FOCUS ON *Cross-Border Law*

When a work visa won't do

Helping B-1 business travellers get to the U.S.

MARK BELANGER

If you have ever wondered whether your client will need a traditional work visa to enter the U.S., a B-1 visa may be an option — but you will need to decipher the fine line often walked by U.S. immigration counsel in advising their clients on this issue.

The B-1 visa is the most used and the least understood visa; if you do not focus your practice on U.S. immigration, you should always seek a second opinion from a lawyer who does.

The purpose behind the B-1 visa is to foster international trade relationships between the U.S. and foreign nations. With this in mind, the B-1 visa is therefore not a "work" visa per se, but geared toward business travellers who are fulfilling the mandate of building on trade relationships and international commerce between the U.S. and foreign nations.

The two leading decisions that set forth the definitive test on whether a foreign national qualifies as a business visitor are *Matter of Hira*, 11 I&N Dec 824 (BIA 1966) and *Matter of Neill*, 15 I&N Dec. 331 (BIA 1975). In *Matter of Hira*, a foreign national travelled to the U.S. on behalf of a Hong Kong manufacturer of custom-made men's clothing items. This particular foreign national would accept payment for the order, take measurements and send back the order to the overseas employer for handling.

The foreign national received payment for his services, but the payment was not from a U.S. source and he demonstrated that he intended to return home

See **B-1** Page 16

YURI ARCURS / DREAMSTIME.COM

Canada needs to liberalize *Extradition Act*, says lawyer

CHRISTOPHER GULY

A Canadian businessman's nightmarish experience with the U.S. legal system highlights stark cross-border differences in the way justice is applied to the accused, according to lawyers involved in his case.

In late February, Michael Beker, his Toronto-based company, Newcon International Ltd. and its former vice-president, Arie Prilik, were acquitted by a San Francisco court on charges of wire fraud, conspiracy to commit wire fraud and money laundering (which both men faced), concerning a multi-million-dollar contract with the U.S. Army to supply Iraq's army with night-vision goggles. The verdict, rendered by U.S. District Court Judge Marilyn Hall Patel of the Northern District of California, slammed the U.S. government. She cited its "failure to adequately develop the issue of materiality before the grand jury, [which] appears to have seriously prejudiced [the] defendants, subjecting them to trial and several years of criminal proceedings notwithstanding the paucity of evidence on the issue."

Her synopsis underscores the severity of the saga endured by 60-year-old, Soviet-born and now-Canadian citizen Beker. Over almost a four-year period, he had to spend five days in jail and some $3 million in legal fees, post about $750,000 in bail, saw his company lose sales, faced extradition and was forced to spend almost a year in the U.S., away from his business and family. Peter Biro, a partner at WeirFoulds LLP in Toronto, led the legal team representing Beker at his San Francisco trial (as of May 1, Biro left his law practice to become president and CEO of Newcon).

In 2004, Newcon was subcontracted to supply night-vision goggles to the U.S. Army's Tank-Automotive and Armaments Command (TACOM), which in turn provided them to the Iraqi army. Less than a year later and pursuant to a new tender, competitor American Technologies Network Corp. (ATN) became the subcontractor. However, Beker and Prilik contacted TACOM and the prime contractor, Jordanian-based International Trading Establishment (ITE), claiming that ATN was, in Biro's words, providing equipment incapable of meeting the required technical specifications, and that Newcon would be willing to step in as subcontractor and provide spec-compliant goggles, albeit at a higher price than that charged by ATN.

As Patel outlined in her 16-page ruling, ATN's Dmitry Rocklin contacted Newcon and threatened legal action after learning the Canadian company had contacted ITE and TACOM with concerns. Unbeknown to Newcon's founder, Rocklin had also contacted the FBI, which recorded the Newcon-ATN conversations as well as those involving Prilik and TACOM.

The Department of Justice (DOJ) relied on the taped calls to support its claim against Newcon and, in late 2007, a grand jury returned an indictment, which charged Beker, Prilik and Newcon with attempting to defraud the U.S. government by, in part, offering to "pay ATN to stop supplying goggles" and for making "false or misleading" statements about ATN to TACOM.

The Lawyers Weekly attempted to contact the trial attorney, Jeane Hamilton of the DOJ's antitrust division, for comment about the case, but the DOJ declined to comment.

In April 2008, the Attorney General of Canada, on behalf of the U.S., applied to the Ontario Superior Court for a provisional arrest warrant that would lead to Beker's extradition to San Francisco where he would face the charges.

Less than a year later, Beker went to the same court seeking an order for full disclosure of the audiotapes and transcripts of the FBI-recorded phone calls, since the record of the case against him only contained "excerpts or summaries" of conversations (some of which were translated from Russian), according to Toronto criminal defence lawyer Brian Heller, who represented Beker. Heller asked the court to make the order since the requesting state for extradition, the U.S., was a party to the proceedings. In seeking Canada's assistance, the U.S. government "submits to the jurisdiction of a Canadian court and the Canadian judicial system," Heller wrote in his 22-page factum.

"When only part of an utterance or statement is known, and is capable of different meanings based on context or by the unknown part of the statement or utterance, [it] may be inadmissible," and to extradite someone on that basis would contravene the Charter, says Heller.

In his factum, he contended that the "false statements" in the record of the case along with the "misleading failure to refer to exculpatory evidence and significant weaknesses in the prosecution's case amounts to an abuse of the Court's process."

However, in their 28-page memorandum of argument responding to the disclosure application, Howard Piafsky and Matina Karvellas, counsel for the Attorney General of Canada, argued that the Ontario Superior Court had "no jurisdiction" to order the U.S. to provide Beker with the tapes and transcripts he requested. "The Supreme Court of Canada has confirmed that the scope of disclosure in the extradition context is severely attenuated because the guilt and innocence of the person sought are not at stake. The person sought is entitled to the materials relied upon by the requesting state at the committal hearing. Nothing more."

The Justice Department lawyers referred to *United States of America v. Dynar*, [1997] S.C.J. No. 64 and *U.S.A. v. Kwok*, [2001] S.C.J. No. 19. In their factum, Piafsky and Karvellas state that the Supreme Court "repeatedly emphasizes that disclosure is a Charter right which therefore cannot be imposed on foreign states who are gathering evidence pursuant to their own laws and duties."

> "When only part of an utterance or statement is known, and is capable of different meanings based on context or by the unknown part of the statement or utterance, [it] may be inadmissible...

However, Heller says that in *U.S.A. v. Ferras*, [2006] S.C.J. No. 33, the same court stated that "an essential aspect of an extradition hearing is that it must be a fair process."

Still, as the Attorney General of Canada's lawyers pointed out, the same decision said that "the ultimate assessment of reliability is still left for the trial where guilt and innocence are at issue." The extradition judge "looks at the whole of the evidence presented at the extradition hearing and determines whether it disclosed a case on which a jury could convict."

In 2002, the Ontario Court of Appeal also weighed in on extradition-related disclosure in *R. v. Larosa* in which the applicant sought documents from Canada and the U.S. The court established an "air of reality" standard in which there must be a "realistic possibility that the allegations can be substantiated if the orders requested are made."

Ontario Superior Court Justice Randall Echlin found no air of reality to the alleged Charter breaches, nor did he find the summaries in the record of the case "frail or manifestly unreliable," according to the oral reasons he gave in dismissing Beker's application for disclosure. As well, Echlin stated that he could not order the attorney general to produce material "that it does not control or possess," since the tapes and transcripts were gathered in the U.S. and remained there. He said the challenge for disclosure was "more properly raised at the trial."

As Piafsky points out, an extradition proceeding is only meant to require that a requesting state present prima facie evidence on the elements of the offence. If lawyers for the attorney general discover "something unusual" in evidence, members of the Justice Department's international assistance program can ask the U.S. government to obtain clarification from DOJ prosecutors, says Piafsky, who is now general counsel with the Public Prosecution Service of Canada.

He adds there are other "built-in protections" in the *Extradition Act* that enable an individual to make a representation to the justice minister prior to his or her surrendering to another country. An individual could also ask an appellate court to review a committal order or have the justice minister's surrender order reviewed, or both.

However, Heller remains "frustrated" that a court could rely on "excerpts" of conversations and risk having a Canadian head south of the border beyond Charter protection. While he says that Beker could sue the U.S. government for the treatment his client endured, Heller would like to see Canada's *Extradition Act* "liberalized" to enable counsel to cross-examine the person who drafted the extradition documents. ■

New Act strengthens powers to freeze misappropriated foreign assets

JEREMY HAINSWORTH

Canadian lawyers engaged in the international trade or securities sectors should take note of how the *Freezing Assets of Corrupt Foreign Officials Act* (FACFOA) can affect their practice and obligations, experts in the field say.

The Act, which received royal assent March 23, allows orders to be made that real or personal property situated in Canada belonging to a designated "politically exposed foreign person" (PEP) may be seized, frozen or sequestered while there is internal turmoil or an uncertain political situation in a foreign state. To date, orders appear to be in effect with regard to Tunisia and Egypt.

FACFOA "addresses new volatile situations that are happening in the world, where people are scrambling [to leave] those countries and taking their assets with them," Blakes Financial Services Group partner Jacqueline Shinfield told *The Lawyers Weekly*. "It's very similar to other asset and freezing legislation."

The schedules to the Act list 69 people in foreign states. At the top of Egypt's list is the name of former president Hosni Mubarak.

The regulations say a person in Canada must not deal directly or indirectly in any property, wherever situated, of any designated politically exposed foreign person; enter into or facilitate, directly or indirectly, any financial transaction related to a dealing referred to in the Act with any such person or provide financial services or other related services for any property of any PEP.

The legislation defines PEPs as a head of state or head of government; member of the executive council of government or member of a legislature; deputy minister or equivalent rank; ambassador or attaché or counselor of an ambassador; military officer with a rank of general or above; president of a state-owned company or a state-owned bank; head of a government agency; judge; leader or president of a political party represented in a legislature; or a holder of any prescribed office or position. If assets of such listed people are found, they must be frozen and reported to the RCMP and CSIS.

Former minister of Foreign Affairs Lawrence Cannon said in a March 23 news release that the legislation gives the Canadian government tools to fight corruption and prevent the misappro-

See **Corrupt** Page 16