

COURT OF APPEAL FOR ONTARIO

DOHERTY, SHARPE and LANG J.J.A.

B E T W E E N :)
)
FEDERAL REPUBLIC OF) **Edward Greenspan, Q.C.,**
GERMANY, THE MINISTER OF) **Marie Henein and**
JUSTICE and THE ATTORNEY) **Vanessa Christie**
GENERAL OF CANADA) **for the appellant**
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Respondents)
)
- and -)
)
KARLHEINZ SCHREIBER) **Robert Hubbard and**
) **Nancy Dennison**
Appellant) **for the respondents**
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) **Heard: December 5 and 6, 2005**

On appeal from the committal order of Justice J. David Watt of the Superior Court of Justice dated May 27, 2004, reported at [2004] O.J. No. 2310, and on judicial review from the surrender order given by The Honourable Irwin Cotler dated October 31, 2004.

SHARPE J.A.:

[1] Karlheinz Schreiber (“the appellant”) appeals his committal for extradition and applies for judicial review of the Minister of Justice’s decision to surrender him for extradition.

FACTS

[2] These protracted extradition proceedings arise from charges brought against the appellant in Germany for tax evasion, fraud, forgery and bribery. The appellant is a citizen of both Canada and Germany and operated at the highest levels of international

finance and government as a lobbyist, consultant and dealmaker in relation to the sale of helicopters, Airbus aircraft and armaments. He was arrested in Canada on August 31, 1999 for extradition to Germany. The appellant has been on bail since shortly after his arrest. He faces charges in Germany that are alleged by the respondents to correspond to the following Canadian offences:

- income tax evasion (*Income Tax Act*, R.S.C. 1985, c.1, s. 239(1)(d));
- making false statements in a tax return (*Income Tax Act*, s. 239(1)(a));
- defrauding the government of tax revenue (*Criminal Code*, R.S.C. 1985, c. C-46, s. 380(1)(a));
- uttering a forged document (*Criminal Code*, s. 368(1)(b));
- fraud (*Criminal Code*, s. 380(1)(a));
- accepting a secret commission (*Criminal Code*, s. 426(1)(a)); and
- bribing a public official (*Criminal Code*, s. 121(1)(a));

[3] The facts giving rise to these charges may be grouped into four broad categories:

(i) Income tax evasion - Germany alleges that the appellant evaded income tax on 64,676,202 DM (\$CDN 45,630,785) by hiding the commission income he earned for negotiating the sale of helicopters, aircraft and armaments. Germany alleges that he hid the income in a number of shell or “letter box” companies and then funnelled the funds to his personal accounts. Germany alleges that the appellant failed to report this income and made false and fraudulent statements in order to evade payment of taxes he owed on account of these commissions.

(ii) Fraud - The fraud charges arise from a deal for the sale of 36 German Army tanks from German arms manufacturer Thyssen Industrie AG (“Thyssen”) to Saudi Arabia. The contract between Thyssen and Saudi Arabia forbade the use of brokers or agents and gave Saudi Arabia the right to recoup as a penalty any commission to a broker or agent. Germany alleges that the appellant and confederates at Thyssen (Jurgen Maßmann xx and Winfried Haastert) created a subsidiary commission contract that was concealed from the Saudis and thereby defrauded Saudi Arabia of the amount of the 24.4 million DM commission that was paid to the appellant and added to the Saudi Arabia contract price.

(iii) Bribery - Germany further alleges in relation to the tank deal that the appellant bribed Dr. Ludwig Holger Pfahls, then the German Deputy Minister of Defence, to help secure the tank deal.

(iv) Breach of Trust - Germany alleges that the appellant paid secret commissions to Maßman xx and Haastert in relation to the contract with Saudi Arabia.

LEGISLATION

[4] The *Extradition Act*, S.C. 1999, c. 18 (the “Act”) came into force on June 17, 1999, after the request for extradition was made. However, by virtue of s. 84, the Act applies to the appellant’s case as the extradition hearing was commenced after the new Act came into force.

General principle

3. (1) A person may be extradited from Canada in accordance with this Act and a relevant extradition agreement on the request of an extradition partner for the purpose of prosecuting the person or imposing a sentence on -- or enforcing a sentence imposed on -- the person if

(a) subject to a relevant extradition agreement, the offence in respect of which the extradition is requested is punishable by the extradition partner, by imprisoning or otherwise depriving the person of their liberty for a maximum term of two years or more, or by a more severe punishment; and

(b) the conduct of the person, had it occurred in Canada, would have constituted an offence that is punishable in Canada,

(i) in the case of a request based on a specific agreement, by imprisonment for a maximum term of five years or more, or by a more severe punishment, and

(ii) in any other case, by imprisonment for a maximum term of two years or more, or by a more severe punishment, subject to a relevant extradition agreement.

Conduct determinative

3. (2) For greater certainty, it is not relevant whether the conduct referred to in subsection (1) is named, defined or characterized by the extradition partner in the same way as it is in Canada.

...

Authority to Proceed

15. (1) The Minister may, after receiving a request for extradition and being satisfied that the conditions set out in paragraph 3(1)(a) and subsection 3(3) are met in respect of one or more offences mentioned in the request, issue an authority to proceed that authorizes the Attorney General to seek, on behalf of the extradition partner, an order of a court for the committal of the person under section 29.

(2) If requests from two or more extradition partners are received by the Minister for the extradition of a person, the Minister shall determine the order in which the requests will be authorized to proceed.

(3) The authority to proceed must contain

(a) the name or description of the person whose extradition is sought;

(b) the name of the extradition partner; and

(c) the name of the offence or offences under Canadian law that correspond to the alleged conduct of the person or the conduct in respect of which the person was convicted, as long

as one of the offences would be punishable in accordance with paragraph 3(1)(b).

Order of committal

29. (1) A judge shall order the committal of the person into custody to await surrender if

(a) in the case of a person sought for prosecution, there is evidence admissible under this Act of conduct that, had it occurred in Canada, would justify committal for trial in Canada on the offence set out in the authority to proceed and the judge is satisfied that the person is the person sought by the extradition partner

...

Evidence

32. (1) Subject to subsection (2), evidence that would otherwise be admissible under Canadian law shall be admitted as evidence at an extradition hearing. The following shall also be admitted as evidence, even if it would not otherwise be admissible under Canadian law:

(a) the contents of the documents contained in the record of the case certified under subsection 33(3);

(b) the contents of the documents that are submitted in conformity with the terms of an extradition agreement; and

(c) evidence adduced by the person sought for extradition that is relevant to the tests set out in subsection 29(1) if the judge considers it reliable.

Exception – Canadian evidence

(2) Evidence gathered in Canada must satisfy the rules of evidence under Canadian law in order to be admitted.

...

Record of the case

33. (1) The record of the case must include

(a) in the case of a person sought for the purpose of prosecution, a document summarizing the evidence available to the extradition partner for use in the prosecution; and

(b) in the case of a person sought for the imposition or enforcement of a sentence,

(i) a copy of the document that records the conviction of the person, and

(ii) a document describing the conduct for which the person was convicted.

Other documents — record of the case

(2) A record of the case may include other relevant documents, including documents respecting the identification of the person sought for extradition.

Certification of record of the case

(3) A record of the case may not be admitted unless

(a) in the case of a person sought for the purpose of prosecution, a judicial or prosecuting authority of the extradition partner certifies that the evidence summarized or contained in the record of the case is available for trial and

(i) is sufficient under the law of the extradition partner to justify prosecution, or

(ii) was gathered according to the law of the extradition partner; or

(b) in the case of a person sought for the imposition or enforcement of a sentence, a judicial, prosecuting or correctional authority of the extradition partner certifies that the documents in the record of the case are accurate.

Authentication not required

(4) No authentication of documents is required unless a relevant extradition agreement provides otherwise.

Record of the case and supplements

(5) For the purposes of this section, a record of the case includes any supplement added to it.

...

When order not to be made

44. (1) The Minister shall refuse to make a surrender order if the Minister is satisfied that

(a) the surrender would be unjust or oppressive having regard to all the relevant circumstances

PROCEEDINGS IN THE SUPERIOR COURT

[5] The appellant brought a series of preliminary motions, all of which were rejected. Hamilton J. rejected the submission that the proceedings were time barred: *Germany v. Schreiber*, [1999] O.J. No. 5297 (Sup. Ct.). Watt J., the extradition judge, dismissed a motion for disclosure: *Germany v. Schreiber*, [2000] O.J. No. 2618 (Sup. Ct.) The

extradition judge also dismissed a motion for commission evidence: *Germany v. Schreiber*, [2000] O.J. No. 5813 (Sup. Ct.); a declaration that the proceedings violated the appellant's *Charter* rights: *Germany v. Schreiber*, [2002] O.J. No. 3170 (Sup. Ct.); and a motion that certain evidence should be excluded on the basis that it is unreliable: *Germany v. Schreiber*, [2002] O.J. No. 5845 (Sup. Ct.).

[6] After a lengthy hearing on the committal application itself, the extradition judge gave detailed reasons, finding that there was sufficient evidence to commit the appellant on all offences except for one count of fraud on Thyssen. In his assessment of the evidence, the extradition judge stated several times that the companies the appellant interposed between himself and his clients were mere shells or "letter box" companies. These companies had no employees, no business function and no purpose other than to receive income from the appellant's clients. According to the extradition judge, there was evidence on which one could conclude that the income was earned by the appellant, but paid to the shell corporations in order to evade the income tax consequences that would follow from payments made directly to the appellant.

[7] Of particular importance to this appeal, the extradition judge rejected the appellant's submission that extradition on the income tax related charges violated the principle of double criminality. He ruled that the essence of the appellant's conduct amounted to tax evasion in both countries. He also ruled that in assessing the double criminality argument, the appellant's conduct, not its foreign legal characterization, is transposed to Canada and assessed against Canadian criminal law. Accordingly, it was irrelevant that income for the purposes of tax law is defined differently under German law.

MINISTER'S SURRENDER DECISION

[8] The Minister of Justice ordered the appellant's surrender on October 31, 2004, rejecting the voluminous submissions made by the appellant. In particular, the Minister rejected the contention that he should defer his decision on the ground that the appellant's two civil actions for damages against the Attorney General of Canada arising from the extradition proceedings gave rise to a reasonable apprehension of bias on the part of the Minister. The Minister also rejected the submission that the extradition treaty between Canada and Germany did not provide for extradition for the income tax related offences. The Minister declined to engage in a review of the reliability of the evidence and concluded that surrender of the appellant would not, in the circumstances of the case, be unjust or oppressive.

ISSUES

I. Appeal from the Extradition Committal

[9] At the oral hearing of this appeal, counsel for the appellant abandoned the following grounds of appeal in relation to the committal for extradition:

- (a) that the extradition judge erred in refusing to order further disclosure of the case against the appellant;
that certain actions of the Minister amounted to an impermissible delegation of authority; and,
that the request for extradition was out of time.

[10] The remaining grounds of appeal from the extradition committal are:

1. Did the extradition judge err in finding that there was sufficient evidence upon which to commit the appellant for:
 - (i) income tax offences;
 - (ii) fraud on Saudi Arabia;
 - (iii) bribery; and,
 - (iv) breach of trust?
2. Did the extradition judge err in ruling that the double criminality rule was satisfied with respect to the income tax related offences?
3. Do ss. 32(1)(a) and (c) and 33 of the *Extradition Act* violate the appellant's s. 7 *Charter* rights?

II. Judicial Review of the Minister's Decision

[11] At the oral hearing of this appeal, counsel for the appellant abandoned the following grounds for judicial review of the Minister's decision to surrender the appellant for extradition:

- (a) that the Minister erred in finding that there was no misconduct by the extradition partner notwithstanding that the appellant was a mere suspect at the time that the request for extradition was made and the appellant's arrest was effected.

- (b) that the Minister erred in concluding that the appellant's surrender to the extradition partner was not unjust and oppressive notwithstanding that the appellant was denied critical disclosure which was capable of establishing that he was not a person "sought for prosecution" as required by the *Extradition Act*.

[12] The remaining grounds for judicial review of the Minister's decision are:

1. Does the *Treaty between Canada and Germany Concerning Extradition* preclude extradition for "fiscal offences"?

2. Was there a reasonable apprehension of bias on the part of the Minister?
3. Did the Minister err by refusing to assess the reliability of the evidence?
4. Would surrender of the appellant without assurances be unjust and oppressive and contrary to s. 7 of the *Charter*?

ANALYSIS

I. Appeal from the Extradition Committal

1. Did the extradition judge err in finding that there was sufficient evidence upon which to commit the appellant for:

- (i) income tax offences;
- (ii) fraud on Saudi Arabia;
- (iii) bribery; and,
- (iv) breach of trust?

(i) Income Tax Offences

[13] The extradition judge summarized his key findings with respect to the income tax related offences as follows at para. 163:

The admissible evidence adduced at the hearing would permit a properly instructed trier of fact to reasonably conclude:

- (i) that Karlheinz Schreiber was the *only* person who provided any negotiation or consultancy services for which the various suppliers contracted and agreed to pay commissions;
- (ii) that the companies, Kensington, IAL, ATG, and Interleiten S.A. [a subsidiary of Kensington] had no employees, only trustees or directors, were managed by Pelossi from Switzerland at least until 1991, and engaged in *no* other business actively beyond the services Schreiber performed;
- (iii) that the companies, which facially appeared to enter into contracts with suppliers, were interposed on Schreiber's instructions;
- (iv) that the movement of the funds due under the contracts

from one account to another was directed by Schreiber;

(v) that the transfer of funds amongst the accounts of the letter box companies was for the purpose of obscuring the connection between their source and their ultimate destination, Schreiber;

(vi) that the transfers described above were designed to distort the true character of the commissions as income that would be subject to tax; and

(vii) that the failure to report this income was for the express purpose of evading, *not* avoiding, the payment of exigible tax.

[14] The appellant submits that the extradition judge erred in concluding that there was any evidence that the appellant was the owner or beneficial owner of the alleged letter box companies Kensington Anstalt (“Kensington”), International Aircraft Ltd. (“IAL”) and ATG Investment Ltd. (“ATG”), such that any income earned by these corporate entities could properly be attributed to the appellant. The appellant submits that the evidence of Giorgio Pelossi, the principal prosecution witness, is the essential underpinning of Germany’s case. According to the appellant, the evidence amounts to nothing more than Pelossi’s “personal assumptions and conclusory statements”, and therefore it is insufficient to support the inference that the appellant was the beneficial owner of the letter box companies. The appellant further submits that the extradition judge failed to consider or place appropriate weight on certain evidence led by the appellant to indicate that he was not the owner or beneficial owner of these companies

[15] I do not accept these submissions. There was evidence that under the appellant’s instructions, and as the appellant’s confidant, Pelossi set up IAL and conducted the day-to-day business of that entity and ATG. Pelossi says that these companies had no real business function. Pelossi may or may not be believed at trial, but his evidence as to the establishment and operation of the letter box companies cannot be dismissed as being merely “personal assumptions and conclusory statements”. It is evidence which, if believed, could support the inference that the appellant is the beneficial owner of the letter box companies and that those entities were shams used by the appellant to conceal income. As the extradition judge correctly observed, an extradition committal hearing is not a trial. It was not his task to assess Pelossi’s credibility.

[16] There was also extensive evidence, analyzed in considerable detail by the extradition judge, from which it could be inferred that the commissions at issue were cycled through these companies on the appellant’s instructions and used by the appellant for his own personal benefit. While the appellant also advanced evidence to support his

contention that he was not the beneficial owner of these companies, that evidence was far from overwhelming and, in any event, it was explicitly considered by the extradition judge at paras 157 – 160. The extradition judge cited and, in my view, properly applied the test in *R. v. Arcuri* (2001), 157 C.C.C. (3d) 21 (S.C.C.) at paras. 29-30 and I see no error on his part that would justify the intervention of this court.

(ii) Fraud on Saudi Arabia

[17] The appellant submits that there is no evidence from which it could be inferred that the appellant had knowledge of the contract between Thyssen and Saudi Arabia and that, without such knowledge, the appellant would lack the necessary *mens rea* for fraud. The appellant further submits that Saudi Arabia's only loss was the contractual right to claim the secret commission as a penalty as against Thyssen, and that this is not sufficient to amount to a loss of property for the purpose of establishing the offence of fraud.

[18] I am not persuaded that there are grounds for appellate intervention on these points. The extradition judge noted at para 176: “[t]he allegations are that Saudi Arabia was defrauded of the amount of commissions paid, which was simply added to the contact price but *not* disclosed to the purchaser.” At paras. 216-19, the extradition judge concluded as follows:

There is evidence upon the basis of which a trier of fact could find that Thyssen increased the original contract price by an amount that was sufficient to cover what the company had agreed to pay Schreiber for his efforts in ensuring the availability of Fuchs tanks to fulfill Thyssen's obligations to Saudi Arabia. A trier of fact could also find that the so-called subsidiary or side agreement with Schreiber...was concluded in advance of the main contract. Without the release of tanks from German army stocks, Thyssen could not fulfill its supply obligations. And it was Schreiber's job to ensure their release.

There is evidence on the basis of which a trier of fact could conclude that Saudi Arabia was deceived by Thyssen about what it paid for under the contract. Saudi Arabia contracted for three dozen tanks. It paid for tanks and a commission prohibited by the agreement. This deception put Saudi Arabia's economic interests at risk, or at the very least deprived Saudi Arabia of its contractual right to deduct the commission amount from the contract price. Under domestic law, it is at least arguable that the loss of the contractual right

of reduction in the contract price amounts to a deprivation of "property" as the term is defined in s. 2 of the Criminal Code.

The evidence, taken as a whole, is reasonably capable of supporting the inference that Schreiber had the state of mind required of a person who aids or abets a principal to commit fraud. The commission agreement preceded the main contract, but was contingent on payment under the main contract. Elaborate steps were taken to ensure the secrecy of the fact and nature of the subsidiary contract. It is a reasonable inference that the parties, including Schreiber, knew of the prohibition on agency contained in the main contract.

The parties to both contracts were closely connected, with the Thyssen representatives constituting the common link. It surpasses belief that Schreiber wouldn't and didn't know the terms of the main contract. He had every reason to help or encourage Thyssen to deceive Saudi Arabia to pay the new contract price. After all, the price included Schreiber's commission [emphasis added].

[19] In my view, the evidence of

the appellant's very close involvement with the negotiation of the contract between Thyssen and Saudi Arabia;

the steps taken to conceal the subsidiary contract for the commission; and

the steps taken by the appellant to conceal that he was receiving any commissions on account of this sale

provided an adequate basis for the extradition judge to conclude that it would be possible to infer that the appellant knew that Saudi Arabia was being deceived and was therefore a party to that fraud. Again, in the end, this is an issue for trial, but the extradition judge was entitled to conclude that there was sufficient evidence to warrant committal and I would not interfere with this conclusion.

[20] I see no merit in the submission that the loss of the contractual right to claim the secret commission is not sufficient to amount to a loss of property for the purpose of establishing the offence of fraud. In *R. v. Theroux* (1993), 79 C.C.C. (3d) 449 (S.C.C.) at

p. 457, McLachlin J. confirmed that economic loss is not essential in order to make out the offence of fraud: “the imperilling of an economic interest is sufficient even though no actual loss has been suffered”. I agree with the respondents’ submission that deprivation of Saudi Arabia’s contractual right to recover the commission is sufficient to constitute an imperilment of an economic interest necessary to justify committal for fraud.

(iii) Bribery

[21] The appellant submits that the extradition judge erred in concluding that there was any evidence upon which to commit the appellant on the offence of bribing a public official (a) because there was no direct evidence that Pfahls received the alleged bribe and (b) because the decision to allow the sale to proceed was not made by Pfahls but at the political level by Chancellor Helmut Kohl.

[22] With respect to the first point, there was, *inter alia*, evidence led as to extensive notations in the appellant’s personal organizer of his contacts with “Pfahls” and “Holger” during the crucial period when the bribe is alleged to have been paid. There was also evidence of a substantial payment to the “Holgart” sub-account shortly after the appellant received the first commission payment for negotiating the tank deal. In my view, this evidence provided a sufficient basis for the extradition judge to conclude that a trier of fact could infer that Pfahls received a bribe.

[23] With respect to the second point, the offence under s. 121 of the *Criminal Code* is made out, in the words of the section “whether or not, in fact, the official is able to cooperate, render assistance, exercise influence or do or omit to do what is proposed”. I agree with the extradition judge’s conclusion at para. 272 that “[i]t is of no moment to liability under s. 121(1)(a) that the recipient lacks the actual authority or ability to provide the sought-after co-operation, assistance or influence.”

[24] Accordingly, I would not interfere with the extradition judge’s conclusion that the evidence was sufficient to satisfy the domestic committal standard for bribery.

(iv) Breach of Trust

[25] The appellant’s arguments with respect to breach of trust were subsumed in the arguments already reviewed and as I have rejected them in relation to the other counts, I would also reject them here. I see no reason to interfere with the extradition judge’s finding that there was evidence that in relation to the Saudi Arabia contract, secret commissions were paid to two Thyssen agents, from the commissions paid to Schreiber, for their assistance in concluding the main contract, that those secret commissions constituted a breach of trust and, that as the donor of those secret commissions, the appellant aided and abetted the breach of trust.

2. Did the extradition judge err in ruling that the double criminality rule was satisfied with respect to the income tax related offences?

[26] The *Extradition Act*, ss. 3, 15 and 29, sets out the double criminality rule requiring as a prerequisite for committal that: (a) the offence is punishable in the requesting state, and (b) the alleged conduct of the party sought, had it occurred in Canada, would justify committal for trial on the Canadian offence set out in the authority to proceed.

[27] The appellant submits that Germany failed to satisfy the double criminality rule, as it has not been shown that what German law considers income is also considered income in Canada. In particular, the appellant submits that the German law attributing corporate income to the principals of a corporation is an essential element of the German income tax evasion charges. As corporate income is not attributed in this manner under Canadian law, it is submitted that the extradition judge erred in ruling that the double criminality rule was satisfied.

[28] In *United States of America v. McVey* [1992] 3 S.C.R. 475 at p. 536, La Forest J. described the underlying purpose of the double criminality rule as being:

that no person shall be surrendered for an act (or conduct) in another country unless that act or conduct is considered a crime here...[quoting Shearer, Ivan Anthony. *Extradition in International Law*. Manchester: University Press, 1971] ‘the double criminality rule serves the most important function of ensuring that a person's liberty is not restricted as a consequence of offences not recognized as criminal by the requested State. The social conscience of a State is also not embarrassed by an obligation to extradite a person who would not, according to its own standards, be guilty of acts deserving punishment.’” (emphasis added by La Forest J.)

[29] The focus of the double criminality rule is on the nature of the “conduct” of the person sought and on the “standards” of the requested state, and not the precise legal definition of the crime. It is not necessary that the legal definitions of the crimes under the law of the requesting state and the law of Canada be equivalent. See *U.S.A. v. Comisso* (2000), 143 C.C.C. (3d) 158 at para. 44 (Ont. C.A.), application for leave to appeal dismissed, [2000] S.C.C.A. No. 190:

It is not necessary that the Canadian offence established by the conduct be described by the same name or that it have the same legal elements as the offence charged in the requesting state. The protection afforded by the double criminality rule is

ensured if the conduct that underlies the foreign charge constitutes any extradition crime under the laws of Canada.

[30] It follows that “the task of the extradition court to fit a set of facts constituting the conduct of the alleged fugitive, not into the legal framework set up by the applicant government, but into Canadian legislation to determine if the alleged conduct constitutes an offence pursuant to that legislation”: *McVey* at p. 512-13, quoting *Borins Co. Ct.J. in United States of America and Smith* (1984), 15 C.C.C. (3d) 16 at 27, *affd.* 16 C.C.C. (3d) 10 (Ont. H.C.J.).

[31] The issue, then, is to determine whether the conduct alleged against the appellant would constitute an offence under the laws of Canada. I will assume for the moment that the appellant is correct in his submission that the respondents must show that the moneys at issue would be treated as the appellant’s income and taxable in Canada as well as in Germany. In my view, even on that standard, the evidence satisfies the double criminality rule.

[32] Canadian law does, in some circumstances, pierce the corporate veil and treat income in the hands of a corporation as that of the beneficial owner of the corporation. The “sham doctrine” applies where an individual deceitfully misleads the government away from his or her true taxable income through the creation of arrangements that, while facially valid, are in reality devoid of substance. The sham doctrine was defined by the Supreme Court of Canada in *Canada (M.N.R.) v. Cameron*, [1974] S.C.R. 1062 at 1068, citing *Snook v. London & West Riding Investments, Ltd.*, [1967] 1 All E.R. 518 at 528 (H.L.), as:

acts done or documents executed by the parties to the “sham” which are intended by them to give to third parties or to the court the appearance of creating between the parties legal rights and obligations different from the actual legal rights and obligations (if any) which the parties intend to create.

[33] An element of deceit must be present in order for the sham doctrine to apply: see *Stuart Investments Ltd. v. Canada*, [1984] 1 S.C.R. 536 at 545-46 defining a “sham transaction” as

a transaction conducted with an element of deceit so as to create an illusion calculated to lead the tax collector away from the taxpayer or the true nature of the transaction; or, simple deception whereby the taxpayer creates a facade of reality quite different from the disguised reality.

[34] I have already set out the extradition judge's key findings in relation to the nature of these transactions. The extradition judge concluded that there was evidence from which it could be inferred that Kensington, IAL and ATG are artificial entities having no legitimate business function and that the transfers of funds described were designed to "distort the true character of the commissions as income that would be subject to tax" (para. 163). The extradition judge found that there was evidence that the appellant had made false or deceptive statements and uttered forged documents in relation to reporting his income and that his conduct amounted to defrauding the Germany of income tax revenue.

[35] These factual conclusions are entitled to deference on appeal and, in any event, are well supported by the evidence. The evidence regarding the use of the letter box companies and the transfers of funds to their ultimate destination, the appellant, is sufficient to bring Germany's allegations within the "sham doctrine".

[36] Accordingly, I agree with the submission of the respondents that, applying the sham doctrine to the extradition judge's findings, committal would be justified under any view of the double criminality rule as, even under Canadian law, the commissions received by Kensington, IAL and ATG would be considered as the income of the appellant.

[37] As this conclusion is sufficient to uphold the committal, it is not strictly necessary for me to consider the correctness of the extradition judge's finding that the double criminality requirement could be met on the basis of importing the definition of taxable income from German law. However, for the sake of completeness, I offer the following.

[38] The extradition judge ruled that for purposes of the double criminality rule, it is appropriate to import the German definition of income and to focus on the conduct of evading tax on income so defined. He ruled that it is not necessary to show that Canadian law would deem the moneys at issue to be income in the hands of the person sought. He ruled that the double criminality rule is satisfied if the appellant's conduct can be characterized more generally as a failure to pay tax on taxable income as defined by the applicable law, assuming that the other elements of the conduct amounting to tax fraud under Canadian law (such as *mens rea*) are made out.

[39] I do not accept the appellant's submission that the extradition judge erred in this regard. As I have already stated, the focus of the double criminality inquiry is on the nature of the alleged conduct and on the standards of the requested state. A precise coincidence between the definition of the offence under domestic and foreign law is not required: *McVey*; *Commisso*, *supra*.

[40] Income tax evasion is a form of fraud on the public purse. The essence of the prohibited conduct, in the words of the Income Tax Act, s. 239 (1), using "deceptive

statements”, destroying or secreting records or books of account, “making...false or deceptive entries” in record of books of account, or otherwise “wilfully” evading “compliance with this Act or payment of taxes imposed by this Act.” Non-payment of taxes does not constitute income tax evasion. The definition of income defines the extent of the individual’s obligation to pay tax but it does not define the essential nature of the wrongful conduct of income tax evasion.

[41] The extradition judge concluded at paras 128-130:

It is necessary to transpose the essence of the conduct alleged to have occurred in the foreign country to Canada. Once the essence of the conduct has been transposed, we apply domestic law to determine whether that conduct is a crime here. Exact correspondence is not required.

The essence of Schreiber's alleged conduct involves several elements. He earned commissions by negotiating contracts on behalf of several suppliers or sellers. He failed to report these commissions as part of his income. He hid the receipt of these commissions by having them paid to letter box companies, then obtained the funds himself through a series of financial transactions amongst companies with no legitimate business other than concealment of income.

According to German authorities, what Schreiber is alleged to have done in Germany amounts to the crime of tax evasion. He earned income that was subject to tax, deliberately omitted it from his tax return, denied its existence, used companies with no legitimate commercial purpose to conceal it, and deliberately evaded the payment of tax. A person who did the same things in Canada would also be intentionally evading or attempting to evade the payment of tax under the Income Tax Act.

[42] I agree with this analysis. I do not accept the submission that it is necessary to advert to the German definition of income to satisfy the double criminality. I agree with the extradition judge (at para 37) that when “transposing the facts from the requesting jurisdiction to the requested jurisdiction, the institutions and laws of the foreign jurisdiction of necessity must be brought along to provide context for the committal decision.” As Anne Warner La Forest, *La Forest's Extradition To and From Canada*, 3rd ed. (Aurora, Ontario: Canada Law Book, 1991) states at pp. 69-70. “...The institutions,

and laws of the foreign country must necessarily form the background against which to examine events occurring in that country. It is after all, the essence of the offence that is important in extradition.” The point was well expressed by Duff J. in *Re Collins* (No. 3) (1905), 10 C.C.C. 80 (B.S.C.C.) at p. 103:

...if you are to conceive the accused as pursuing the conduct in question in this country, then along with him you are to transplant his environment; and that environment must, I apprehend, include, so far as relevant, the local institutions of the demanding country, the laws effecting the legal powers and rights, and fixing the legal character of the acts of the persons concerned, always exception, of course, the law supplying the definition of the crime which is charged.

[43] There is little authority on precisely what may be included in the imported legal environment and what must be considered to be an element of the conduct alleged against the person sought. It is probably impossible to provide a precise bright line distinction that will cleanly define the boundary in all cases. However, I am satisfied that the legal definition of income falls within the category of the foreign legal environment that is properly considered as the context or background within which the alleged wrongful conduct occurred. One must look to the definition of income to identify the nature and extent of the obligation to pay taxes but the essence of the alleged wrong is the use of deceitful and dishonest means to avoid that legal obligation, however it is determined.

[44] As the extradition judge observed, tax laws are notoriously complex. Taxes are imposed and deductions are allowed to achieve a wide variety of economic and social policies. These policies and the intricacies of the resulting tax regime do not describe or define the wrong of evading payment of tax.

[45] For example, Canadian tax law accords various forms of special relief to fishers, farmers, small businesses, those who save for their retirement, and those who give to charity. Presumably, German law imposes a very different set of rules to achieve different policies. I fail to see how these differences in the legal rules to determine liability to pay tax have any direct bearing on the wrong of evading tax. If the appellant were a farmer, could he resist extradition on the ground that if his German farm were in Canada, his farm income would not have been taxable? In my view, the way Canadian tax law would treat certain forms of income does not assist us when assessing the nature of the wrong of an individual who evades the payment of taxes to a foreign country that does not accord similar treatment. The definition creating the legal obligation to pay tax does not define the wrong of income tax evasion. The test for extradition is double criminality, not double taxability.

[46] In oral argument, it was suggested that a foreign state may impose a tax that is so offensive to Canadian standards of justice that Canadian law should refuse to extradite an individual who evades such a tax. In my view, such an exceptional case may be appropriately dealt with by the Minister in the exercise of his discretion under s. 44 to refuse surrender where it “would be unjust or oppressive having regard to all the relevant circumstances.”

3. Do ss. 32(1)(a) and (c) and 33 of the Extradition Act violate the appellants s. 7 Charter rights?

[47] The appellant argues that ss. 32(1)(a) and (c) and 33 of the *Extradition Act* violate his s. 7 Charter rights on the following grounds:

1. Sections 32(1)(a) and 33 of the *Extradition Act* violate section 7 of the *Charter*, in that the evidentiary standard for the admissibility of evidence adduced by the requesting state allows for the admission of evidence that would otherwise be inadmissible in a Canadian court.
2. Section 32(1)(c) of the *Extradition Act* violates section 7 of the *Charter* in that the evidentiary standard for the admissibility of evidence adduced by the person sought for prosecution requires an assessment of reliability that is not required in relation to evidence adduced by the requesting state.

[48] These arguments have been rejected by prior decisions of this court: *United States of America v. Yang* (2001), 157 C.C.C. (3d) 225 (Ont. C.A.); *United States of America v. Scott*, [2003] O.J. No. 5377, leave to appeal to S.C.C. dismissed, [2004] S.C.C.A. No. 288; *United States of America v. Ferras* (2004), 183 C.C.C. (3d) 119 (Ont. C.A.), leave to appeal granted Oct 7, 2004, S.C.C. Bulletin, 2004, p. 1484; *United States of America v. Latty* (2004), 183 C.C.C. (3d) 126 (Ont. C.A.), leave to appeal granted October 7, 2004, S.C.C. Bulletin, 2004, p. 1485. The appellant did not ask for a five judge panel to review the correctness of these decisions nor did counsel suggest that those decisions could be distinguished from the case at bar. In keeping with our practice of following our own decisions, I decline the invitation to reconsider the constitutionality of ss. 32(1)(a) and (c) and 33 of the *Extradition Act* and accordingly, would not give effect to this ground of appeal.

[49] The Supreme Court of Canada heard argument in *Ferras* and *Latty* in October 2005. Judgment was reserved. The appellant asked us to reserve our decision pending the release of the Supreme Court’s decisions. There is, of course, no indication as to when the Supreme Court may render its decisions. In my view, we should decide the case according to the law as it exists at the time this case was argued and not speculate as to when or how the Supreme Court might decide the cases now before it. Extradition is

meant to be expeditious. This case has proceeded at a snail's pace. I can see no reason to delay it further. If so advised, the appellant can protect his rights by seeking leave to appeal to the Supreme Court.

II. Judicial Review of the Minister's Decision

1. Does the Treaty between Canada and Germany Concerning Extradition preclude extradition for "fiscal offences"?

[50] The appellant submits that the extradition treaty between Canada and Germany precludes extradition for "fiscal offences" and that the Minister's surrender order constitutes a violation of the appellant's s. 7 *Charter* rights. Article 2 of the treaty defines an extraditable offence as an offence set out in the Schedule to the treaty. At the time these proceedings were commenced, the Schedule listed 31 offences, including forgery and fraud, but did not include income tax offences or "fiscal offences".

[51] The appellant initially made these arguments to the extradition judge and led extensive expert evidence to the effect that under German law, the treaty would not be interpreted to include "fiscal offences". The extradition judge ruled that the issue of treaty interpretation was a matter for the Minister. The Minister rejected the appellant's arguments and found that he could be extradited for the income tax related offences. In the course of his reasons, the Minister referred to the Supplementary Treaty between Germany and Canada that came into force after the request for extradition was made. The Supplementary Treaty removed the listed-offence approach for extradition between Canada and Germany.

[52] The appellant submits that the extradition judge erred in deferring interpretation of the treaty to the Minister. I disagree. The extradition judge properly concluded that he did not have jurisdiction to consider whether the inclusion of a fiscal offence in the treaty would violate the appellant's s. 7 *Charter* right, as the issue of treaty interpretation is reserved to the Minister: see *McVey* at para. 53.

[53] The appellant argues that fiscal offences are not subject to extradition for the following reasons:

1. Historically, fiscal offences have not been captured by extradition because they are based purely on domestic law. Tax laws are largely idiosyncratic and accordingly, a conduct based approach to tax offences is unworkable. Because the essential elements of fiscal offences vary from country to country, absent any internationally uniform tax laws, fiscal offences can only be extraditable by a specific amendment to the treaty.

2. Fiscal offences are not listed in the schedule to the German-Canada treaty.
3. The law of Germany is that the German-Canadian treaty precludes the extradition of anyone, citizen or non-citizen, to Canada for fiscal offences.
4. For Canada to interpret the German-Canadian treaty as allowing Canadian citizens to be extradited to Germany for fiscal offences, when Germany prohibits extradition to Canada for fiscal offences, violates s. 7 of the *Charter* and would shock the conscience of the community.

[54] The Minister's decision attracts a high standard of deference: see *Idziak v. Canada (Minister of Justice)* (1992), 77 C.C.C. (3d) 65 (S.C.C.). The appellant has failed to persuade me that we should interfere with the Minister's conclusion that the appellant should be extradited pursuant to the treaty.

[55] I agree with the respondents that it is the appellant's conduct that must be considered when determining whether the offence with which he is charged is included in the offences listed in the treaty. In *McVey* at para. 105, LaForest J. stated:

[I]t must be remembered that the crimes listed in the treaty are not to be interpreted according to the niceties of the applicable legislation of either country. Rather they are described in compendious terms to catch broad categories of conduct...In other words, extradition crimes are described in a comprehensive and generic sense.

[56] The offences listed in the treaty include:

12. Offences against the laws relating to fraud and criminal breach of trust; fraudulent conversion; obtaining property, money or securities by fraud or false pretences.

13. Offences against the laws relating to forgery, including uttering what is forged.

...

16. Offences against the laws relating to perjury, including subornation of perjury; making a false affidavit, statutory declaration or oral statement under oath or on affirmation; false statements, either written or oral,

whether or not under oath, made to a judicial authority or to a government agency or office.

[57] The extradition judge found that there was evidence upon which it could be concluded that the appellant hid the receipt of commissions, arranged transactions in order to conceal income, and deliberately evaded the payment of taxes. The extradition judge further found that the evidence of fraud, deception and falsification was sufficient to support domestic committal not only on the offence of income tax evasion contrary to s. 239 (1)(d) of the *Income Tax Act* but also on the offences of making false or deceptive statements in an income tax return contrary to s. 239(1)(a) of the *Income Tax Act*, defrauding the government of income tax revenues contrary to s. 380(1)(a) of the *Criminal Code*, and uttering a forged document contrary to s. 368(1)(b) of the *Criminal Code*. It has been held that the offence of income tax evasion may also constitute fraud contrary to the *Criminal Code*: see *R v. Cancor Software Corp. et al.* (1990), 58 C.C.C. (3d) 53 (Ont. C.A.), leave to appeal to S.C.C. refused (1991), 61 C.C.C. (3d) vi.

[58] As there is evidence of conduct embraced by the offences that are listed in the treaty, I see no basis to interfere with the Minister's decision to surrender the appellant notwithstanding the absence of any mention of the specific offence of tax evasion in the treaty.

[59] In light of this conclusion, I need not consider whether extradition for offences that the appellant labels (but does not define) as "fiscal offences" is precluded under the treaty as it existed at the time the request was made or whether the Minister erred by taking into consideration the amendment to the treaty that removed the "listed offence" approach.

2. Was there a reasonable apprehension of bias on the part of the Minister?

[60] The appellant commenced a civil action in Alberta against the Attorney General of Canada in relation to a Letter of Request that had been sent by the Director of the International Assistance Group to the Swiss government authorities. The statement of claim alleged negligence, defamation, and breach of statutory and professional duty, including abuse of process and abuse of public office. In another action, the appellant sued Germany and the Attorney General of Canada claiming damages for negligence and abuse of power as a result of his arrest and detention pursuant to Germany's treaty request for extradition. The appellant asked the Minister to suspend his decision as to surrender pending resolution of these actions. The Minister rejected the submission that these pending civil actions give rise to a reasonable apprehension of bias and refused to suspend his decision as to surrender:

The Supreme Court of Canada has described my role in deciding the issue of surrender as being "at the extreme legislative end of the continuum of administrative decision-making: [See *Idziak v. Canada (Minister of Justice)* (1992), 77 C.C.C. (3d) 65 (S.C.C.)]

The applicable test for whether my decision on surrender would give rise to a reasonable apprehension of bias is whether a reasonable apprehension of bias exists "in the mind of a fully informed person in a substantial number of cases". [See *United States v. Cotroni*, [1989] 1 S.C.R. 1469 and *Idziak, supra*]

Allegations of bias against political decision-makers are reviewed in the context of the functions and powers assigned to them, and only when they have acted outside the framework delineated by the applicable law will judicial intervention be warranted. [See *Imperial Oil Ltd. v. Quebec (Minister of the Environment)*, [2003] S.C.R. 624]

Applying this analysis in the extradition context, the Supreme Court of Canada found that my dual roles as Minister of Justice and Attorney General of Canada do not create a reasonable apprehension of bias, since my functions at the judicial and ministerial phases of the extradition process involve separate and distinct considerations.

[61] The appellant made no oral submissions on this point and relied entirely on the argument advanced in his factum.

[62] I see no merit to the submission that the Minister erred in refusing to suspend his decision in view of the civil actions. The Minister's reasons rejecting the allegation of bias demonstrate no error. The existence of a civil claim brought by the appellant as to the extradition proceedings themselves could not, in the mind of a fully informed person, give rise to a reasonable apprehension of bias.

3. Did the Minister err by refusing to assess the reliability of the evidence?

[63] The appellant submits that the Minister erred by refusing to assess the reliability of the evidence "in the context of the relaxed rules of evidence in the *Extradition Act*". In particular, the appellant submits that the Minister erred by refusing to consider Pelossi's credibility when determining whether it would be unjust to surrender the appellant. I see no merit in this submission.

[64] To the extent that the *Extradition Act* "relaxes" the rules of evidence, the *Act* does not alter the jurisdiction, responsibility or authority of the extradition judge or that of the Minister with respect to the assessment of the evidence. It is for the extradition judge to determine whether or not there is sufficient evidence to warrant committal. Once that determination has been made, weighing the evidence or assessing its reliability are matters for trial in the foreign jurisdiction. There are not matters for the Minister to address when considering whether to surrender the appellant. The Minister retains a residual discretion to refuse surrender where it would be unjust or oppressive. However, the exercise of that discretion is accorded a high level of deference on judicial review. In view of the substantial body of evidence led in support of the committal, I am far from persuaded that there is any basis for this court to interfere on this ground.

[65] The appellant also submits under this ground that the Minister erred by refusing to postpone his decision until after the Supreme Court of Canada decides *Latty and Ferras*. I agree with the respondents that the Minister was entitled to proceed on the basis that the impugned provisions of the *Extradition Act* are valid.

4. Would surrender of the appellant be unjust and oppressive and contrary to s. 7 of the Charter?

[66] The appellant did not address this issue in his oral submissions and relied on the arguments advanced in his factum. The factum provides a long list of arguments, most of which are subsumed in the appellant's general contention that the Minister erred in failing to consider the evidence submitted by the appellant establishing that the evidence relied upon by the extradition partner was unreliable, inaccurate and misleading. This

argument is related to and overlaps with the contention I have just discussed. The Minister refused the appellant's invitation to review the evidence:

[I]t is not my role to review the accuracy or reliability of the German evidence against Mr. Schreiber, as this would require me to assume the role of the trier of fact. To do so would be inconsistent with the aim and purpose of extradition. The extradition process is not intended to determine the guilt or innocence of the person sought but rather to ascertain whether surrender to the requesting state is appropriate in the circumstances of a particular case.

[67] In my view, the Minister properly understood his role and I see no basis to interfere with his decision not to assume the role of trier of fact and assess the reliability or accuracy of the evidence.

[68] The appellant also submits that the Minister erred in failing to obtain assurances from Germany that

- (a) the appellant would not be held in pre-trial custody;
- (b) any testimony provided by the appellant in Canada will be subject to use and derivative use immunity in Germany; and,
- (c) the tax fraud upon which the appellant would be prosecuted would conform to the amount asserted by Germany in its "Final Tax Report".

[69] I see no merit in these submissions. The Minister stated that seeking an assurance regarding pre-trial custody "would amount to an improper interference with the sovereignty of Germany as regards the conduct of their criminal process". There is nothing in the record that would bring the risk of pre-trial detention within the "shock the conscience" test articulated in *United States of America v. Burns*, [2001] 1 S.C.R. 283, and I agree with the respondents that there is no basis for us to interfere with the Minister's decision that this matter should be left to be dealt with by the German authorities according to German law.

[70] The Minister found that s. 13 of the *Charter* was not applicable in this case, since applying it would give the *Charter* extraterritorial effect: *R v. Terry* (1996), 106 C.C.C. (3d) 508 (S.C.C.) at paras. 14-20 and *Burns* at paras. 50-57. As the respondents point out, this issue was resolved against the appellant in *R v. Eurocopter Canada Ltd.* (2004), 185 C.C.C. (3d) 233 (Ont. Sup. Ct.). The appellant brought an application to quash a

subpoena to testify in the preliminary hearing, arguing that forcing him to testify in the absence of use and derivative use immunity of his testimony in criminal proceedings in Germany would violate his s. 7 and 13 *Charter* rights. Morin J. dismissed the application, holding that the appellant had not made out a *Charter* violation. At para. 64, Morin J. stated that there was a high degree of probability that, if the appellant had to testify at the preliminary inquiry, “German law will afford him ample protection against the use of that evidence in the proceedings in Germany.”

[71] As for the amount of the alleged tax fraud, the Minister refused to impose any condition on the German prosecuting authorities. I agree with the respondents that the amount of the alleged fraud is a matter for trial in Germany and that there is no basis for us to interfere with the Minister’s decision in that regard.

CONCLUSION

[72] For these reasons, I would dismiss the appeal from the extradition committal and dismiss the application for judicial review of the Minister’s surrender decision.

“Robert J. Sharpe J.A.”

“I agree D.H. Doherty J.A.”

“I agree S.E. Lang J.A.”

RELEASED: March 01, 2006