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December 14, 2016

Via Email and Regular Mail

President Barack Obama
The White House
1600 Pennsylvania Avenue NW
Washington, DC
20500

RE: Executive Clemency for Leonard Peltier

I acted as part of Leonard Peltier's legal team in Canada at the time of his extradition hearings over 40 years ago. At that time Leonard was, in effect, kept in solitary confinement for 23.5 hours a day in Canada. I have continued to support him and assist lawyers in the US who are seeking clemency. Leonard has now been behind bars in a maximum security prison since his extradition in December 1976 despite questions regarding the highly controversial evidence and despite Leonard's age and failing health.

As you have most likely been advised, Leonard was extradited on the basis of false evidence.

Unfortunately, at his trial, that false evidence was not disclosed to the jury and prevented Mr. Peltier from presenting a proper case of defense. Whether this may have affected their decision is something we will never know. What we do know is that the evidence against him has been discredited over the years to the point that even the federal prosecutors have conceded that they do not know if he killed the two agents. However, it is my understanding under US law, that his conviction can stand because he was present in the area when the two agents were killed. In Canada this is known as the 'felony murder' rule. Under Canada's *Charter of Rights*, this provision was struck down as unconstitutional several years ago.

When the then Canadian Justice Minister, Ron Basford, approved Leonard's extradition to the United States in 1976, he stated:

> One of the matters referred to in the submissions [by Leonard's legal counsel to the Minister] was the alleged inconsistency in the affidavits of Myrtle Poor Bear. This is a legal matter for the courts which have dealt with it in Canada and will **undoubtedly** do so in the U.S. (copy of press release attached) (emphasis added)

By the time of the extradition of Leonard Peltier, his two co-accused, Dino Butler and Bobby Robideau, had been acquitted, thus assuring Canada's Justice Minister that he would get a fair trial in the United States. Unfortunately for Leonard, he was denied a fair trial.

The Poor Bear affidavits were described in 1978 by Justice Anderson of the BC Supreme Court in *Halprin v. Sun Publishing Co et al* [1978] BCJ 960 as follows (para. 6):

> Shortly after Schultz J. had made the extradition order, counsel for Peltier in the United States, as the result of pre-trial particulars [regarding his co-accused who were in the US], came into possession of a third affidavit sworn by Myrtle Poorbear. This affidavit, which was sworn…several weeks prior to the dates on which the other affidavits of Myrtle Poorbear were sworn, clearly indicated that Myrtle Poorbear was not present at Pine Ridge Reservation on the date that the F.B.I. agents were killed.

Mr. Halprin was the Canadian Justice Department lawyer who acted for the United States in Leonard's extradition. As a matter of full disclosure, I was also sued by Mr. Halprin in this proceeding but his case for defamation was dismissed by the court.

Although the contradictory second and third affidavits were put before the Federal Court of Canada in Leonard's appeal of the extradition, they were excluded as not having been considered by the extradition Judge. In fact, no consideration was ever made to the conflicting statements by the key extradition witness. Her false testimony was relied on as true to justify the extradition. Similarly, in the United States, the evidence of the Poor Bear false testimony was excluded at Leonard's trial and appeals.

In 1989, some thirteen years after Leonard's extradition, during oral arguments before the Supreme Court of Canada on an application for *leave to appeal* the extradition, Justice LaForest of the Supreme Court of Canada commented on the need for good faith between states in extradition proceedings. He commented that the use of the false Poor Bear affidavits by the US government to succeed in Leonard's extraditions raised questions about the *bona fides* of the means used by the United States to extradite Leonard Peltier. He concluded that the Leonard Peltier case was an issue to ascertain a political remedy between the two states. Unfortunately that has not yet happened.

Based on the opinion of the late Justice Heaney of the Eighth Circuit Court of Appeals, there is certainly a need to move towards reconciliation between the US government and its aboriginal peoples over this dark era of US–aboriginal relations. As noted by Judge Heaney in his 1991 letter to U.S. Senator Inouye in support of a grant of Executive Clemency to Peltier: "The United States government overreacted at Wounded Knee. Instead of carefully considering the legitimate grievances of the Native Americans, the response was essentially a military one which culminated in the deadly firefight on June 26, 1975... The United States government must share responsibility with the Native Americans for the... firefight... the government's role can properly be considered a mitigating circumstance."

As our Prime Minister may have told you, Canada is going through a period of 'reconciliation' between our Aboriginal peoples and the state. This is due to the horrific history of the residential school legacy in our country and the failure to address the violations of treaty and aboriginal rights.

You have been looked upon by Canadians and many other non-Americans as a symbol for improving justice and fairness in your country and the world. You have the power to give this elderly Aboriginal man the chance to live his last years with his grandchildren. Alternatively, you have the choice, as did your predecessors, to turn your back to Leonard, ignore the injustices that occurred to ensure he was convicted and pass on a legacy that in the United States the goals of justice and fairness for American Indians is still not a priority for the national government.

Notwithstanding the above and a multitude of other issues relating to evidence used at trial, Leonard has remained incarcerated for 40 years. At 72 years of age and suffering from a lengthy list of serious health issues, it is time for Leonard to be with his grandchildren.

There are many in Canada, including the Assembly of First Nations and the Canadian Bar Association, who strongly support Leonard's request for clemency at this stage in his life. As a member of Leonard's legal team in Canada, I strongly support the campaign to grant Leonard Executive clemency and commute his sentence to the forty years served.

I urge you to exercise your power to grant clemency and demonstrate your leadership in demonstrating fairness and justice to one of the oppressed peoples of North America.

Thank you for your consideration of this matter.

Sincerely yours,

PETER GRANT & ASSOCIATES

Peter R. Grant

PRG/co
Enc.

cc: Robert A. Zauzmer, Pardon Attorney, Re: Case Number C179410
Via email to: USPardon.Attorney@usdoj.gov and via regular mail

The Right Honourable Justin Trudeau
Via email to: Justin.trudeau@parl.gc.ca and via regular mail

STATEMENT BY THE HONOURABLE RON BASFORD

December 17, 1976

OTTAWA----Ron Basford, Minister of Justice and Attorney General for Canada today issued the following statement in connection with the extradition of Leonard Peltier:

Leonard Peltier was charged in the United States with:

1. November 22, 1972, Milwaukee, Wisconsin: attempted murder
2. June 26, 1975, near Oglala, South Dakota: murder of Ronald A. Williams, Special Agent, F.B.I.
3. June 26, 1975, near Oglala, South Dakota: murder of Jack R. Coler, Special Agent, F.B.I.
4. November 14, 1975, near Ontario, Oregon: attempted murder; and
5. November 15, 1975, near Nyssa, Oregon: burglary

A provisional arrest was made in Hinton, Alberta, on February 12, 1976; this was followed by a diplomatic note from the Embassy of the United States to the Department of External Affairs on February 18, 1976 requesting formally the provisional arrest and extradition of Mr. Peltier. Extradition was requested by the Government of the United States, joined by the states of Wisconsin and Oregon. Following his arrest, Mr. Peltier was transferred to Vancouver to await his extradition hearing.

Extradition matters involving Canada and the United States are governed by the Canada-U.S. Extradition Treaty, by the Extradition Act and by the case law on the subject. Under the Extradition Act the role of the courts and the role of the Minister are quite different. Each has distinct and separate duties.

The court's function is generally:

to determine whether the offences charged are extraditable offences within the treaty; to determine, on the basis of the evidence adduced, whether there is sufficient evidence that if the offence had been committed in Canada the judge would order the accused person to stand trial in Canada; to receive evidence on the question whether the offence involved is an offence of a political character or that the proceedings are being taken with a view to prosecute or punish the fugitive for an offence of a political character. (Note that the judge's duty is only to receive this evidence; it is not his duty to adjudicate upon the question.)

A hearing was held in Vancouver before Mr. Justice Schultz of the Supreme Court of British Columbia, from May 3-28, 1976 and a decision was rendered on June 18, 1976. Mr. Peltier was found extraditable on four of the five alleged crimes. With respect to the Oregon attempted murder, the court held that the evidence produced at the hearing would not, according to the law of Canada, justify committal for trial if the crime had been committed in Canada.

The decision of the judge who has conducted the extradition hearing may be reviewed by the Federal Court. An application to set aside the decision of Mr. Justice Schultz was made to the Federal Court of Appeal pursuant to section 28 of the Federal Court Act. A hearing was held on October 25, 26, and 27. At the conclusion of the hearing October 27 the application was denied.

Having decided that Mr. Peltier is extraditable on four of the five offences upon which his extradition has been sought, the courts have thus exercised their responsibility under the Extradition Act.

The separate and distinct role of the Minister of Justice is clearly set out in section 22 of the Extradition Act which states that :

"Where the Minister of Justice at any time determines

a. that the offence in respect of which proceedings are being taken under this Part is one of a political character,
b. that the proceedings are, in fact, being taken with a view to try to punish the fugitive for an offence of a political character, or
c.that the foreign state does not intend to make a requisition for surrender, he may refuse to make an order for surrender……."

Subsequent to the decision of the Federal Court of Appeal, counsel for Leonard Peltier indicated that they were instructed by their client not to appeal to the Supreme Court of Canada. I then agreed to receive a written submission from counsel for Mr. Peltier and to receive oral submissions from two of his lawyers and four native people from the West Coast. These submissions were directed to the issue of the political character of the offences in question.

One of the matters referred to in the submissions was the alleged inconsistency in the affidavits of Myrtle Poor Bear.
This is a legal matter for the courts which have dealt with it in Canada and will undoubtedly do so in the U.S.

Submissions were also made concerning the conduct of the F.B.I. and the United States Bureau of Indian Affairs. It was suggested that Indians in general and members of the American Indian Movement in particular are subject to persecution by the Government of the United States, and that Mr. Peltier might very well be killed upon his return to the United States. Without commenting upon the soundness of these views, I want to emphasize that it will be the courts, and not the F.B.I. or the B.I.A., who will be trying Mr. Peltier. Moreover, the evidence does not show that Mr. Peltier will be denied his constitutional rights as an American citizen or that "due process" does not prevail in the courts in which he will be charged. It should be noted that two other Indians, Darelle Dean Butler and Robert Eugene Robideau were accused with Mr. Peltier in the alleged murder of the two F.B.I. agents in South Dakota, and that both of these co-defendants have been tried and acquitted on these charges in the United States. Mr. Butler and Mr. Robideau are presently in custody serving sentences for other offences. There is no evidence that either individual is in any physical danger. This appears to apply as well to several other leaders of the American Indian Movement. Dennis Banks is presently living in California. He is not in custody. Federal charges against him relating to the illegal possession of weapons were dismissed in Oregon; the United States government is now appealing.

Carter Camp is one of three A.I.M. Leaders who were convicted in South Dakota on December 10, 1975 of assaulting a federal officer following the Wounded Knee incident. He received a three year sentence. On September 2, 1976, the judgment was reversed due to a technical defect in the warrant for arrest. Camp is not presently in custody.

It is my conclusion after considering all the evidence that is before me that it has not been demonstrated that the two murders, the attempted murder and the burglary with which Mr. Peltier has been charged were offences of a political character. Nor has it been established that the proceedings in question are being taken with a view to try or punish Mr. Peltier for an offence of a political character.

Consequently, I have signed an order which calls for Mr. Peltier to be delivered into the custody of the U.S. officials.

In addition, in response to a request from me, the Assistant Attorney General for the Criminal Division of the United States Department of Justice, has advised that if Mr. Peltier is convicted of murder under the indictment in relation to which he is surrendered, he cannot be sentenced to death.

I should also add that under our Extradition Treaty with the U.S.A., Mr. Peltier cannot be tried for any past offences, other than those upon which he has been ordered extradited.

- 30 -

For further information please call Allan Lutfy (613) 992-4621

Case Name:

Halprin v. The Sun Publishing Co.

Between
Halprin, and
The Sun Publishing Company Ltd.,
Pacific Press Ltd., Keate and Grant

[1978] B.C.J. No. 960

[1978] 4 W.W.R. 685

[1978] 2 A.C.W.S. 368

Vancouver No. C771952

British Columbia Supreme Court
Vancouver, British Columbia

Anderson J.

May 3, 1978.

(51 paras.)

Counsel:

C.R. MacLean, for the plaintiff.
H. Rankin, for the defendant Grant.
P.W. Butler, for the remaining defendants.

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1 **ANDERSON J.**:-- This is an action by the plaintiff, a barrister and solicitor employed as senior counsel in the Department of Justice, for an alleged libel arising out of an article published in The Vancouver Sun on 19th April 1977, reading as follows:

"OTTAWA 'AN ACCOMPLICE' IN CONVICTION

"The Canadian government was an accomplice of the United States government in the 'miscarriage of justice' which resulted in Monday's murder conviction against American Indian Movement leader Leonard Peltier in U.S. federal court, according to a Vancouver lawyer who assisted Pettier during his extradition hearings here last summer.

"'Clearly [Justice Minister] Ron Basford's promise of a fair trial to a native American in the U.S. means nothing,' Peter Grant, a member of the Leonard Peltier legal defence committee, said following Peltier's conviction on charges of murdering two FBI agents on South Dakota's Pine Ridge reservation in 1975.

"'State involvement in this case, both in Canada and the United States, has been marked by government misconduct from its inception. The Canadian government through the involvement of its justice department, has been complicit in this misconduct by the American State and the F.B.I.'

"Grant charged that evidence used by U.S. and Canadian officials during Peltier's Canadian extradition hearing to demonstrate cause for him to be returned to the U.S. for trial in the Pine Ridge slayings was both contradicted and not used by Prosecutors during Peltier's murder trial in Fargo, N.D.

"'At the extradition hearing in Canada, two affidavits of Myrtle Poorbear were produced as the substantial portion of the state's case against Mr. Peltier,' Grant said.

"'Poorbear claimed to be an eyewitness to the deaths of the FBI agents, and implicated Mr. Peltier. On this evidence, Mr. Peltier was extradited. Yet at the trial in North Dakota the U.S. did not call Poorbear or any eyewitness to anything and produced a totally different and contradictory theory as to their case against Mr. Peltier.'

"The Vancouver lawyer also cited the testimony of FBI firearms division chief Courtland Cunningham who, in an affidavit to the extradition hearing, said he found gun cartridge casings implicating Peltier at the scene of the murders, but retracted that evidence during testimony at the murder trial.

"These incidents call for changes in Canada's extradition law which would provide the same rights of protection in the courts to accused in cases of extradition that are now provided to defendants in other court actions, Grant said.

"'As our extradition law stands, a single, fabricated affidavit which is not subject to cross-examination can serve to extradite any person to a foreign state,' he said.

"'That foreign state may have no intention whatsoever of using that fabricated evidence at trial. The U.S. case against Mr. Peltier has made a complete mockery of the Canadian justice system and of the minister of justice.'

"Grant said the Peltier defence committee in Vancouver feels the murder conviction is 'a blow to the rights of native Americans to defend themselves against the violence and aggression of the state.'

"But, he said, 'we do not believe that native Americans will surrender and they will continue to defend themselves against oppression.'

"Peltier's lawyers in North Dakota announced following the conviction that they would appeal after sentencing."

2 In March 1976 extradition proceedings were commenced by the government of the United States against one Leonard Peltier in respect of a number of charges against Peltier, including charges of murdering two F.B.I. agents at Pine Ridge Reservation, South Dakota, United States of America. The plaintiff, whose normal duties were to act as counsel in the Criminal Law Division of the Vancouver office of the Department of Justice, acted as counsel for the United States government in the proceedings. He did so pursuant to an agreement between Canada and the United States whereby counsel employed by the Canadian Department of Justice handle extradition proceedings initiated by the United States and counsel employed by the United States Department of Justice handle extradition proceedings initiated by Canada.

3 The plaintiff, in addition to numerous other affidavits, received from the F.B.I. several affidavits sworn by one Myrtle Poorbear, wherein she deposed that she was an eyewitness to the slaying of the F.B.I. agents and that she saw Peltier shoot the said agents.

4 The plaintiff presented these affidavits as evidence against Peltier in the extradition

proceedings, which took place in April and May 1976 before Schultz J. While other affidavits containing circumstantial evidence against Peltier were also presented [see, e.g., 32 C.C.C. (2d) 121 (B.C.)], the plaintiff admitted in cross-examination that the affidavits of Myrtle Poorbear formed a vital part of the case against Peltier. She was the only eyewitness.

5 In June 1976 Schultz J. made an extradition order on the basis of the evidence presented to him. He held that a prima facie case had been made out against Peltier.

6 Shortly after Schultz J. had made the extradition order, counsel for Peltier in the United States, as the result of the delivery of pre-trial particulars, came into possession of a third affidavit sworn by Myrtle Poorbear. This affidavit, which was sworn on 19th February 1976, several weeks prior to the dates on which the other affidavits of Myrtle Poorbear were sworn, clearly indicated that Myrtle Poorbear was not present at Pine Ridge Reservation on the date that the F.B.I. agents were killed.

7 An appeal was taken by Peltier from the order of Schultz J. to the Federal Court of Appeal, and this appeal was heard in October 1976. Shortly before this appeal was heard, the plaintiff was provided with a copy of the third affidavit. Up to that time he had no knowledge that the third affidavit existed. He was shocked that the United States government and the F.B.I. had suppressed this evidence. He did not, however, seek or receive any explanation from the United States government for this unusual and reprehensible conduct.

8 An application was made to the Federal Court of Appeal to adduce new evidence, but this application and the appeal were dismissed without reasons.

9 An appeal was made to the Minister of Justice not to surrender Peltier to the United States on the following grounds:

(a) The alleged offence was of a "political" character.
(b) The conduct of the United States government in suppressing vital evidence amounted to an "abuse of process".

10 The plaintiff took no part in the proceedings before the Minister of Justice. He was not consulted by the minister and made no submissions or representations of any kind. The appeal was rejected by the minister and Peltier was extradited.

11 In April 1977 Peltier was convicted in respect of the South Dakota murder charges. Myrtle Poorbear was not called as a witness at Peltier's trial and, in fact, counsel for the United States, on the appeal from conviction, has stipulated that Myrtle Poorbear was not present at the time the F.B.I. agents were killed.

12 Shortly after Peltier's conviction a press release was issued by Peltier's "defence committee". The defendant Grant took part in preparing the press release, typed the release and read the contents of the release to a reporter from The Sun. The said release reads as follows:

"Clearly Ron Basford's promise of a fair trial to a Native American in the United States means nothing. The government conduct which characterized the extradition hearing also marked the trial of Mr. Peltier in North Dakota.

"We have not spoken to Leonard Peltier, but expect an Appeal to be launched.

"We consider the decision to be a blow to the right of Native Americans to defend themselves against the violence and aggression of the State. The implication of this decision is that all oppressed peoples should be defenceless against the aggression of an armed State. But the American Indian Movement will not surrender. They will continue to defend themselves.

"The State involvement in this case both in Canada and in the U.S.A. has been marked by government misconduct from its inception. The Canadian government through the involvement of its Justice Department has been complicit in this misconduct by the American State and the F.B.I.

"However, collaberation [sic] with the American state has not prevented the U.S. from lying to the Canadian people and making a complete mockery of our courts and our government.

"The significant legal repercussion of this case as far as the Canadian government is concerned is the obvious way in which our Extradition law as it now stands can be manipulated by unscrupulous foreign governments. At the Extradition hearing in Canada two affidavits of Myrtle Poorbear were produced as the substantial portion of the state's case against Mr. Peltier.

"Poorbear claimed to be an eye witness to the deaths of the FBI agents and implicated Mr. Peltier. On this evidence, Mr. Peltier was extradited, yet AT THE TRIAL IN NORTH DAKOTA THE U.S. DID NOT CALL POORBEAR OR ANY EYE WITNESS TO ANYTHING, AND PRODUCED A TOTALLY DIFFERENT AND CONTRADICTORY THEORY AS TO MR. PELTIER'S INVOLVEMENT IN THE CASE.

"People who swore the affidavits identifying Mr. Peltier for the Canadian hearing admitted at trial that he could not be identified. One FBI agent admitted at trial

that the affidavit he swore for the Canadian hearing was not true.

> "This blatant example of the contempt the American government has shown to the Canadian court system.(sic) As our extradition law stands, a single fabricated affidavit, which is not subject to cross-examination can serve to extradite any person, citizen of Canada or otherwise, to a foreign state. That state can have no intention whatsoever to use that fabricated evidence at trial. That state's case against Mr. Peltier in the U.S. has made a complete mockery of the Canadian Justice [sic] and of Mr. Basford."

13 The press release differs from the article complained of in several respects, as follows:

(a) The headline "Ottawa 'An Accomplice' In Conviction" does not appear in the press release, and I find that Grant did not use the word "accomplice" in his conversation with the Sun reporter.
(b) The words "Canadian officials" in the fourth paragraph of the article were not used by Grant.

14 Grant testified that he did not intend to refer to the plaintiff when he issued the press release.

15 He was asked about the following extract from the article:

> "The State involvement in this case both in Canada and the U.S.A. has been marked by government misconduct from its inception. The Canadian government through the involvement of its Justice Department has been complicit in this misconduct by the American State and the F.B.I."

16 He says his intent was to criticize the proceedings on the following bases:

(a) The United States government and the F.B.I. were guilty of gross misconduct in suppressing vital evidence.
(b) The Minister of Justice was at fault in executing the extradition warrant after having been informed that vital evidence had been suppressed.
(c) The fact that a person could be extradited on the basis of a single fabricated affidavit, without any right of cross-examination, indicates a serious weakness in our justice system.

17 Grant says that in using the words "its Justice Department" he meant to refer to the Minister of Justice.

18 I accept Grant's evidence and hold that there was no evidence of malice and that Grant did not intend to refer to the plaintiff.

19 The extradition proceedings and all other matters relating to the extradition received full and extensive press, radio and television coverage. Demonstrations took place outside the courthouse during the proceedings and there was great public interest and debate with respect to the whole matter.

20 The press reports of the proceedings and the appeal referred to the plaintiff as counsel for the United States government, and also indicated that he was normally employed by the Canadian Department of Justice. The last press report naming the plaintiff as counsel for the United States was on 26th October 1977. The article complained of was published on 19th April 1978.

21 It is clear beyond all doubt that the plaintiff had no knowledge whatsoever of any suppression of evidence, or of any misconduct on the part of anyone. It is also clear that the plaintiff has a reputation at the bar, and with those who know him, as being a person of the highest integrity. He has always acted fairly, honestly and in a straightforward manner, and in strict conformity with the ethical standards required of a prosecutor. His friends and associates who were called as witnesses could not, and did not, believe he was the sort of person that would suppress evidence or take part in a conspiracy to obstruct justice.

22 The plaintiff, on the day the article was published, was telephoned by his close friend L. Hasman, who informed him of the contents of the article. The plaintiff was very upset and angry. He felt he had been insulted, and that he had been accused of suppressing evidence he knew to be vital.

23 The plaintiff's wife testified that she was upset and shocked by the article. She did not believe the article. The article had no effect on their life. They have not lost any friends. The plaintiff continues to be happy in his work.

24 Nine witnesses were called by the plaintiff. Three of the witnesses were close personal friends, and the others were associates, or former associates, of the plaintiff in the Department of Justice. They all knew the plaintiff had been engaged as counsel in the Peltier case and had followed the proceedings closely. They were all of the opinion that the words "involvement of its Justice Department" in para. 3 of the article referred to the plaintiff personally. They thought the plaintiff had been accused of conspiring with the United States government or its agents to present fabricated evidence. As previously stated, they did not believe the article as interpreted by them. All reached the conclusion that the plaintiff, from their knowledge of him, would not be a party to such unethical and perhaps criminal conduct.

25 The following excerpts from the plaintiff's discovery were put to him:

> "Q. 352 Now is there anybody in the community that thinks your general character is less than it was before this case that you can name? A. Not that I can name.
> "Q. 353 Anybody that thinks your credibility or reputation has been brought into public scandal? A. Not that I can name.

"Q. 354 Anybody that thinks you are an odium and contempt in the eyes of the community? A. Not that I can name.

"Q. 355 And does anybody think your credited reputation as a barrister and solicitor and officer of our courts has been brought into contempt? A. Not that I can name."

26 Donald J. Rosenbloom, who acted as counsel for Peltier in the extradition proceedings and on the appeal to the Federal Court, gave evidence for the defendants. He made the point that the plaintiff acted as counsel for the United States government and not in any sense as a representative of the Canadian Department of Justice. It was his opinion that the article did not refer to the plaintiff, but was directed toward the Minister of Justice, who, in Rosenbloom's opinion, had acted improperly in executing the warrant of surrender with full knowledge that the United States government had suppressed vital evidence at the extradition hearings.

27 David Gibbons, a barrister and solicitor and former partner of Rosenbloom, testified that he was aware that the plaintiff had acted as counsel for the United States government in the extradition proceedings, but when he read the article "the plaintiff's name did not come to my mind".

28 The defendants, other than Grant, did not call evidence. Apart from the differences between the press release and the article complained of, Grant agrees that the report is a fair summary of his conversation with the reporter from The Sun with whom he spoke.

29 There are only four issues on the question of liability, as follows:

(1) Does the article identify the plaintiff?
(2) Are the words used capable of being defamatory of the plaintiff?
(3) Are the words in fact defamatory of the plaintiff?
(4) Does the defence of qualified privilege apply?

30 With respect to the first three issues I should point out that all counsel are agreed that the outcome of this case depends to a large extent on the interpretation of para. 3 of the article when read in the context of the article as a whole. Paragraph 3 reads as follows:

> "State involvement in this case both in Canada and the United States has been marked by government misconduct from its inception. The Canadian government through the involvement of its Justice Department has been complicit in this misconduct by the American State and the FBI."

31 During argument, I requested that counsel set out in writing their version of the meaning which an ordinary and sensible reader of the article, with special knowledge, would give to para. 3, having regard to the circumstances and the context of the article.

32 The written version submitted by counsel for the plaintiff reads as follows:

"The headline sets the thrust of the attack as being directed primarily to 'Ottawa' i.e. the Federal Government of Canada not the United States of America or any of its governmental agencies and, taken alone, imputes some illegal activity in the use of the word 'accomplice'. The first paragraph begins by referring to the Canadian Government as the subject of the sentence and accuses it of guilty knowledge and an active role as an accomplice in a miscarriage of justice which resulted in a murder conviction in the United States.

"The second paragraph limits Justice Minister Ron Basford's involvement, to the 'promise of a fair trial'.

"The third and fourth paragraphs describe the Canadian Government's misconduct as being 'from its inception', which is clearly indicated by the use of the words 'both in Canada'. The responsibility for this misconduct is then narrowed down to the 'Justice Department' which is accused of 'complicity', in effect of conspiring with the United States Government to pervert the course of justice in Canada. The broad allegation in paragraph three is then particularized in paragraph four by the reference to evidence used by ... 'Canadian officials during Peltiers' Canadian extradition Hearing', which cleanly limits the use of what is subsequently described as 'fabricated evidence' to those Canadian officials, or official, responsible for the presentation of the evidence during the extradition hearing.

"Paragraphs 5, 6 and 7 recite factual matters.

"Paragraph 8 is an expression of opinion with regard to changes in the law.

"Paragraphs 9 and 10 are an attempt to justify the recommendations in the previous paragraph and clearly refer to the subject matter of all of the preceding paragraphs in the description of the evidence presented at the Extradition Hearings as 'fabricated'.

"The thrust of the article is an attack on the Department of Justice of the Canadian Government for knowingly participating through its Counsel in a 'frame-up' of Peltier by using fabricated evidence at his extradition hearing, and so perverting the course of justice."

33 The written version submitted by counsel for Grant reads as follows:

> "State involvement (meaning the United States of America) in this case (meaning the whole of the Peltier case from investigation in the U.S.A. through extradition to the eventual trial of Peltier in North Dakota) has been marked by government (meaning the U.S. government) misconduct (meaning the obtaining and withholding of the February 19, 1976 affidavit and the use of evidence which was both contradicted and not used) from its inception (meaning at least from late February 1976). The Canadian government (meaning the executive arm of the government) through the involvement of its Justice Department (meaning the Minister of Justice Ron Basford referred to in Paragraphs 2 and 10 whose duty it was to decide the issue as to whether or not Peltier was being sought for a crime of a political character or the prosecution was of a political character and who had the discretion to refuse to extradict [sic]) has been complicit (meaning knowingly went along with the request of the U.S. government to extradict [sic] in December of 1976 after becoming aware of the February 19, 1976 affidavit) in this (meaning the previously referred to) misconduct (meaning the withholding of the affidavit) by the American State and the F.B.I. (who are the parties guilty of misconducting themselves)."

34 The written version submitted by counsel for The Sun reads as follows:

> "You requested my interpretation of how an average reader of the Vancouver Sun would read the article in question - and particularly Paragraph 3 thereof.
>
> "(1) Firstly, I submit that the average reader would not dissect it word by word. Normally speaking, in a libel case, the article should be dissected word by word, but in the particular circumstances of this case where 'identification of the Plaintiff' is one of the key issues, the article should be read in the same manner as an ordinary reader would peruse same to consider if the narration of facts and events would lead the average reader to believe that the article referred to the Plaintiff. The words obviously must be dissected carefully when you are considering whether it is defamatory.
>
> "(2) The average reader would read the headline - and immediately formulate the impression that OTTAWA (that is, the Federal Government in Ottawa) was being blasted and that Ottawa assisted in Peltier's conviction. The average reader would immediately jump to that conclusion - partly based on the headline - and party (sic) because they would tie the headline into the photograph of Peltier right below the headline and the words used under the photograph.

"(3) The reader, upon perusing the first two paragraphs of the article, would then realize that one of the members of the Leonard Peltier legal defence committee, also being one of the defence lawyers for Peltier, was blasting Ron Basford and the Canadian Government for assisting the U.S. Government in obtaining a conviction of Peltier in the U.S. which was in Grant's mind a quote (sic) 'miscarriage of justice'.

"(4) Third Paragraph - the reader would believe this to be a continuation of a quote from Mr. Grant and would be of the opinion that the words 'government misconduct from its inception meant U.S. misconduct. At first blush, upon reading the first sentence of the paragraph, the reader might not be sure whether it included Canadian government misconduct - but on reading the second sentence and especially the words 'THIS misconduct by the American State' - the matter would be clarified in the mind of the reader as being American misconduct.

"The reader would interpret that the misconduct by the American state occurred from the inception of the case (which in fact it did). He then would also believe that the Canadian Government, through the involvement of its Justice Department (because he had read the headline and the previous paragraph about Mr. Basford - would think the reference to the Justice Department was to Ottawa and Basford and not some Prosecutor on the Canadian Extradition proceedings) had aided the American state and the F.B.I.

"(5) 4th Paragraph and Subsequent paragraphs - the reader would then consider the 4th paragraph was not a quote, but that Grant was indicating that evidence used in the Extradition Proceedings was both contradicted and not used by the Prosecutors during the Peltier murder trial in North Dakota.

"The reader, would think of the 'U.S. and Canadian officials' as Government officials (and in the case of the Canadian officials, because of the reference to Ottawa and Basford previously, as OTTAWA OFFICIALS).

"The reader again would not think of the Prosecutor in the Canadian proceedings but rather Basford and Ottawa officials, because of the headline and the previous paragraphs. That view is further corroborated by the fact that the article uses the

word 'prosecutors' when discussing the murder trial in Fargo, North Dakota - and therefore the average reader would make a distinction between the description of 'Canadian officials' and 'prosecutors'.

"Furthermore, even if I was wrong in that interpretation, which I submit I am not, and the reader thought that 'Canadian officials' meant 'Canadian prosecutors' - the paragraph is true and not defamatory of the Canadian prosecutors at all, but rather an indictment of the Prosecutor in North Dakota for using evidence which was not presented at the Extradition hearing and was contrary to the evidence used in Canada.

"The 5th to 8th paragraphs deal with the Extradition proceedings and I do not believe there is any need to consider them.

"The last column of the article, being Paragraphs 9 and 10, would be read by the reader as dealing with flaws in our Extradition laws, and Grant gives as an example that the U.S. did not use Myrtle Poorbear as a witness in the U.S. and yet used her affidavit in Canada, and therefore he attempted to show that there was a flaw in our Extradition laws because our Extradition laws do not permit cross-examination of affidavits.

"(6) Finally, the words that the Plaintiff complains about: 'accomplice' - 'miscarriage of justice' - 'government misconduct - and 'complicit' - do not and never meant to refer to the Canadian Prosecutor at the Extradition proceedings. The word 'accomplice' is modified by 'Ottawa' and the words 'miscarriage of justice' were Mr. Grant's comments and opinion upon the fact of Mr. Peltier's conviction. The word 'misconduct' (used twice) referred to the U.S. misconduct, because of the modifying words 'this' and 'by the American state'. The word 'complicit' is referring, as previously stated, to the Canadian Government and its Justice Department which the average reader would take to be 'Ottawa' and 'Basford' because of the headline and the second paragraph of the article.

"(7) The whole tenor of the article and the way the average subscriber to the Vancouver Sun would read it, is that it was an attack on 'Ottawa' and 'Mr. Basford' allowing extradition of Mr. Peltier when the U.S. Government did not use Myrtle Poorbear as a witness because they knew she was unreliable, but allowed us in Canada to use her affidavit at extradition proceedings - and that

> therefore 'Ottawa' and 'Mr. Basford' assisted in Mr. Peltier's conviction in the United States, a conviction which in the opinion of Mr. Grant, was a 'miscarriage of justice'."

35 With respect to the above-quoted versions, while this is a "borderline" case, I am unable to say that the plaintiff's version is correct and the other versions are incorrect. I hold, therefore, that the plaintiff, on the balance of probabilities, has not proved that he has been identified in the article or that the article is capable of being, or in fact is, defamatory of the plaintiff.

36 My reasons for so holding are as follows:

(1) The plaintiff is not named in the article.
(2) The headline of the article is entitled "Ottawa 'An Accomplice' In Conviction" and the reader's mind would be directed to Ottawa and not Vancouver.
(3) The opening words of the article refer to the "Canadian government" as being an accomplice of the "United States government" and not to persons.
(4) The second paragraph of the article refers to the Minister of Justice.
(5) The fourth paragraph refers to "Canadian officials" and not to prosecutors, but does use the word "prosecutors" when referring to lawyers.
(6) While para. 3 of the article is open to the interpretation that the Canadian government was involved in misconduct from the very beginning through the involvement of "its justice department", as represented by the plaintiff, I do not think an ordinary reader would reach that conclusion. "Complicit" means "being an accomplice" and would lead the reader to cast his mind back to the headline where "Ottawa" was named as an "accomplice".
(7) The last report in The Sun in reference to the Peltier case was on the occasion of Peltier's surrender to the United States authorities. That report, dated 18th December 1976, attacked the Minister of Justice and did not mention the plaintiff's name.
(8) The word "inception" does not necessarily mean that the Canadian government was involved from the "inception". It can, and in the context does, mean "United States" government misconduct from the "inception" and Canadian government misconduct thereafter. This is particularly so when one has regard to the words "this misconduct by the American State".
(9) While a lawyer always imports knowledge as an essential ingredient in determining whether or not a person is an accomplice, the average member of the public might not concern himself with this aspect of the matter. The ordinary reader would probably reach the conclusion that "complicit" meant simply "using evidence supplied by the F.B.I." He would not reach the conclusion, as a criminal lawyer probably would, that "complicit" meant the use of "fabricated" evidence with knowledge of "fabrication".
(10) The ordinary reader would not jump to the conclusion from the general and

vague language contained in para. 3 that the plaintiff had been guilty of a criminal offence. Surely a right-thinking citizen would not jump to such a conclusion in the absence of clear and specific language.

(11) The plaintiff acted not as a representative of the Department of Justice but as counsel for the United States government.

37 With reference to the evidence given by the witnesses for the plaintiff, I do not suggest that they do not honestly believe that the language used referred to the plaintiff. I do, however, believe that they were so close to the plaintiff that insofar as they were concerned the Peltier case was a contest between the plaintiff and Peltier. They read the article in this light whereas the average reader, even with knowledge that the plaintiff prosecuted Peltier and was normally employed by the Department of Justice, would probably approach the matter in the context of the article as a whole (as an attack on the Minister of Justice and our extradition laws).

38 It is, I think, common for professional persons and their close friends to become so emotionally involved in matters of this kind that they infer from newspaper reports the very worst inferences that can be drawn from these reports. They see things through their eyes which do not even occur to the average reader. I think this is a natural reaction, and I do not criticize the plaintiff or his witnesses. I do say, however, that because the plaintiff and his witnesses honestly believe the language used to be defamatory this cannot in law make the language defamatory or referable to the plaintiff.

39 I believe this case falls to be decided by reference to Knupffer v. London Express Newspaper Ltd., [1944] A.C. 116, [1944] 1 All E.R. 495 (H.L.). The [All E.R.] headnote and editorial note of that case read as follows:

> "The respondents published an article in a newspaper from a correspondent abroad adversely commenting on the activities of an association of certain Russian political refugees called Mlado Russ or Young Russia in terms which, it was admitted, would have been defamatory if written of a named individual. The association had a very large membership in other countries but that of the branch in the United Kingdom was only some 24 members. The appellant who resided in London was the active head of the United Kingdom branch of the association and it was contended that the article reflected upon him personally. The respondents contended that the article was an attack on the general character and activities of the association and not on the appellant. There was in fact no reference in the article to the appellant nor to the branch of the association in the United Kingdom:
>
> "HELD: when defamatory words are written or spoken of a class of persons it is not open to a member of that class to say that the words were spoken of him

unless there was something to show that the words about the class refer to him as an individual. In this case there was nothing to show that the words referred to the appellant as an individual and his claim, therefore, failed.

"Decision of Court of Appeal ([1942] 2 All E.R. 555) affirmed.

"EDITORIAL NOTE. In the lower courts there was a considerable discussion based on the decision in E. Hulton & Co. v. Jones, [1910] A.C. 20 (H.L.). It was said that, after witnesses had said that they had read the article as referring to the plaintiff and the trial judge had accepted that evidence, the court could not hold that the words could not refer to the plaintiff. This aspect of the case is passed over almost in silence by the House of Lords, though it seems that their Lordships were not satisfied with the precise terms in which the question to the witnesses was framed. Whether an individual member of a group can complain of defamatory matter written about the group is to be decided by asking two questions. The first is one of law and is whether the words are capable of referring to the plaintiff. The second is one of fact and is whether reasonable people who know the plaintiff think the words refer to him. There is no particular rule governing the case except the primary rule in all cases of defamation that the plaintiff must show that the words complained of were published of himself."

40 See the judgment of Viscount Simon L.C. at p. 497, reading as follows:

"It will be observed that Le Fanu v. Malcomson (1848), 1 H.L. Case 637, 9 E.R. 910 (H.L.), was a case where there were facts pointing to the particular factory which was meant to be referred to, though the article spoke in more general terms of a factory in Waterford. In the present case the statement complained of is not made concerning a particular individual, whether named or unnamed, but concerning a group of people spread over several countries and including considerable numbers. No facts were proved in evidence which could identify the plaintiff as the person individually referred to. Witnesses called for the appellant were asked the carefully framed question, "To whom did your mind go when you read that article?" and they not unnaturally replied by pointing to the appellant himself. But that is because they happened to know the appellant as the leading member of the society in this country, and not because there is anything in the article itself which ought to suggest even to his friends that he is referred to as an individual.

"There are two questions involved in the attempt to identify the appellant as the

> person defamed. The first question is a question of law - can the article, having regard to its language, be regarded as capable of referring to the appellant? The second question is a question of fact, namely, does the article in fact lead reasonable people, who know the appellant, to the conclusion that it does refer to him? Unless the first question can be answered in favour of the appellant, the second question does not arise, and where the trial judge went wrong was in treating evidence to support the identification in fact as governing the matter, when the first question is necessarily, as a matter of law, to be answered in the negative."

41 See, also, the judgment of Lord Porter at p. 499, as follows:

> "The question whether the words refer in fact to the plaintiff or plaintiffs is a matter for the jury or for a judge sitting as a judge of fact, but as a prior question it has always to be ascertained whether there is any evidence upon which a conclusion that they do so refer could reasonably be reached. In deciding this question the size of the class, the generality of the charge and the extravagance of the accusation may all be elements to be taken into consideration. But none of them is conclusive. Each case must be considered according to its own circumstances."

42 Reference may also be made to Morgan v. Odhams Press Ltd., [1971] 1 W.L.R. 1239, [1971] 2 All E.R. 1156 at 1162 (H.L.), where Lord Reid sand:

> "Six witnesses, of whom three were or had been in the police force and three owned businesses, said that they thought that this article referred to the plaintiff. So on what ground is it to be said that the article could not reasonably be so understood, and that there was no case to go to the jury? The fact that a number of honest witnesses formed a certain view is by no means conclusive. It is only an item of evidence. It is for the judge to decide whether on the evidence an ordinary sensible man could draw an inference that the article referred to the plaintiff. Much must depend on the degree of deliberation and concentration with which that sensible man must be supposed to have read the article. If he must have done as a lawyer or a man of business would do in scrutinising an important document to discover its meaning, he might reach one result. If he should only be supposed to have read his daily newspaper in the way in which ordinary people generally do read it he might reach a different result."

43 See also the judgment of Lord Guest at pp. 1176-77:

> "The question is one purely of identity. 'Are the words capable of being understood to refer to the plaintiff?' In my view, a somewhat more exacting test should be predicated where the question is one of identity. It is not sufficient for

> the reader to say 'I wonder if the article refers to Johnny Morgan' nor is pure speculation sufficient. Nor is it sufficient that a reasonable person believes that the words refer to the plaintiff. The test is an objective one. The ordinary reader must be fair-minded and not avid for scandal. He must not be unduly suspicious. The ordinary reader must have rational grounds for his belief that the words refer to the plaintiff. In my view, this requirement is necessary for the purpose of preserving the freedom of speech and of preventing newspapers being further liable for torts which they quite unwittingly have committed."

44 See, also the judgment of Lord Donovan at p. 1180:

> "The plaintiff's argument is supplemented by this allied contention: that proprietors of newspapers such as The Sun know that their readers are apt to jump to conclusions; and if they do so, so much the worse for the newspaper. But this is the very situation in which the law, as it stands at the moment, steps in to protect not merely newspapers but any writer or publisher, for it imposes an objective test. It requires that any conclusion that they have libelled somebody must be a reasonable conclusion capable of being drawn by reasonable people, and that mere jumping to conclusions will not do. And the inference of guilt from mere association is the hall-mark of the unreasonable man."

45 In summary, I hold that as a matter of law and fact the article does not identify the plaintiff. I hold also that the article is not capable in law of being defamatory of the plaintiff and is not in fact defamatory of the plaintiff.

46 It is not necessary for me to deal with the defence of qualified privilege, and I refrain from so doing.

47 If I were wrong in holding that the plaintiff has not been libelled, I would fix damages in the sum of $1,000. It has been suggested by counsel for the plaintiff that, if I make a low award of damages, so to do will be an insult to the plaintiff. I do not agree with this submission. The reason for not making a larger award is based on the fact that the plaintiff's reputation has not been damaged to any extent. The plaintiff was not named in the article. There was no evidence of malice or intent to injure. The group who would be aware that the plaintiff acted as counsel in the Peltier case must be very small indeed. The plaintiff has earned his good reputation over the years and, at the risk of repetition, he is an honourable man, in every sense of that word, and a credit to the legal profession. The court and all but a miniscule segment of the public would be aware of these facts.

48 In conclusion, I feel bound to say that, in my opinion, cases of this kind should only be brought in clear cases. The members of the legal profession, who engage in the adversary process, by reason of association with their clients must be prepared to accept some criticism. They must be slow to take offence and should not, except in the plainest of cases, bring themselves to believe that criticism of their client, employer or cause is directed at them in a personal way.

49 While all journalists are required by the nature of their calling and by law to act in a responsible manner, where there is no evidence of malice or intent to injure, a too restrictive analysis of press coverage will have a tendency to prevent the public from being fully informed. The courts will be careful to protect all persons from unfair or untruthful attacks by the press, but will be careful not to muzzle the press by drawing unreasonable inferences from the language used in articles such as the one under consideration here.

50 In the particular circumstances of this case, as at present advised, I do not propose to make any order as to costs. As the matter of costs has not been argued, if counsel wish to make a submission on this issue they may arrange to speak to the matter.

51 The action is dismissed.

qp/s/qlkam/qllqs