d) 385 (S.C.C.) (**Tab 36**).

88. The purpose of the Charter is to guarantee and protect the enjoyment of the listed rights and freedoms within the limits of reason. It is designed to constrain governmental action inconsistent with those rights and freedoms. *Hunter v. Southam Inc.*, [1984] 2 S.C.R. 145, 14 C.C.C. (3d) 97, 41 C.R. (3d) 97 (S.C.C.) (**Tab 37**).

c. Section 1 of the Charter

89. The Supreme Court of Canada has also held (albeit with respect to extradition *to the United States, in 1989*) that the discretion of the Minister of Justice to extradite under the authority of the *Extradition Act* is subject to section 1 of the Charter, because it is "a reasonable limit prescribed by law as can be demonstrably justified in a free and democratic society." *United States of America v. Cotroni*, [1989] S.C.J. No. 56, [1989] 1 S.C.R. 1469 (S.C.C.) (**Tabs 19, 38**).

90. "Prescribed by law" means "prescribed by statute or regulation....or from the application of a rule of the common law" (*R. v. Therens*, [1985] S.C.J. No. 30, 18 C.C.C. (3d) 481, 45 C.R. (3d) 97 (S.C.C.) (**Tab 39**). "Prescribed" in this legal context, means "To lay down authoritatively as a guide, direction, or rule; to impose as a peremptory order; to dictate" (*Black's Law Dictionary*, s.v. "Prescribe" (**Tab 15**)).

91. The *Extradition Act* empowers the Minister by giving him discretion, but his act of surrendering for extradition is by definition not "prescribed by law," since it is subject to the "discretion" of the Minister of Justice, who almost without exception has extradited Canadian citizens when asked to do so by an extradition partner since his "discretion" is fettered by section 6(2) of the *Criminal Code* and policy considerations.

92. "The word 'prescribe' connotes a mandate for specific action, not merely permission for that which is not prohibited" (*R. v. Hebert*, [1990] 2 S.C.R 151 at 205, per Sopinka J.

(**Tab 40**)). Directives issued by government departments fall outside the definition of "prescribed by law" (*Re Ontario Film and Video Appreciation Society* (1984) 45 O.R. (2d) 80 (C.A.) (**Tab 41**)).

93. In particular, a law that confers a discretion on an official to act in derogation of a Charter right will not satisfy the requirement of being "prescribed by law" unless that discretion is constrained by clear and "intelligible" legal standards (*Irwin Toy v. Quebec*, [1989] 1 S.C.R 927 at 983 **Tab 42**). Article V of the Treaty is not "clear and intelligible" since it is (deliberately or otherwise) ambiguous.

94. In the case at bar, the Minister's discretion itself is unreasonably fettered by the absence of applicable legal standards, because the Minister is unable to offer the option of domestic prosecution.

95. Where the Minister is given complete discretion to act in ways that impact on the rights or freedoms of third parties, and the governing statute (or treaty) does not stipulate the criteria to be applied, the statutory or treaty provision does not satisfy the "prescribed by law" requirement, even though the Minister and the International Assistance Group may have developed their own criteria.

96. Had the criteria developed by the Minister or the I.A.G. been contained in the statute or Treaty itself, the limit on the Applicant's section 6 Charter right to remain in Canada would have been prescribed by law. Since these criteria were not spelled out in either the statute or the Treaty, the provisions cannot be used in a section 1 Charter argument to counter or erase the section 6(1) Charter right of a citizen to remain in Canada. (*Re Ontario Film and Video Appreciation Society* (1984), 45 O.R. (2d) 80 (C.A.) (**Tab 41**).

97. Article I of the Treaty (which is syntactically nonsensical), coupled with unenforceable strictures of Article V(3), makes the Germany-Canada Extradition Treaty too vague to amount to a "prescription by law" that could serve to defeat a section 6 Charter right. A law that is excessively vague or obscure cannot by definition be a "reasonable" limit within the section 1 analysis (*Osborne v. Canada*, [1991] 2 S.C.R. 69 at 94 (**Tab 43**)).

98. "A vague law offends the values of constitutionalism. It does not provide sufficiently clear standards to avoid arbitrary and discriminatory applications by those charged with enforcement....

> In Canada, the idea that a law may be void for vagueness is also implicit in the requirement that a limit on a Charter right be prescribed by law. That follows from the rule described above that precision is one of the

ingredients of the prescribed-by-law requirement. (Hogg, *Constitutional Law of Canada* (**Tab 13**) at 864-865

99. A law fails the "prescribed by law" test "where there is no intelligible standard and where the legislature has given a plenary discretion to do whatever seems best in a wide set of circumstances" (*Irwin Toy*, **Tab 42**).

100. Here, the discretion whether to extradite or prosecute a Canadian national wanted for offences committed outside the country, when Germany has no discretion to extradite its nationals and Canada has no discretion to prosecute them, makes the Treaty, when coupled with the domestic law, so defective as to fall short of an "intelligible standard." Furthermore, in the *Extradition Act*, Parliament has given to the Minister "a plenary discretion to do whatever seems best in a wide set of circumstances." Therefore this is not a law that can be used to pre-empt the applicant's section 6 Charter rights by invoking section 1 of the Charter.

101. The *Oakes* test determined that in order to establish that a limit is reasonable and demonstrably justified in a free and democratic society, two criteria must be met: 1) the legislative objective must be of "sufficient importance" to warrant overriding a constitutionally protected freedom; and 2) the means chosen to implement it must be reasonable and demonstrably justified in the sense that it is "proportional." This second criterion can in turn be broken down into three sub-criteria: a) The law must be rationally connected to the objective; b) the law must impair the right as little as possible – that is to say, "no more than necessary to accomplish the objective" (Hogg); and c) "The law must not have a disproportionately severe effect on the persons to whom it applies" (Hogg, **Tab 13** at 867); *R. v. Oakes*, [1986] 1 S.C.R. 103 (S.C.C.), at 138-139 (**Tab 44**).

d. The Option of Prosecution in Canada

102. It is the terms of the Treaty itself, not the "given circumstances" of a specific case, that are at odds with domestic law, specifically section 6(2) of the *Criminal Code*. This discordance fetters the Minister's discretion to the degree that never once in the history of Canada has Canada ever opted to prosecute the subject of an extradition request – whether citizen or not – for an offence committed outside the country, rather than extradite that person. "The fact is, the Minister of Justice or Attorney General of Canada has not once in two centuries ordered domestic prosecution in preference to extradition, even though exercise of that prerogative is considered a central principle of extradition law in civil law jurisdictions." Botting, *Canadian Extradition Law Practice* (Markham: Butterworths LexisNexis, 2007 (**Tab 3**)), pp. 238-239 ("Practice Note" to section 47 of the *Extradition Act*).

103. The Minister's position on the extradition of nationals, coupled with the inability of Canada to prosecute its nationals for crimes committed elsewhere, has far-reaching effects beyond the Canada-Germany Extradition Treaty.

104. Canada, through the United Kingdom, has compacted *not under any circumstances* to extradite its nationals to nine countries: El Salvador, Greece, Guatemala, Haiti, Hungary, Latvia, Nicaragua, Norway, and Portugal. Under these circumstances, since Canada has not amended its *Criminal Code* to allow domestic prosecution for crimes committed elsewhere, the only remedy in conformity with the treaty is to discharge its citizens, despite their alleged overseas crimes. Compare the virtually identical provisions of Article III of Canada's extradition treaties with El Salvador, Greece, Guatemala, Haiti, Hungary, Latvia, Nicaragua, Norway and Portugal. ("Bilateral Extradition Treaties," in Botting, *Canadian Extradition Law Practice* Part II (Markham: Butterworths Lexis-Nexis, 2009) (**Tab 3**).

105. The existence of these treaties confirms the fact that the decision to extradite a given person is ultimately a political decision: although extradition treaties import international obligations, each country has the absolute final discretion to extradite or not to extradite.

106. Canada has ratified extradition treaties in which it is "not bound to," "not obliged to," "not required to," or may in its absolute discretion "refuse to" surrender its nationals - *without* a corollary obligation to prosecute - with 14 countries: Albania, Argentina, Bolivia, Chile, Colombia, Cuba, Czech Republic, Estonia, Liberia, Lithuania, Monaco, Peru, San Marino, and Thailand. (Botting, "Bilateral Extradition Treaties" (**Tab 3**). Compare the virtually identical provisions of Article III of Canada's extradition treaties with each country.

107. Canada has ratified extradition treaties in which it is "not bound to," "not obliged to," "not required to," or may in its absolute discretion "refuse to" surrender its nationals – *with* a corollary obligation to prosecute if it chooses not to extradite – with ten countries, including Germany. The treaties with the other nine countries (Austria, Finland, France, Korea, Mexico, Philippines, Spain, Sweden, and Switzerland) came into force between 1985 and 2001, all but the most recent ones following the template of the Canada-Germany Extradition Treaty. (Botting, "Bilateral Extradition Treaties" (**Tab 3**). Compare the similar provisions of the named extradition treaties.

108. The Canada-Germany Extradition Treaty was thus the first extradition treaty in which Canada purported to commit to prosecuting its own nationals if it decided not to extradite. This shift in policy should have attracted the attention of the framers and ratifiers of the 1979 *Treaty*, who according to Canadian government policy and received practice had an obligation to take the draft treaty

and necessary legislation to Parliament so that the conflicting legislation, specifically section 5 (now 6) of the *Criminal Code*, could be revised.

109. The necessary remedy for bringing Canada's domestic law into line with its treaty obligations and express options specified in Article V(3) of the Canada-Germany Extradition Treaty (and similar provisions for the option of prosecution rather than extradition contained in nine subsequent treaties following it) is to immediately draft government legislation for the amendment of section 6 of the *Criminal Code* allowing for prosecution in Canada of alleged offences committed elsewhere, or to amend the *Extradition Act* to allow prosecution under section 6 of the *Code*, which is subject to any other law of Canada.

110. It is respectfully submitted that the Applicant should not be extradited pursuant to an invalid and unenforceable treaty that, owing to the oversight of successive Ministers of Justice and Secretaries of State for External Affairs is *ultra vires*.

D. The Request

147. Mr. Schreiber requests disclosure of documents surrounding the negotiation and purported ratification of the Canada-Germany Extradition Treaty up to the time it was tabled in Parliament on 10 July 2000 to demonstrate that it was not ratified and that amending legislation was not brought before the House.

148. The necessary remedy for bringing Canada's domestic law into line with its treaty obligations and express options specified in Article V(3) of the Treaty is to immediately draft government legislation for the amendment of section 6 of the *Criminal Code* allowing for prosecution in Canada of alleged offences committed elsewhere – as Canada has done to accommodate domestic prosecution of offences in multilateral treaties.

149. It is respectfully submitted that you should not surrender Mr. Schreiber, pursuant to the precedents set in *Francis v. The Queen*, [1956] S.C.R. 618 (refusal to enforce treaty granting customs exception to Indians) **Tab 7**; and *Capital Cities Communications v. C.R.T.C.*, [1978] 2 S.C.R. 141, 173 (refusal to enforce radio communications convention) (**Tab 8**).

150. It is respectfully submitted that you should not surrender Mr. Schreiber pursuant to a treaty that is in all likelihood *ultra vires* and unenforceable, and that before you take further steps to surrender Mr. Schreiber, you allow him to prove the treaty's invalidity.

151. It is respectfully submitted that in any case, you should not surrender the Applicant until these preliminary issues are resolved

152. *In the alternative,* we request that you not surrender Mr. Schreiber until you have a clear legal option, supported by the *Criminal Code,* of prosecuting him in Canada pursuant to an amendment to the Code, or by an amendment to the *Extradition Act.*

Yours sincerely,

GREENSPAN PARTNERS

Edward L. Greenspan, Q.C.

Encls.

CURRICULUM VITAE

Gary Botting

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1. Current Employment

1991 - 2009
Barrister and Solicitor; Author of legal texts
Vancouver Island and Coquitlam, BC

Duties: Legal consultant with primary focus on extradition and wrongful conviction; writing texts on legal history and law for Butterworths/Nexis-Lexis, Fitzhenry & Whiteside and Transnational Publishers.

2. Past Employment

2006 -2007
Honorary Research Associate, University of British Columbia Faculty of Law, Vancouver BC.

Duties: Researching and writing books and articles on extradition and wrongful conviction

2005 - 2007
SSHRC Post-Doctoral Fellow and Visiting Scholar, University of Washington School of Law, Seattle, Washington (2005-2007)

Duties: Research and writing texts on legal history and law for Butterworths/Nexis-Lexis, Fitzhenry & Whiteside and Transnational Publishers

1991- 1999
Barrister and Solicitor
Gary Botting & Associates
Victoria, B.C.

Duties: Trial and appellate lawyer and consultant with primary focus on criminal appeals and trials and extradition.

1990 - 1991
Lecturer
Simon Fraser University
Burnaby, B.C., Canada

Duties: Teaching university English courses to students at the William Head Campus on Vancouver Island.

1990 - 1991
Articling Lawyer
Douglas Christie, Barrister
Victoria, B.C.

Duties: Legal research and preparation of factums for British Columbia Court of Appeal and Supreme Court of Canada.

Past Employment (continued)

1986 - 1991
Creative Writing Instructor
Lakeland College
Cold lake, Alberta, Canada

Duties: Instructing creative writing (both fiction and non-fiction); developing new techniques in distance education.

1988 - 1990
Research Assistant
Canadian Institute of Natural Resources Law, Univ. of Calgary

Duties: Preparing a computer database for a major study on mining law in Canada, including researching, synopsizing cases.

1988 - 1990
Vice-president of Liaison
Calgary Region Arts Foundation
Calgary, Alberta, Canada

Duties: Assigning liaison officers to work with individual arts groups and supervising distribution of $4 million of gov't funding.

1972 - 1986
Instructor of English
Red Deer College
Red Deer, Alberta, Canada

Duties: Teaching university English and creative writing. Terms as coordinator of media relations and English.

1970 - 1972
Producer/Director/Playwright
People & Puppets Incorporated
Edmonton, Alberta, Canada

Duties: Budgeting, financial planning, programming, playwriting, promoting, acting in and directing of plays.

1969 - 1970
High School English Teacher
Crestwood Secondary School
Peterborough, Ontario, Canada

Duties: Teaching English, grades 10-12. Faculty advisor for student newspaper, creative writing club, drama club.

1964 - 1968
Journalist
Peterborough Examiner
Peterborough, Ontario, Canada

Duties: Reporting various news beats, editorial writing, movie reviewer, under the tutelage of Robertson Davies, publisher.

1961 - 1963
Journalist
South China Morning Post
Hong Kong

Duties: Reporting and feature writing for *South China Morning Post*, *China Mail*, and *Sunday Post-Herald*, with weekly column.

3. Education

2004: **Doctor of Philosophy (Law)**, University of British Columbia. Dissertation: "Executive and Judicial Discretion in Extradition between Canada and the United States." Graduate focus: comparative law (U.S. and Canada), international criminal law, jurisprudence, interdisciplinary legal studies, and law and society. Worked with Dr. W. Wesley Pue, Dr. Albert McClean, and Michael Jackson QC.

1999: **Master of Laws**, University of British Columbia. Thesis: "Competing Imperatives: Extradition from Canada to the U.S.A." Graduate focus: Canadian aboriginal law, international criminal and penal law, postmodernism. Primarily worked with Peter Burns QC, Michael Jackson QC, and Professor Joel Bakan.

1990: **Bachelor of Laws**, University of Calgary. Focus on Canadian constitutional law, criminal law, international law, intellectual property, and Canadian legal history. Major project published by University of Calgary Press as *Fundamental Freedoms and Jehovah's Witnesses* (1993).

1982: **Master of Fine Arts in Playwriting**, University of Alberta. Thesis project: *Whatever Happened to Saint Joanne?* (original play). Focus: playwriting, screenwriting, dramaturgy. Thesis project supervisor: Professor Bill Meilen.

1975: **Doctor of Philosophy (English Literature)**, University of Alberta. Dissertation: "Three Grades of Thought in the Novels of William Golding." Graduate focus: Victorian literature, modern American literature, the modern English novel, modern drama. Primarily worked with Dr. Sheila Watson, Dr. Wilfred Watson, and Dr. Norman Page.

1970: **Master of Arts**, Memorial University of Newfoundland (English). Thesis: "Dualism in the Novels of William Golding." Graduate focus: modern British and American literature, bibliography, textual criticism. Primarily working with Dr. George Storey, Professor Keith Ecclestone, Dr. D.G. Pitt, Dr. Gerald Francis.

1968: **Bachelor of Arts**, Trent University (English and philosophy major). Activities: editor of student newspaper; editor of *Tridentine* Literary Magazine. Primarily working with Dr. T.H.B. Symons, Dr. Michael Sidnell, Dr. Richard Sadleir.

1966: **Queen's University**, Kingston, Ontario. Philosophy and political science.

4. Awards

2005-07: Social Sciences and Humanities Council Post-Doctoral Fellowship, $38,000 p.a.
2005-07 University of Washington School of Law Visiting Scholarship.
2003-04: Paetzold Fellowship, University of British Columbia, $18,000.
2002-03: Paetzold Fellowship (supplanting University Graduate Fellowship), $18,000.
2002-03: SSHRC Federalism and Federations Supplement, tenable at U.B.C., $6,000.
2001-02: SSHRC Doctoral Fellowship (supplanting U.B.C. graduate fellowship), $17,000.
2001-02: U.B.C. Faculty of Law Grant Supplement Award, $4,000.
2001-02: University of Washington School of Law Visiting Scholarship.
2000-01: University of Washington School of Law Visiting Scholarship.
2000-01: University of British Columbia University Graduate Fellowship, $16,000.
1988-90: University of Calgary Faculty of Law Research Assistantship.
1987-88: University of Calgary Faculty of Law Frank Burnet Scholarship.
1984: Citizen of the Year Award - Central Alberta Arts Council.
1984: Province of Alberta Drama Award for Best Production (*Winston Agonistes*)
1984: Province of Alberta Drama Award for best Director (*Winston Agonistes*)
1984: Province of Alberta Playwriting Award for One-Act Play (*Winston Agonistes*).
1983: Province of Alberta Drama Award for Best Production (*Crux*)
1983: Province of Alberta Drama Award for Best Director (*Crux*)
1983: Province of Alberta Playwriting Award for One-Act Play (*Crux*).
1982: Province of Alberta Playwriting Award for Feature Screenplay (*Flight of the Raven*).
1982: Province of Alberta Playwriting Award for Radio Play (*Conventions*).
1981: Province of Alberta Playwriting Award for Television Screenplay (*Cow Bird*).
1980-81: Province of Alberta Graduate Scholarship in Drama (tenable at University of Alberta).
1978: Province of Alberta Playwriting Award for Radio Drama (*God Save the Queen*).
1977: Province of Alberta Playwriting Award for Full Length Play (*Fathers*).
1976: Province of Alberta Playwriting Award for Musical (*The Girls in the Steno Pool*).
1973: Province of Alberta Playwriting Award for Radio Drama (*A Message in the Ice*).
1972: Province of Alberta Playwriting Award for One-Act Play (*The Box Beyond*).
1971-72: University of Alberta Graduate Teaching Assistantship.
1971: First Prize, *Edmonton Journal* Literary Award for Playwriting (for *Harriott!*).
1970-71: University of Alberta Graduate Teaching Assistantship.
1968-69: Memorial University of Newfoundland Graduate Research Assistantship.
1967: Book Prize, *Tridentine 67* Short Story Competition for "Race Against the Red."
1967: Belmont/*Saturday Night* literary award for editorship of *Tridentine 67*.
1965: Book Prize, *Tridentine 65* Short Story Competition for "The Bell Tolled On."
1961: Second Prize, Biology Division, United States National Science Fair - International.
1961: National Pest Control Association Award, U.S. National Science Fair - International.
1961: First Prize, Ontario Science Fair (for "Intergeneric Hybridization of Giant Silk Moths").
1960-61: U.S. National Academy of Sciences Bing Travel Award to go to Europe and India.
1960: American Institute of Biological Sciences Award to travel to Arkansas and Oklahoma.
1960: First Prize, Zoology Division, United States National Science Fair - International.
1960: First Prize, Ontario Science Fair (for "Interesting Variations of the Cynthia Silk Moth").

5. Published Books and Articles (* = juried or refereed publication)

Canadian Extradition Law Practice 2009 (Markham: Butterworths LexisNexis, 2009) (standard guide to Canadian extradition law, treaties and policy for judges and lawyers).

*Criminal*Practice (co-author with Alan W. Bryant, James A Fontana, Alan D. Gold, Joseph F. Kenkel, Sidney N. Lederman, Clayton R. Ruby and Fern Weinper (Markham: LexisNexis Quicklaw) 2008 (online version of *Canadian Extradition Law Practice*).

"International Extradition Law and Practice in the United States and Canada," with M. Cherif Bassiouni (ed.), *International Criminal Law, Third Edition* (New York: Brill, 2008).

Canadian Extradition Law Practice 2007 (Markham: Butterworths, 2007).

"The Supreme Court 'Decodes' the *Extradition Act*: Reading Down the Law in *Ferras and Ortega*," *Queen's Law Journal*, Volume 32, Issue 2 (Spring 2007).

Chief Smallboy: In Pursuit of Freedom (Calgary: Fifth House/Fitzhenry and Whiteside, 2005) (indigenous governance/biography/Canadian and United States history).*

Canadian Extradition Law Practice 2005 (Markham: Butterworths LexisNexis, 2005).*

Extradition Between Canada and the United States (New York: Transnational Publishers, 2005) (explication of Canadian and U.S. legal and political history, policy and treaty making).*

"Extradition," *The Oxford Companion to Canadian History*, Don Mills: Oxford University Press, 2004.*

"'It's All Been Done Before,'" "Eagles," "The Day We Flew with Eagles," 28 *Legal Studies Forum*, 1 & 2 (Spring 2004) (publication of the American Legal Studies Association).*

"Alternate Routes," "Small Claims," "Autumn in New York," "Canabanadaman," 27 *Legal Studies Forum* 1 (Spring 2003).*

"*Sentencing and Society: International Perspectives*" (review), *Law and Politics Book Review*, Vol. 12 No. 11 (November 2002).*

"The Kelly Odyssey," *The Lawyer's Weekly* (20 September 2002), p. 4.

"*Extradition, Politics and Human Rights*" (Review), Richard Brisbin, ed. *The Law and Politics Book Review*, vol. 11. No. 5 (May 2001), pp. 223-225.*

Leadership: An Anthology (co-editor, M.E.Symons) (Victoria: Royal Roads University, 1998).

"Witness Evidence Via Live Video Link in the Canadian Criminal Courtroom," 55 *The Advocate* 4 (June 1997) 523 (with Hugh Trenchard).*

Fundamental Freedoms and Jehovah's Witnesses (Calgary: University of Calgary Press, 1993).*

Lady of My House and Other Poems (Edmonton: Harden House of Canada, 1986).

Prime Target: A Play in Two Acts (Edmonton: Harden House of Canada, 1985).

The Orwellian World of Jehovah's Witnesses (with Heather Botting) (Toronto: University of Toronto Press, 1984).*

Winston Agonistes (Edmonton: Harden House of Canada, 1984).

Crux (Edmonton: Harden House of Canada, 1983).

Freckled Blue and Other Poems (Red Deer: Red Deer College Press, 1979).*

Lady Godiva on a Plaster Horse (Red Deer: Red Deer College Press, 1977).*

A William Golding Bibliography (Red Deer: Red Deer College Press, 1976).*

Thinking As a Hobby: The Novels of William Golding (Edmonton: Harden House, 1975).

Monomonster in Hell (Red Deer: Red Deer College Press, 1975).*

Computer-Assisted Instruction of English As a Second Language (co-author), (Red Deer: Red Deer College Press, 1973).*

Streaking! (Red Deer: Red Deer College Press, 1993)

The Box Beyond (Edmonton: Harden House of Canada, 1972).
Harriott! (Edmonton: Harden House of Canada, 1972).
Perambulance and Pipe Dream: Two Plays (Edmonton: Harden House of Canada, 1972).
Prometheus Rebound: A Dramatic Poem (Edmonton: Harden House of Canada, 1972).
The Theatre of Protest in America (Edmonton: Harden House, 1971).
BumweltS (St. Johns: Memorial University of Newfoundland, 1969).

6. Research Papers (* = refereed or peer reviewed)

"Four Shaky Pillars: 'Evidence' and 'Factual Innocence' in the Steven Truscott Case." Paper presented as guest lecture at Faculty of Law, U.B.C. on 23 February 2008.

"Imasees' Long Flight to Freedom," Canadian Law and Society Association Annual Conference, Saskatoon, Saskatchewan, 1 June 2007.*

"Degrees of Innocence," *Bridging Law's Communities*, Annual Conference of the Canadian Association of Law Teachers, Saskatoon, Saskatchewan, May 30, 2007.*

"First Nations Land Claims to the Mountains of Banff and Jasper National Parks: The Merit of the Arguments of Cree Chief Bobtail Smallboy," *Legal Intersections*, Canadian Law and Society Association Annual Conference, 75th Congress of the Humanities and Social Sciences, York University, Toronto, May 31-June 3, 2006.*

"Far from the Madding Metropolis: The Claim of Chief Bobtail Smallboy to the Mountains of Banff and Jasper National Parks," *Expanding the* Polis*: Law's Engagement and Location*, Canadian Association of Law Teachers Conference, Osgoode Hall Law School, York University, Toronto, May 29-31, 2006.*

"Chief Smallboy's Land Claim to Banff and Jasper National Parks: Another Nisga'a?" *Whose Law? Why Law?* Law's Empire Interdisciplinary Conference, University of British Columbia, May 4-6, 2006.*

"Assuaging the National Guilt: Deliberations on Wrongful Conviction in Canada," *International Developments in the Innocence Movement*, Innocence Network Conference, University of Washington School of Law, Seattle, 18 March 2006.

"Destination – Anywhere: The Illusion of Protected Rights and Reality of Lawful Wrongs in Canada's *Extradition Act*," 10th Annual U.B.C. Conference for Graduate Students in Law, 28 April 2005.

"The Diminution of Individual Rights in Canadian Extradition Law," Canadian Law and Society Assn (CLSA) Annual Conference, University of Manitoba, Winnipeg, 3 June 2004.*

"The Confluence of Extradition Practice in Canada and the United States," Canadian Association of Law Teachers Annual Conference, University of Manitoba, 31 May 2004.*

"Transcending the Limits of Comity: Major Flaws in Canada's Extradition Act," 9th Annual U.B.C. Conference for Graduate Students in Law, 30 April 2004.

"The Dynamics of Extradition Law: Executive Discretion Trumps Judicial Discretion," 8th Annual U.B.C. Conference for Graduate Students in Law, 12 May 2003.

"To Extradite or Prosecute? Coping with the Diaspora of Terrorism," Conflict, Development and Peace (CODEP) Conference, University of London, London, UK, 13 June 2002.*

"Racism and Abuse of Process in Extradition Proceedings," combined U.S. and Canadian Law and Society Associations Annual Conference, Vancouver, B.C., 1 June 2002.*

"Abandoning the Rule of Law and Civil Liberties: Anti-Terrorism Legislation in Canada and the United States," The Promise of Law: Yesterday and Today Conference., U.B.C., 6 May 2002.*

"Institutionalized Racism in 19th Century Canada: Sir John Beverley Robinson's Policy of Extradition,"19th Century Interdisciplinary Studies Conf., U.B.C., 23 March 2002.*

"The Threat of Extradition of Alleged Terrorists from Canada to the United States since September 11," Mid-winter Conference, CLSA, U.B.C., 1 February 2002.*

"Racism and Abuse of Process in Extradition Proceedings between Canada and the United States," Department of Anthropology, University of. Victoria, 27 September 2001.

"Making Legal Sense of *Bush v. Gore*," Canadian Law and Society Association Annual Convention, Laval University, Quebec City, Quebec, 2 June 2001.*

"The Roots of Sexism in Religion and the Law," Centre for Research in Women's Studies and Gender Relations, U.B.C., Vancouver, 26 April 2001.*

"Looking under the Rug of the Law: the Scope and Mandate of Law and Society," University of Calgary Faculty of Communications and Culture, 19 January 2001.

"The Art of Jurisprudence," CLSA Annual Conference, Lake Louise, Alberta, 2 June 2000.*

"Ministerial vs. Judicial Discretion." Market.Order@Law.Destabilized. York University, Toronto, Ontario, 12 May 2000.*

"The New *Extradition Act*. and Its Implications," Law on the Cusp Conference, U.B.C., Vancouver, 4 May 2000.*

"Putting the Law in Its Place: Comparative and Interdisciplinary Perspectives on Legal Theory," U.B.C. Faculty of Law doctoral seminar, March, 2000.

"Bringing Fugitives to Justice," Creating Constellations Conference, U.B.C., 1 May 1999.

7. Upcoming Books, Chapters and Articles (with expected release dates)

Canadian Wrongful Conviction Tribunals: The Recommendations. Markham: Butterworths LexisNexis (fall 2009)

8. Current Memberships

The Law Society of British Columbia
The Canadian Bar Association
Canadian Law and Society Association
The Writers Union

9. References

Dr. Walter J. Walsh
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325 William H. Gates Hall
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Seattle, WA 98195-3020, U.S.A.
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Mr. Richard Gagnon
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1299 Derwent Way
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Department of Justice Canada
Ministère de la Justice Canada

International Assistance Group
284 Wellington Street, EMB-2187
Ottawa, Ontario
K1A 0H8

Telephone: 613-948-3003
Facsimile: 613-957-8412

May 1, 2009

BY FACSIMILE

Mr. Edward L. Greenspan, Q.C.
Greenspan Partners
Barristers
144 King Street East
Toronto, Ontario
M5C 1G8

Dear Mr. Greenspan:

RE: SCHREIBER, Karlheinz - Extradition Request by the Federal Republic of Germany

I acknowledge receipt of your letter dated April 20, 2009, in which you provide submissions on behalf of your client, Mr. Schreiber.

Yours truly,

Janet Henchey, General Counsel and Associate Director
International Assistance Group
Litigation Branch, Criminal Law Division

JH/mh

Department of Justice Canada / Ministère de la Justice Canada

FACSIMILE TRANSMISSION

SEND TO		FROM	
Name:	Edward L. Greenspan Q.C.	**Name:**	Marlene Hayes for Janet Henchey General Counsel and Associate Director
Address:	Greenspan Partners Barristers 144 King Street East Toronto, Ontario M5C 1G8		International Assistance Group 284 Wellington Street, EMB-2187 Ottawa, Ontario K1A 0H8
Fax # 416-366-7904	**Tel. #:** 416-366-3961	**Fax #** 613-957-8412	**Tel. #:** 613-948-3003

Comments:

Federal Republic of Germany. v. Karlheinz SCHREIBER

Please refer to the attached correspondence.

SECURITY INSTRUCTIONS

Unclassified documents only VIA clear transmission.
Protected information permitted within Justice secure FAX network.

Protected documents? ☐ **Yes** ☐ **No**

Transmission

Pages (+1):	Date:	Time
1	May 1, 2009	2:21 PM

GREENSPAN PARTNERS
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Todd B. White BA, LLB
Julianna A. Greenspan AB, JD**
Vanessa V. Christie BA, LLB
Rebecca La Flamme BA, LLB
Kelsey L. Sitar BA, LLB

May 11, 2009

VIA FAX 1-613-990-7255

The Honourable Rob Nicholson, P.C., Q.C.
Minister of Justice and Attorney General of Canada
Department of Justice
284 Wellington Street, Room 2274
Ottawa, Ontario

Dear Mr. Minister:

Re: Federal Republic of Germany v. Schreiber

On two separate occasions, October 17, 2008 and April 20, 2009, we wrote new and further submissions to you pursuant to Section 43(2) of the *Extradition Act*. Counsel for the International Assistance Group have acknowledged the receipt of these further submissions on October 20, 2009 and May 1, 2009, respectively. Apart from the acknowledgement of receipt, we have not received any response from you.

I am aware that the issues raised in the submissions dated October 17, 2008 may be affected by the appeal presently before the Supreme Court of Canada in the case of *R. v. Fischbacher,* scheduled to be heard on June 16, 2009. I appreciate that these outstanding legal issues presently before the Supreme Court of Canada may be causing the delay in your response to our letter.

However, with respect to our letter dated April 20, 2009 regarding the ratification of the Canada-Germany Extradition Treaty, you have now had 21 days to consider these further submissions. As you well know, time is of the essence in this matter given your earlier response that "Mr. Schreiber will not be surrendered until he has testified before the inquiry".

*Also of the Alberta Bar **Also of the Illinois Bar

Therefore, I am writing to you at this time to request a response from you to our letter dated April 20, 2009, **no later than May 14, 2009 at 5:00 p.m.**

Yours sincerely,

GREENSPAN PARTNERS

Edward L. Greenspan, Q.C.

****
*** TX REPORT ***
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TRANSMISSION OK

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Todd B. White BA, LLB
Julianna A. Greenspan AB, JD
Vanessa V. Christie BA, LLB
Rebecca La Flamme BA, LLB
Kelsey L. Sitar BA, LLB

PLEASE DELIVER THE FOLLOWING PAGES TO:

NAME: The Honourable Rob Nicholson

FIRM: Minister of Justice

CITY: Ottawa

TELECOPIER NO.: 1-613-990-7255

TELEPHONE NO.:

FROM: Edward L. Greenspan QC

TOTAL NUMBER OF PAGES: 3, INCLUDING THIS PAGE

DATE: May 11/09

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Kelsey L. Sitar BA, LLB

May 14, 2009

VIA FAX 1-613-990-7255

The Honourable Rob Nicholson, P.C., Q.C.
Minister of Justice and Attorney General of Canada
Department of Justice
284 Wellington Street, Room 2274
Ottawa, Ontario

Dear Mr. Minister:

Re: Federal Republic of Germany v. Schreiber

I received, today, a letter from the International Assistance Group indicating that our correspondence of April 20, 2009 with attachments "is currently with the Minister, and a response will be provided in due course".

I trust that we will be given a reasonable opportunity to consider your response when it is received and given a reasonable opportunity to apply for a judicial review of your decision if necessary.

Yours sincerely,

GREENSPAN PARTNERS

Edward L. Greenspan, Q.C.

Cc: Janet Henchey
Fax: 613-957-8412

*Also of the Alberta Bar **Also of the Illinois Bar

****
*** TX REPORT ***
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PLEASE DELIVER THE FOLLOWING PAGES TO:

NAME: The Honourable Rob Nicholson

FIRM: Minister of Justice

CITY: Ottawa

TELECOPIER NO.: 1-613-990-7255

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FROM: Edward L. Greenspan QC

TOTAL NUMBER OF PAGES: 2, INCLUDING THIS PAGE

DATE: May 14/09

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OPERATOR: VANESSA

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*** TX REPORT ***
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Rebecca La Flamme BA, LLB
Kelsey L. Sitar BA, LLB

PLEASE DELIVER THE FOLLOWING PAGES TO:

NAME: Janet Henchey

FIRM: International Assistance Group

CITY: Ottawa

TELECOPIER NO.: 1-613-957-8412

TELEPHONE NO.:

FROM: Edward L Greenspan QC

TOTAL NUMBER OF PAGES: 2, INCLUDING THIS PAGE

DATE: May 14/09

TIME:

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OPERATOR: Vanessa

NOTES:

Department of Justice Canada / Ministère de la Justice Canada

International Assistance Group
284 Wellington Street, EMB-2187
Ottawa, Ontario
K1A 0H8

Telephone: 613-948-3003
Facsimile: 613-957-8412

May 14, 2009

BY FACSIMILE

Mr. Edward L. Greenspan, Q.C.
Greenspan Partners
Barristers
144 King Street East
Toronto, Ontario
M5C 1G8

Dear Mr. Greenspan:

RE: SCHREIBER, Karlheinz - Extradition Request by the Federal Republic of Germany

On behalf of the Honourable Rob Nicholson, Minister of Justice and Attorney General of Canada, I acknowledge receipt of your letter dated May 11, 2009. You request that Minister Nicholson respond, by May 14, 2009, to your letter of April 20, 2009, in which you provide 29 pages of submissions and two binders enclosing 44 attachments.

Your correspondence is currently with the Minister, and a response will be provided in due course.

Yours truly,

Janet Henchey, General Counsel and Associate Director
International Assistance Group
Litigation Branch, Criminal Law Division

JH/mh

TO: **Mr. Richard J. Wolson, Q.C.**
Lead Commission Counsel
427 Laurier Avenue West, Suite 400
Ottawa, ON K1P 5W7

Fax: (613) 995-0785

AND TO: **Mr. Guy J. Pratte**
Borden Ladner Gervais LLP
Barristers and Solicitors
World Exchange Plaza
100 Queen Street, Suite 1100
Ottawa, ON K1Y 7Y2

Tel: (613) 787-3521
Fax: (613) 230-8842
email: gpratte@blgcanada.com

Counsel for the Rt. Hon. Brian Mulroney

AND TO: **Mr. Robert E. Houston, Q.C.**
Burke-Robertson
Barristers & Solicitors LLP
70 Gloucester Street
Ottawa, ON K2P 0A2

Tel: (613) 566-2058
Fax: (613) 235-4430
email: rhouston@burkerobertson.com

Counsel for Mr. Fred Doucet

AND TO: **Mr. Paul Vickery**
Director and Senior General Counsel
Department of Justice Canada
234 Wellington Street
East Tower, Room 1001
Ottawa, ON K1A 0H8

Counsel for the Attorney General of Canada

GREENSPAN PARTNERS
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Vanessa V. Christie BA, LLB
Rebecca La Flamme BA, LLB
Kelsey L. Sitar BA, LLB

May 25, 2009

VIA FAX 1-613-990-7255

The Honourable Rob Nicholson, P.C., Q.C.
Minister of Justice and Attorney General of Canada
Department of Justice
284 Wellington Street, Room 2274
Ottawa, Ontario

Dear Mr. Minister:

Re: Federal Republic of Germany v. Schreiber

I wrote to you on May 14, 2009 but have not received a response. I must know immediately whether you will give us a reasonable opportunity to consider your response to our further submissions dated April 20, 2009 and give us a reasonable opportunity to apply for a judicial review of your decision if necessary, prior to effecting Mr. Schreiber's surrender.

Further, I am writing to advise you that on May 12, 2009, Mr. Schreiber was admitted to hospital in Ottawa where he underwent emergency gallbladder surgery. As you will see from the medical reports, attached, Mr. Schreiber's condition was serious and continues to be monitored by his doctors. Mr. Schreiber's next follow up medical appointment is scheduled for June 19, 2009.

I trust you would agree that given Mr. Schreiber's present medical condition, surrender would be unjust and oppressive having regard to all the relevant circumstances, pursuant to s. 44(1)(a) of the *Extradition Act*.

I await your response.

Yours sincerely,

GREENSPAN PARTNERS

Edward L. Greenspan, Q.C.

Encls.

Cc: Janet Henchey
Fax: 613-957-8412

*Also of the Alberta Bar **Also of the Illinois Bar

Department of Justice Canada
Ministère de la Justice Canada

International Assistance Group
284 Wellington Street, EMB-2187
Ottawa, Ontario
K1A 0H8

Telephone: 613-948-3003
Facsimile: 613-957-8412

May 27, 2009

BY FACSIMILE

Mr. Edward L. Greenspan, Q.C.
Greenspan Partners
Barristers
144 King Street East
Toronto, Ontario
M5C 1G8

Dear Mr. Greenspan:

RE: SCHREIBER, Karlheinz - Extradition Request by the Federal Republic of Germany

I acknowledge receipt of your letters to the Minister of Justice, dated May 14, 2009 and May 25, 2009 (received on May 26, 2009).

Yours truly,

Janet Henchey, General Counsel and Associate Director
International Assistance Group
Litigation Branch, Criminal Law Division

JH/mh

Department of Justice Canada / Ministère de la Justice Canada

FACSIMILE TRANSMISSION

SEND TO		FROM	
Name:	Edward L. Greenspan Q.C.	**Name:**	Marlene Hayes for Janet Henchey General Counsel and Associate Director
Address:	Greenspan Partners Barristers 144 King Street East Toronto, Ontario M5C 1G8		International Assistance Group 284 Wellington Street, EMB-2187 Ottawa, Ontario K1A 0H8
Fax # 416-366-3961	**Tel. #:** 416-366-3961	**Fax #** 613-957-8412	**Tel. #:** 613-948-3003

Comments:

Federal Republic of Germany. v. Karlheinz SCHREIBER

Please refer to the attached correspondence.

SECURITY INSTRUCTIONS

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Transmission

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1	May 27, 2009	10:17 AM