DEALING WITH THE DRAGON: WHAT SAFEGUARDS ARE REQUIRED TO MAKE AN EXTRADITION TREATY BETWEEN CANADA AND THE PEOPLE’S REPUBLIC OF CHINA CONFORM TO CANADIAN EXTRADITION LAW?

by

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Abstract

Canada does not have an extradition treaty with China. Concerns over the Government of China’s use of the death penalty and use of torture as well as the lack of procedural fairness in the Chinese criminal justice system present obstacles to the creation of an extradition treaty. Despite the problems with the Chinese legal system, Canada sees fit to trade extensively with China and continues to develop other treaty relationships with the Chinese Government. The Chinese Government wants extradition with Canada, in part to further its massive anti-corruption schemes including Operation Fox Hunt and Operation Skynet.

This paper examines Canadian extradition law in the context of possible extradition from Canada to China. While not advocating for or against a Canada-China extradition treaty, the paper considers the current state of the Chinese criminal legal system relevant to extradition law and examines the primary problems and legal reforms undertaken by the Chinese Government to its Criminal Procedure Law and judiciary. From the perceived problems that would hinder or prevent extradition from Canada to China, safeguards are proposed to allow the Minister of Justice and reviewing courts the ability to respond to an extradition request from China on terms that do not offend Canadian principles of justice or the protections established by the Charter of Rights and Freedoms. These safeguards, which derive from diplomatic assurances, current extradition treaties and immigration law, are examined and set out in a proposed Canada-China extradition treaty that provides a framework from which to evaluate extradition between the countries.
Preface

This thesis is the original, unpublished and independent work of John M.L. Gibb-Carsley.

The views expressed in this paper are the author’s and cannot be attributed to the Department of Justice or the Government of Canada.
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<thead>
<tr>
<th>Acronym</th>
<th>Description</th>
</tr>
</thead>
<tbody>
<tr>
<td>BCCA</td>
<td>Court of Appeal for British Columbia</td>
</tr>
<tr>
<td>BCSC</td>
<td>British Columbia Supreme Court</td>
</tr>
<tr>
<td>CAT</td>
<td><em>Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment</em></td>
</tr>
<tr>
<td>CPC</td>
<td>Communist Party of China</td>
</tr>
<tr>
<td>CPL</td>
<td><em>Criminal Procedural Law</em> (China)</td>
</tr>
<tr>
<td>EGO</td>
<td>Evidence gathering order</td>
</tr>
<tr>
<td>MLA</td>
<td>Mutual Legal Assistance</td>
</tr>
<tr>
<td>MLA</td>
<td>Minister of Justice (Canada)</td>
</tr>
<tr>
<td>ONCA</td>
<td>Court of Appeal for Ontario</td>
</tr>
<tr>
<td>RETL</td>
<td>Re-education through labour</td>
</tr>
<tr>
<td>ROC</td>
<td>Record of the Case</td>
</tr>
<tr>
<td>SCC</td>
<td>Supreme Court of Canada</td>
</tr>
<tr>
<td>SPC</td>
<td>Supreme People’s Court (China)</td>
</tr>
</tbody>
</table>
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I am grateful for the wise and gentle advice of Professor Pitman B. Potter throughout this process. Professor Potter made my work better and I greatly appreciate his depth of subject matter knowledge and his supportive and kind manner.

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Dedication

To my parents, Natalie and John T.B. Gibb-Carsley, who prepared and inspired me for a lifelong love of exploring the world and ideas.
DEALING WITH THE DRAGON: What safeguards are required to make an extradition treaty between Canada and China conform to Canadian extradition law?

When there is trust, no proof is necessary. When there is no trust, no proof is possible.¹

Chinese proverb

1.0 Introduction

China’s weak or non-existent rule of law, use of torture to force confessions and lack of transparency² has created a criminal justice system that is plagued with procedural unfairness.³ China executes more people than all other countries in the world combined by far.⁴ There are allegations levelled against China that it murders and harvests organs from imprisoned Falun Gong practitioners to sell to transplant tourists for profit.⁵ Given these conditions related to the Chinese criminal justice system, it may not be surprising that the Canadian Government does not have an extradition treaty with the Chinese Government.

⁴ Amnesty International, “Death Sentences and Executions 2014”, Amnesty International (March 31, 2015), online: <http://www.amnestyusa.org/research/reports/death-sentences-and-executions-2014>. While China does not publish death penalty data because it is considered a state secret, Amnesty International estimates that thousands are executed in China every year. For perspective, Amnesty International reports that in 2014, at least 607 known executions were carried out by all other countries, excluding China, combined.
⁵ David Matas & Torsten Trey, State Organs Transplant Abuse in China (Woodstock: Seraphim, 2012).
However, Canada sees fit to trade extensively with China. The Canadian Government entered into an economic treaty with the Government of China in October, 2012, that is second only to Canada’s economic engagement in the North American Free Trade Agreement. In the criminal law context, Canada and China are partners in a bilateral agreement to gather and share evidence in criminal matters for use in criminal proceedings in each country. The Chinese Government has expressed desire to enter into extradition treaties with Western countries. Fuelling China’s interest in extradition may be its attempt to redress the huge corruption problem that has seen approximately US$120 billion embezzled by approximately 10,000 officials who have fled China between 1990 and 2008. Recent attempts to root out corruption through programmes such as Operation Fox Hunt and Operation Skynet demonstrate the Chinese Government’s appetite to repatriate fleeing criminals and stolen funds.

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6 In 2011, China was Canada’s 3rd largest market for exports (3.74%) after the U.S. (73.71%) and the U.K. (4.2%) and the 2nd largest source of imports to Canada (10.8%) after the U.S (49.52%): Government of Canada, Foreign Affairs and International Trade (March 17 2012), online: <http://international.gc.ca/economist-economiste/performance/state-point/state_2012_point/2012_5.aspx?lang=eng&view=d>.
8 Beth Hong, “Canada-China FIPPA agreement may be unconstitutional, treaty law expert says”, Vancouver Observer (October 17, 2012), online: <http://www.vancouverobserver.com/politics/canada-china-fippa-agreement-unconstitutional-treaty-law-expert-says>.
By not having an extradition treaty with China, does Canada risk becoming a safe haven for fleeing Chinese criminals wishing to escape Chinese justice? What are the legal obstacles to Canada entering into an effective extradition treaty with China? This paper explores the legal issues in respect of an extradition treaty between China and Canada given the current extradition regime in Canada and argues that, given sufficient safeguards in a treaty, Canada could extradite individuals to China in conformity with existing Canadian extradition law. This paper does not advocate either for or against the creation of an extradition treaty with China and does not evaluate whether or not Canada ought to have a treaty with China. Instead, the argument builds upon the premise that, given the increased economic cooperation and engagement between Canada and China, and given China’s desire for an extradition treaty with Canada, an extradition treaty between the two countries is possible, if not likely, in the future.

Optimistically, underlying this thesis is a belief that Canada’s engagement with China might provide a positive influence upon Chinese criminal law, because compliance with the requirements of an extradition request to Canada necessitates conformity to Canadian norms of human rights and procedural fairness. Through exposure, the Chinese Government might recognize that a successful extradition request must not rely on torture derived evidence, must not seek the death penalty and must include assurances that the person sought will be treated fairly and humanely once he or she is returned to China.

Realistically, this paper acknowledges the limited impact in shifting Chinese policies on procedural fairness, human rights and the criminal justice system that engagement could achieve. Accordingly, the primary objective of this paper is to raise
the principal considerations in respect of what is required to develop an effective Canada-China extradition treaty.

1.1 **Structure of the Paper**

This paper is developed in seven chapters. After the introduction set out in Chapter 1, Chapter 2 provides a brief explanation of methodological choices and scope limitations of the research. Chapter 3 sets out a general overview of the procedures and issues at play in Canadian extradition law. The focus of Chapter 3 is upon the final stage of extradition in which the Minister of Justice (the “Minister”), as reviewed by appellate courts, determines whether or not to surrender a person sought for extradition. Although there are many factors that the Minister may consider in determining whether or not to order surrender, as will be discussed in detail below, analysis is limited to those factors that are most likely to arise in the case of extradition to China, namely the use of the death penalty, procedural fairness, use of torture and prison conditions.

Chapter 4 examines possible motivations of Canada and China to enter into an extradition treaty. This chapter also looks at Canada’s concerns of treaty engagement with China in extradition. Chapter 5 provides a brief history of the development of the Chinese legal system in order to provide context for the current problems and reforms at play in the Chinese criminal justice system. Chapter 6 posits that, despite the formal reforms to the Chinese criminal legal system, problems still exist, including alleged

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13 This includes, if leave is granted, ultimate review by the Supreme Court of Canada.
14 The *Extradition Act* uses the term “person sought” for the person sought for extradition. Prior to revisions to the *Extradition Act* in 1999, the legislation used the terminology “fugitive”. “Requesting state” and “requested state” are used to define the country making and receiving the request for extradition, respectively.
human rights and procedural fairness violations. The analysis of problems with the Chinese legal system targets the reality of the criminal justice system and its treatment of an accused because, despite the reforms trumpeted by the Chinese Government as improvements, there is a disjunction between formal legislative reforms and implementation of these reforms in practice.15

Chapter 7 provides a case study of the cooperation between the Government of Canada and the Government of China in the investigation and prosecution of the 2012 murder of Amanda Zhou, under the Treaty Between Canada and the People’s Republic of China on Mutual Legal Assistance in Criminal Matters16 (the “Canada-China MLA Treaty”). This case study illustrates issues that arise when the Canadian and Chinese legal systems interact. Details of the Chinese prosecution that occurred after the cooperation between the countries are also informative in reminding one that the Chinese criminal system is vulnerable to corruption and political influence.

Chapter 8 imagines what safeguards are needed in an extradition treaty between Canada and China to provide sufficient protection to Canada to allow the Minister to surrender an individual to China in compliance with the Charter.17 Safeguards developed in this chapter are implemented in a proposed Canada-China extradition treaty set out in Appendix A. The purpose of the proposed treaty is to illustrate that extradition to China could occur in a manner that would not be “unjust or oppressive” or “shock the

conscience” of Canadians. The proposed treaty incorporates safeguards aimed at protecting an individual’s rights measured against both Canadian and international human rights norms. Further, language for the proposed safeguards is found in clauses in extradition treaties between China and other nations as well as in diplomatic assurances provided by China to Canada in immigration cases where the Government of Canada has ordered a person deported from Canada to China.

\[18\] Under the *Extradition Act*, the Minister must refuse to order the surrender of a person sought if to do so would be unjust or oppressive or shock the conscience of Canadians. See: *Lake v. Canada (Minister of Justice)*, 2008 SCC 23.

\[19\] The concepts of deportation and extradition are often confused. In basic terms, deportation is the expulsion of a person from a country for some reason of domestic ineligibility and is based on the *Immigration and Refugee Protection Act*, S.C. 2000, c. 27. Extradition is the surrender of a person to a foreign country at the request of the foreign country. Extradition and deportation are governed by different legislation and have different legal procedures.
2.0 Methodology

2.1 Scope of Study

This paper examines only the Canadian side of an extradition request made by the Government of China to the Government of Canada. In other words, the analysis is limited to requests by the Government of China for the extradition of an individual who is in Canada and being sought by China for extradition. Extradition treaties and the Canadian Extradition Act, S.C. 1999, Chap. 18 (as amended) (the “Extradition Act”) contemplate extradition requests both made by other countries to Canada and by Canada to foreign countries. An examination of Canadian extradition requests to China is beyond the scope of this paper. Further, the process of making an extradition request to another country is a political action that does not engage the Canadian court system.\(^{20}\) The focus upon how the Minister and the Canadian courts address an extradition request provides an opportunity to examine the friction between the political desire to assist a foreign government to bring criminals to justice against maintaining respect for Canadian sovereignty and Charter values.

2.2 Gaps in Research Regarding Extradition from Canada to China

This paper attempts to fill a gap in the research concerning Canada’s extradition relationship with China. A review of the literature indicates that while there is doctrinal research on principles of Canadian extradition law\(^ {21}\) and volumes of research regarding

\(^{20}\) Pursuant to ss. 77 and 78 of the Extradition Act, a Canadian request to a foreign state for an individual to be extradited to Canada is made by the Federal Minister of Justice at the request of the Attorney General of Canada or the Attorney General of the province responsible for the prosecution of the case.

the state of the Chinese judicial system, there is a dearth of literature considering the Canadian relationship with China with respect to extradition. This paper’s objective is to examine this relationship thereby making a meaningful contribution to knowledge.\textsuperscript{22} A further goal is to provide a resource for Canadian policy makers and legislators as to what issues must be considered in respect of treaty engagement between Canada and China in extradition.

2.3 Assumptions

This paper is founded on the assumption that extradition from Canada to China under the current *Extradition Act* and the standard language of Canadian extradition treaties\textsuperscript{23} would not be viable. This assumption is based on the notion that given the allegations levelled against China in respect of problems with its criminal justice system, without further safeguards contained in an extradition treaty, a person could not be extradited from Canada to China without offending *Charter* values.

As will be discussed in detail below, each extradition request is evaluated on its own merits, first by the Minister in deciding to approve the request and then by the courts in determining if the prerequisites under the *Extradition Act* are satisfied. Accordingly, there could be situations in which a specific extradition from Canada to China would not


\textsuperscript{23} In this paper, “standard extradition treaty” refers to the clauses contained in the extradition treaties Canada has with the United States and other western countries as well as the clauses set out in the *United Nations Model Treaty on Extradition*, A/RES/45/116 68th Plenary Meeting 14 December 1990 45/116. A review of the clauses of these treaties indicates a similarity between the treaties and a general use of standard clauses.
offend Charter values. Further, diplomatic assurances could be added to a specific extradition request to provide the Minister and the reviewing courts with comfort that extradition could occur. However, this paper addresses codification of diplomatic assurances in a treaty to address extradition from Canada to China generally.

Another assumption underlying this paper is that there is merit in entering into extradition treaties, even at the risk of subordinating domestic sovereignty. Engagement in international treaties always risks the erosion of domestic sovereignty. The risk is heightened when the treaty partner holds a different political and legal system. Arguably, Canada and China are on opposite ends of the political spectrum and it is fair to question what benefit is served by Canada’s engagement with China in extradition. The basis of exploring engagement over isolation is twofold. First, international crime and criminals do not respect international boundaries, except when it is to their own benefit.24 As such, cooperation and coordination of law enforcement between countries can provide an effective tool for combating crime.

The second argument favouring exploring a treaty relationship between Canada and China is that there are greater opportunities to modify behaviour through engagement than through isolation. Shifting practices through cooperation is stated as one of the Government of Canada’s goals in engaging with China in economic matters. According to the Department of Foreign Affairs and International Trade, one of Canada’s four main policy goals of engagement with China, in addition to the obvious objective of

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strengthening economic ties, is to “work with China towards China’s greater adherence to internationally accepted standards on human rights and the rule of law.”

It may be naïve to believe that Canada’s engagement with China in extradition may have a positive impact on China’s respect for human rights within its criminal justice system. However, in the words of David Mulroney, Canada’s former Ambassador to China, human rights dialogue with China can be likened to “fragile levers to nudge and ultimately move the imposing rock of Chinese policy and practice.” Applied to a consideration of extradition with China, Mulroney’s metaphor suggests that while one act of China’s compliance with Canadian extradition law may not improve the Chinese legal system, there may be long-term positive impacts to China’s respect for human rights, restraint in the use of the death penalty and increased procedural fairness, if the Chinese Government must repeatedly conform to Canadian standards as set out in an extradition treaty.

A final assumption underlying this paper is that ultimately there will be some form of an extradition treaty between the Government of Canada and the Government of China. As such, the purpose of the research is to be prepared for the eventuality of engagement in extradition between Canada and China, by considering the issues that will arise and providing ideas as to how those issues might be addressed.

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26 David Mulroney, Middle Kingdom Middle Power (Toronto: Allen Lane, 2015) at 218.
2.4 Avoiding Normative Assessments

As much as possible, this paper attempts to remain agnostic as to whether Canada and China should enter into an extradition treaty. While prescriptive to the extent it recommends safeguards as a solution for making an extradition treaty between Canada and China viable, normative judgments as to whether an extradition treaty between Canada and China would be a positive or negative development for Canada are avoided.

The Chinese Government’s current record on human rights does not encourage one to advocate for greater engagement with the regime by the Canadian Government. However, as will be discussed below, Canada and China have a growing economic relationship and Canada appears to make every effort to increase trade with China. Ignoring the reality that Canada already has a close relationship with China would be hypocritical and, as such, this paper takes the approach that an extradition relationship with China should be examined.

2.5 Defined Research Terms

This thesis asks which “safeguards” are required so that an extradition treaty between Canada and China “conforms to Canadian extradition law.” These concepts require definition. This paper defines “Canadian extradition law” to mean the Canadian jurisprudence and statutes governing extradition in Canada. While it is the Minister who makes the decision to authorize an extradition request based on the constraints placed on him or her by the Extradition Act and the relevant treaty, in reality, it is through the

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27 The concept of approaching research from an “agnostic” perspective was brought to my attention by Professor Emma Cunliffe, University of British Columbia.
jurisprudence that the interpretation and elucidation of the concepts and principles of Canadian extradition law are established.

This paper considers “conforms to” to mean that the treaty will provide specific safeguards that will guide the Minister in approving a request for extradition and for ordering surrender that will withstand court challenge. In other words, an extradition request from China will conform to Canadian extradition law if the surrender order is either unchallenged or accepted as reasonable by the appellate courts.

“Safeguards” refer to be clauses in the proposed Canada-China extradition treaty that will address perceived concerns of the Minister and the Canadian courts regarding the state of the Chinese criminal justice system. It is assumed that without such safeguards, extradition from Canada to China could not occur. For example, if there is a concern that if returned to China through extradition an individual will not be provided with legal counsel, a safeguard in the proposed treaty would be that a person sought will be provided with the opportunity to speak with a lawyer upon return to China or provided with an opportunity to speak to a Canadian consular official to arrange for the appointment of a lawyer.

2.6 Difficulties of Research Regarding the Chinese Legal System

The control of the Chinese Government over dissemination of information and its lack of transparency with respect to government matters makes gathering of accurate information regarding China difficult for any researcher.²⁸ Given that I am not Chinese nor do I speak Chinese, I have the additional impediment of not being able to access

²⁸ Lawyers Committee for Human Rights, supra note 2 at 65.
information regarding the Chinese legal system in the Chinese language. According to Robert Morris, my inability to speak the language of the subject matter of my research presents a serious and perhaps insurmountable obstacle because I will not be fully credentialed in all aspects of my research.\textsuperscript{29} Morris believes that if one is not expert in each aspect of the research subject matter the work is “immediately suspect in the global scholarly community.”\textsuperscript{30}

The purpose of my research regarding China, however, is to determine what perceptions will be accepted by the Canadian Government and Canadian courts regarding the state of the Chinese legal system as opposed to researching the nuances of the system itself. Put another way, I am interested in the arguments that will be raised in Canadian courts and considerations made by the Minister regarding the perceived state of the Chinese legal system.

The source of information used by Canadian courts and the Minister would most likely be human rights observers and scholars of Chinese law writing for an English language audience. Therefore, I believe my lack of Chinese linguistic credentials does not prevent credible research into the issues of the Chinese legal system that are relevant to extradition between Canada and China.

\textbf{2.7 Chapter Conclusion}

This paper limits its scope of research, as was defined in this chapter, to protect it from oversimplifying what are expansive areas of law that include an analysis of foreign

\textsuperscript{29} Morris, \textit{supra} note 22 at 31.

\textsuperscript{30} \textit{Ibid} at 76.
law. These limits are important because the subject matter has potentially serious consequences. If problems with the Chinese legal system are minimized, a person extradited to China from Canada could face torture or execution. If problems are exaggerated or the efforts of China to reform are dismissed as meaningless, then an extradition treaty might not be further explored resulting in criminals escaping justice and missing an opportunity to better combat international crime.
3.0 Overview of Canadian Extradition Law

3.1 Introduction

The purpose of this chapter is to describe the current state of extradition law in Canada with a focus on considerations of the Minister and reviewing court during the surrender phase of extradition from Canada. The surrender phase is the final of the three-part extradition process and requires the Minister to determine whether or not the person sought for extradition will be sent to the requesting state. In making this decision, the Minister considers if surrender would be “unjust or oppressive” or contrary to the Charter. A full analysis of the complexities of extradition from Canada is beyond the scope of this paper. However, an understanding of the fundamental principles governing Canadian extradition law is necessary to provide a framework for an extradition request from China to Canada.

3.2 Overview of the Extradition Process

Extradition law governs the transfer of a person sought from one country to another country for purposes of criminal prosecution or to impose or enforce a sentence that has not been completed. Under customary international law, states have no obligation to surrender an individual fleeing from justice to the country from which he or she fled. Further, principles supporting extradition do not exist at common law. As such, extradition between nations is a creature of international treaties as implemented by 31 The language in the Extradition Act is “person sought” for the person sought for extradition. Prior to revisions to the Extradition Act in 1999, the previous legislation used the terminology “fugitive”. “Requesting state” and “requested state” are used to denote the country making the request for extradition. As this paper is concerned with requests made to Canada, the “requested state” refers to Canada and the requesting state refers to a foreign country.

32 Sections 3, 15 and 29 of the Extradition Act.


34 Ibid.
domestic law. In Canada, the operative federal legislation for extradition is the *Extradition Act*.

Inherent in extradition is a tension between honouring commitments to fight international and transnational crime\(^{35}\) and maintaining respect for domestic values and sovereignty. Extradition brings into conflict differences between countries’ political structures, legal systems and human rights standards. The difficulties associated with prosecuting transnational crime are described in a judgment by the United States Court of Appeal, by Wood J.A. as follows:

> The complexities inherent in transnational criminal law enforcement can be vexing: ordinary tasks like securing the presence of the defendant, collecting evidence, and enforcing a judgment are transformed into hurdles that are difficult, or impossible to pass.\(^{36}\)

Canada currently has bilateral extradition treaties with 51 countries and an additional 30 countries are designated as extradition partners.\(^{37}\) An extradition request does not need to be based on a treaty because the *Extradition Act* permits Canada to enter into a “specific agreement” for the purpose of giving effect to an extradition request for a particular case.\(^{38}\) However, the absence of a treaty arguably reduces the frequency of extraditions because there is no framework for the request and the certainty of the process

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\(^{35}\) Robert Currie, *International & Transnational Criminal Law* (Toronto: Irwin: 2010) at Chapter 2 where Mr. Currie explains the difference between “international crime” as crimes that offend international law versus “transnational crime” as criminal actions that occurs across borders.

\(^{36}\) *Re Hijazi*, 589 F.3d 401 (7th Cir. 2009).

\(^{37}\) Government of Canada, Heritage Canada, “Appendix 1: Bilateral Extradition Treaties”, online: <http://www.pch.gc.ca/eng/1356023800347/1356023991852>. Please note: “Designated extradition partners” are members of the Commonwealth or countries added to the schedule of the *Extradition Act*, and are included as extradition partners. (s. 9 of the *Extradition Act*.)

\(^{38}\) s. 10 the *Extradition Act*. 
is diminished. Further, the lack of a treaty does not provide a guarantee of future reciprocity in the same way as does a bilateral extradition treaty.\textsuperscript{39}

A concept that underpins extradition in Canada is known as conduct-based “double criminality,” which means that the underlying offending conduct for which extradition is sought, wherever it physically occurred, must be a crime in both the requesting state and in Canada.\textsuperscript{40} Further, the conduct, had it occurred in Canada, must attract certain minimum penalties for it to qualify as an extraditable offence.

There are three distinct Canadian procedural phases to extradition from Canada to a requesting state under the \textit{Extradition Act}. In general terms, the steps may be described as:

- the Minister reviews and authorizes (or refuses) the requesting state’s extradition request;

- a judge of a superior court of a province determines if there is sufficient reliable evidence from the requesting state that supports a \textit{prima facie} case that, had the conduct occurred in Canada, the matter could proceed to trial in Canada; and

- the Minister determines whether or not to surrender the person sought to the foreign state and, if so, whether any conditions should be attached to surrender.\textsuperscript{41}

The three phases of the Canadian side of a foreign request for extradition are examined below.


\textsuperscript{40} Canada (Justice) v. Fischbacher, 2009 SCC 46 [Fischbacher].

\textsuperscript{41} Ibid at paras 30-38.
3.3 The Minister Issues the Authority to Proceed

When a foreign state requests the extradition of an individual from Canada, it falls upon the Minister to review the request. The Minister must determine whether the conduct described in the request is criminal in the foreign jurisdiction. This satisfies the foreign side of the double criminality element. If that test is met and the conduct, had it occurred in Canada, would attract a punishment of greater than two years of incarceration, the Minister issues an authority to proceed (the “ATP”) that sets out the Canadian equivalent offences for which the person is sought for extradition. The offences are set out as Canadian criminal offences which almost always means that they reference the *Criminal Code of Canada*. The ATP authorizes the Attorney General of Canada in the province in which the person sought is thought to physically be located to apply for an arrest warrant and commence the extradition proceeding before a judge of the superior court of that province (the “Extradition Judge”).

3.4 The Committal Phase of Extradition: The Role of the Extradition Judge

The function of the Extradition Judge is to determine whether the domestic component of double criminality is met. The process is likened to a preliminary inquiry in Canadian domestic criminal proceedings, in that the Extradition Judge is tasked with determining whether the conduct underlying the foreign request would constitute a *prima

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42 Section 3 of the *Extradition Act* requires that the alleged offence carry a sentence of at least 2 years for the offence in the requesting state and 2 years under Canadian law (5 years under Canadian law, if under an *ad hoc*, non-treaty, extradition). However, these minimums can be reduced by treaty. For example, the Canada-United States extradition treaty provides that the minimum punishment need only be six months for the offence to qualify as extraditable.

43 Offences under environmental or tax statutes could also be referenced in the ATP as long as they also meet the minimum punishment requirement.

44 Section 16 of the *Extradition Act* provides for an application for an arrest warrant. Section 13 of the *Extradition Act* allows the Attorney General to apply for a provisional arrest warrant prior to the issuance of an ATP in circumstances of urgency.
A "prima facie" case against the person sought had it occurred in Canada.\footnote{Fischbacher, supra note 40 at para 35.} The Extradition Judge may enter into a “limited weighing” of the evidence presented by the requesting state to test its reliability and availability.\footnote{United States of America v. Ferras, 2006 SCC 33 [Ferras]. The limited weighing is interpreted to mean that the Extradition Judge may evaluate the threshold reliability of evidence and disregard that evidence if it is determined to be unreliable.} If the Extradition Judge concludes that there is a prima facie case that the alleged conduct, if committed in Canada, would amount to a criminal offence under Canadian law, the person sought is committed for surrender.\footnote{Fischbacher, supra note 40 at para 35.}

The evidence of the underlying conduct alleged by the foreign state is normally put before the Extradition Judge in a document called the Record of the Case (the “ROC”) which provides a summary of the evidence in the requesting state that is available for trial. Given that the extradition hearing is not a trial and is meant to be an expedited proceeding,\footnote{United States of America v. Dynar, (1997) 115 C.C.C. (3rd) 481, at para 122.} the rules of evidence are relaxed in a committal hearing as compared to a domestic criminal trial and may include evidence that is ordinarily inadmissible under Canadian law.\footnote{Section 32 of the Extradition Act.} The ROC must be certified by a judicial authority in the requesting state in order to be given a presumption of reliability and availability at the committal hearing. The certification process demonstrates the reliance on the good faith Canada places in its treaty partners.\footnote{Ferras at para 30.} If properly certified, the presumption of reliability will stand unless seriously challenged. For example, the extradition judge has the ability to disregard evidence in the ROC that is manifestly unreliable.\footnote{Ibid. The extradition judge may engage in a limited weighing of the evidence to determine the threshold reliability of evidence and disregard that evidence if it is determined to be unreliable or unavailable.}
The reliability of an ROC from China is relevant to the consideration of extradition from Canada to China. An ROC usually contains a summary of statements of police officers, victims, witnesses, named and unnamed co-operating informants and co-accused. There are documented cases of the use of torture by Chinese police authorities during interrogations which may be a result of a systemic problem of an acceptable social attitude toward the use of torture. With the spectre of torture as part of the criminal investigation apparatus in China, it is likely that a person sought will challenge the reliability of the evidence contained in the ROC. The issue of torture will be discussed below, but for context it is useful to understand how challenges to the reliability of the ROC could be brought in a committal hearing.

Challenging the reliability or availability of evidence in an ROC requires “a body of evidence that directly undermines the reliability of the evidence in the record of the case presented by the requesting state.” The evidence in an ROC is challenged on a case-by-case basis. The standard extradition treaties to which Canada is a party do not contain provisions that allow a refusal to act on a request based on the substance of the evidence submitted in support of the request. As will be discussed below in this paper’s consideration of proposed safeguards in a Canada-China extradition treaty, general scrutiny of the ROC by the Minister should occur given the allegations of the use of torture in China. As such, safeguards in a proposed treaty acknowledging that the evidence in the ROC was not obtained through coercion or torture are warranted.

The issue of allegations of torture by the requesting state at a committal hearing have been considered by Canadian courts. In *Czech Republic v. Zajicek*,\(^{54}\) Mr. Zajicek argued that the Czech authorities had obtained his confession through torture. The extradition judge refused to consider whether allegations of torture could result in a stay of proceedings because such consideration was properly left to the Minister. The Ontario Court of Appeal disagreed and in ordering a new committal hearing cited *United States of America v. Khadr*\(^{55}\) for the proposition that if the requesting state’s misconduct amounts to a violation of human rights. As such, to proceed with a committal hearing threatened the court’s integrity.\(^{56}\) In *Khadr*, on the basis that the requesting state illegally detained Mr. Khadr, the court ordered a stay of proceedings. The message in *Zajicek* and *Khadr* is relevant to consideration of extradition with China. Torture will not be tolerated in the Canadian extradition process and an allegation of serious abuse by the requesting state implicates the integrity of the Canadian court process during the committal hearing.\(^{57}\)

### 3.5 The Minister’s Decision Whether to Order Surrender

Madam Justice Charron of the Supreme Court of Canada aptly describes the post-committal phase of extradition as follows:

> Following committal, the matter reverts to the Minister who reviews the case in its entirety to determine whether to order the individual’s surrender and, if so, on what basis. This requires the Minister to determine whether it is politically appropriate and not fundamentally unjust for Canada to extradite the person sought.\(^{58}\)

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\(^{54}\) 2012 ONCA 99 [*Zajicek*].
\(^{55}\) 2011 ONCA 358 [*Khadr*].
\(^{56}\) *Ibid* at para 4.
\(^{57}\) *Zajicek*, supra note 54 at para 24.
\(^{58}\) *Fischbacher*, supra note 40 at para 36.
The Minister’s decision to surrender affects Canada’s diplomatic relations with the requesting state and is essentially political in nature.\textsuperscript{59} However, while surrender is a political decision and engages the Minister’s duty to fulfill Canada’s treaty obligations, surrender will not be ordered if to do so is fundamentally unjust. Defining the scope of the parameters of what would make surrender fundamentally unjust is established by the provisions of the \textit{Extradition Act}, the \textit{Charter} and courts’ interpretations of both. With respect to extradition from Canada to China, further examination of the specific areas of concern that will confront the Minister is necessary.

\subsection{3.5.1 Parameters Set by the \textit{Extradition Act}}

In making the surrender decision, the Minister is to consider submissions made by the person sought\textsuperscript{60} and any factors relevant to the specific case. The Minister is guided by ss. 44 and 46 of the \textit{Extradition Act} which sets limits upon her discretion to surrender by precluding surrender in certain circumstances. Section 44 of the \textit{Extradition Act} guides the Minister as to when surrender shall not be ordered as follows:

\textbf{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; or

(b) the request for extradition is made for the purpose of prosecuting or punishing the person by reason of their race, religion, nationality, ethnic origin, language, colour, political opinion, sex, sexual orientation, age, mental or physical

\textsuperscript{59} Sriskandarajah v. United States of America, 2012 SCC 79 at para 11.

\textsuperscript{60} Section 43 of the \textit{Extradition Act} allows the person sought to make submissions to the Minister of Justice regarding why the Minister should not be surrendered or if surrendered, requests for diplomatic assurances.
disability or status or that the person’s position may be prejudiced for any of those reasons.

**When Minister may refuse to make order**

(2) The Minister may refuse to make a surrender order if the Minister is satisfied that the conduct in respect of which the request for extradition is made is punishable by death under the laws that apply to the extradition partner.

The specific grounds enumerated in s. 44(1)(b) are relatively self-evident, but of particular importance to a request for extradition from China is “political opinion” given the enmeshed relationship between the Chinese Government, the police and judiciary. Further, s. 46(1)(c) of the *Extradition Act* provides guidance to the Minister that she shall refuse extradition if the conduct for which extradition is sought is a political offence or an offence of political character.

In China, the lack of independence of the police and the courts from the ruling Communist Party of China (CPC) means that the Minister must vigilantly evaluate Chinese requests for extradition to ensure that the request is not actually politically motivated and only disguised as a criminal investigation. The distinctions between a legitimate request and a politically motivated request may not always be clear in China given the integration and control exerted by the Chinese Government upon the police authorities and the judiciary.

In addition to the right of the Minister to refuse a request that is based specifically on the grounds that the prosecution is related to political opinion, s. 44(1)(a) of the *Extradition Act* requires that the Minister refuse to surrender should the surrender of the individual be “unjust or oppressive”.

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3.5.2 The Meaning of “Unjust or Oppressive” under s. 44 of the *Extradition Act*

The Minister shall refuse surrender if to do so would be “unjust or oppressive, having regard for all of the relevant circumstances.” The test of what is unjust or oppressive has been interpreted by the Courts to be equivalent to circumstances that would “shock the conscience” under *Charter* analysis. However, as explained by the Supreme Court of Canada in *Fischbacher*, the Minister must refuse to surrender even in the absence of a *Charter* breach if to do so would be unjust and oppressive. Madam Justice Charron describes the interaction of s. 44 of the *Extradition Act* with the *Charter* as follows:

In turn, as recognized by this Court in *Lake*, at para. 24, where surrender is found to be contrary to the principles of fundamental justice protected by s. 7 of the *Charter*, it will also be unjust and oppressive under s. 44(1)(a), and the Minister must refuse surrender. [...] However, it is worth emphasizing that s. 44(1)(a) entitles the Minister to refuse surrender even where no *Charter* breach is alleged or where an alleged breach is not established. Where a surrender is constitutional, the Minister retains “a residual discretion to refuse surrender as being unjust or oppressive in view of the totality of the relevant circumstances, including, but not limited to, the circumstances alleged to make surrender inconsistent with the principles of the *Charter.*”

In *United States v. Burns*, the Supreme Court of Canada held that the “shocks the conscience” terminology should not obscure the ultimate assessment of whether the extradition is in accordance with principles of fundamental justice. An extradition that violates the principles of fundamental justice will always shock the conscience. Given

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61 Section 44(1)(a) of the *Extradition Act.*
63 *United States v. Burns*, 2001 SCC 7 [*Burns*].
64 *Ibid* at paras 128-129.
that the *Charter* applies to all actions of government in Canada, the Minister’s decision to authorize an extradition request or order the surrender of a person sought is subject to *Charter* scrutiny. As such, the decision of the Minister to order surrender of the person sought will not survive judicial scrutiny if to surrender the person would “shock the conscience” of Canadians or otherwise offend the principles of fundamental justice.\(^{65}\)

Additional guidance regarding the review of the Minister’s decision and the circumstances the Minister must consider is provided by the Supreme Court in *Kindler*:

Thus the reviewing court must consider the offence for which the penalty may be prescribed, as well as the nature of the justice system in the requesting jurisdiction and the safeguards and guarantees it affords the fugitive. Other considerations such as comity and security within Canada may also be relevant to the decision to extradite and if so, on what conditions. At the end of the day, the question is whether the provision or action in question offends the Canadian sense of what is fair, right and just, bearing in mind the nature of the offence and the penalty, the foreign justice system and considerations of comity and security, and according due latitude to the Minister to balance the conflicting considerations.

In determining whether, bearing all these factors in mind, the extradition in question is "simply unacceptable", the judge must avoid imposing his or her own subjective views on the matter, and seek rather to objectively assess the attitudes of Canadians on the issue of whether the fugitive is facing a situation which is shocking and fundamentally unacceptable to our society.\(^{66}\)

The Courts have latitude in determining what would make surrender “unjust or oppressive”. In the context of China, the main concerns raised by scholars and rights groups appear to be: a) the use of the death penalty; b) fairness of the Chinese justice system; c) prison conditions and use of torture. These issues have been judicially

considered in extradition to countries other than China in the context of s. 44 of the
Extradition Act. In order to establish the factors that are important to the courts in such
considerations, the jurisprudence is worthy of investigation.

3.6 Death penalty

Given that China executes far more people than all other countries of the world combined,\(^{67}\) one might think that the death penalty would be central to the debate as to whether Canada should consider treaty engagement with China in extradition. However, the very high probability that the Chinese Government would provide assurances that the death penalty would not be imposed in an extradition request from China to Canada and the clarity given to the death penalty issue in extradition both in the Extradition Act and by the Supreme Court of Canada (“SCC”) in Burns suggest that China’s use of capital punishment will likely present a political rather than legal hurdle to extradition treaty engagement by Canada.

The use of the permissive “may” in s. 44(2) of the Extradition Act suggests that the Minister has the discretion to order surrender even if the requesting state seeks the death penalty. In reality, the SCC in Burns foreclosed the possibility of surrender without an assurance against the use of the death penalty in “all but exceptional cases.”\(^{68}\) While the Court was not specific as to what might be an exceptional case, it is unlikely that the

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\(^{68}\) Burns, supra note 65 at para 8.
Minister is able to surrender a person sought to a country with capital punishment without an assurance that the death penalty would not be sought if the person was convicted.

The facts in the case of Burns are that Mr. Burns and Mr. Rafay, two young men from British Columbia, brutally killed Mr. Rafay’s parents and his disabled sister in Washington State to collect and share Mr. Rafay’s inheritance from his slain parents. The men then returned to Canada. The United States sought the return of Mr. Burns and Mr. Rafay to face prosecution for three counts of murder.

Mr. Burns and Mr. Rafay were committed for extradition in the British Columbia Supreme Court. The Minister then ordered them surrendered, despite not obtaining an assurance from the United States that it would not seek the death penalty if the men were convicted. On reviewing the Minister’s decision, the SCC held that in all but “exceptional circumstances” it would shock the conscience of Canadians to extradite a person sought to a country to face the death penalty. The decision in Burns marked a departure from earlier decisions of the Supreme Court of Canada in Kindler°° and Reference re Ng Extradition (Can.), 1991 CanLII 79 (SCC), [1991] 2 S.C.R. 858, which did not require the Minister to obtain an assurance from the United States that the death penalty would not be sought.

Commentators argue that the decision in Burns could lead to Canada becoming a destination for fugitives attempting to avoid capital punishment, by stating “…terrorists, American criminals, and other individuals who commit crimes in the United States that carry a potential capital sentence may flee to Canada to avoid the death penalty, thereby

°° Kindler, supra note 66.
using Canada as a “safe haven.” While relevant to extradition between Canada and the United States, where there is an active extradition agreement, it is arguably the lack of an extradition treaty with China that provides the greatest incentive for criminals to flee China to Canada to avoid prosecution.

3.7 Fairness of the Criminal Justice System in the Requesting State

There is a principle in Canadian extradition law that the Minister and reviewing courts should not interfere with the requesting state’s legal system in all but the most obvious of cases. The SCC has held that refusing surrender is “deeply inconsistent with the principles of international cooperation that are the foundation of an extradition treaty.” The Courts of Appeal in Quebec and Alberta held that “courts must assume that the person sought will be given a fair trial in the Requesting State” and “absent evidence to the contrary, the Minister may rely on the fairness and good faith of the judicial and political authorities in the Requesting State.”

The foreign legal system to which the person sought will be extradited is not identical to the system in Canada. The fact that extradition must accommodate differences between legal systems is clearly expressed by the SCC in following passage from Kindler:

Most importantly, our extradition process, while premised on our conceptions of what is fundamentally just, must accommodate differences between our system of criminal justice and the systems in place in reciprocating states. The simple fact is that if

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74 Themens v. United States of America, 1996 CanLII 6237 (QC CA).
we were to insist on strict conformity with our own system, there would be virtually no state in the world with which we could reciprocate. Canada, unable to obtain extradition of persons who commit crimes here and flee elsewhere, would be the loser. For this reason, we require a limited but not absolute degree of similarity between our laws and those of the reciprocating state. 

Thus this Court, per La Forest J., recognized in Canada v. Schmidt, 1987 CanLII 48 (SCC), [1987] 1 S.C.R. 500, at pp. 522-23, that our extradition process does not require conformity with Canadian norms and standards. The foreign judicial system will not necessarily be considered fundamentally unjust because it operates without, for example, the presumption of innocence and other legal safeguards we demand in our own system of criminal justice.  

In Pacificador v. Philippines (Republic of), [1999] O.J. No. 35 (Gen. Div.), rev’d. on other grounds (2002), 166 C.C.C. (3d) 321 (Ont. C.A.), the Ontario Court of Appeal set aside the Minister’s decision to surrender Mr. Pacificador to the Philippines on the basis that the lengthy and unexplained delay in proceedings in the Philippines violated Mr. Pacificador’s s. 7 Charter rights. Mr. Pacificador’s extradition was sought by the Philippines to prosecute him for his alleged role in a political assassination in which a strong supporter of the opposition party was murdered in the streets of San Jose, Philippines. The extradition judge ordered that Mr. Pacificador be committed for extradition. The matter then proceeded to the Minister to consider whether Mr. Pacificador should be ordered surrendered. 

In his submissions to the Minister, Mr. Pacificador argued that to surrender him would violate his s. 7 Charter rights because the evidence before the Minister

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75 Kindler, supra note 66, at pp. 844-845  
76 s. 7 of the Charter: Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.
demonstrated that the political forces behind the prosecution were directed by the brother of the man that Mr. Pacificador allegedly assassinated; there was a risk he would face torture; there was a lack of independence of the judiciary in the Philippines; and, there was evidence that other people implicated in the assassination were held without trial for years.  

The Minister obtained assurances from the Government of the Philippines that it would not seek the death penalty if Mr. Pacificador was convicted and that he was to have his trial within one year of surrender. Despite the assurances, the Ontario Court of Appeal set aside the Minister’s surrender order on the basis that “taken as a whole, the record does demonstrate that to surrender the appellant would be “simply unacceptable” as the manner in which this prosecution has been conducted in the courts of the Philippines “shocks the conscience.”

The issue of fairness presents a major area of concern in a consideration of an extradition treaty between Canada and China. China’s criminal justice system is heavily criticized for a number of reasons. Despite formal reforms to its criminal laws, China’s judicial system suffers from a lack of independence of the judiciary from the CPC. Several systemic problems contribute to wrongful convictions. Some of these elements include: confessions obtained through torture because of intense pressure on the police to solve cases quickly due to a quota system; a social attitude toward the acceptance of the

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78 Ibid at para 12.
79 Ibid at para 51.
use of torture in China which contributes to its use; and police who interrogate suspects do not typically testify at the trial, which insulates their accountability for pre-trial breaches.  

3.8 Prison Conditions in the Requesting State

One factor the Minister must assess in making the surrender decision are the prison conditions awaiting the person in the requesting state. This issue will likely arise in a surrender decision of a person sought to China because it is reported that prison conditions in China are deplorable and include, beatings with tubes filled with sand and solitary confinement for up to a month. There are also credible claims that the Government of China, despite abolishing the “re-education through labour” camps in November 2013, continues to use black jails to arbitrarily detain and torture individuals outside of the public legal system.

The conditions of a foreign prison system must be very bad before a Minister will refuse surrender. Gwynne v. Canada (Minister of Justice) is illustrative of how deplorable prison conditions must be before they will reach a level that will shock the conscience. Mr. Gwynne, who fled to Canada after escaping from prison in Alabama, painted a bleak picture of his Alabama prison conditions. In his submissions before the Minister, Mr. Gwynne described the prison conditions he experienced as follows:

81 Xiaofeng, supra note 52 at 458.
It wasn’t unusual for rattlesnakes to slither through the fence into the yard, into the buildings. Black widow spiders, brown recluse spiders are everywhere. A black friend of mine was lying in bed and he got bit above the knee by a black widow or brown recluse…..On one occasion, this was in a different prison but it was still in Alabama, I sat down on the toilet and I had my trousers down around my knees, of course. I caught movement out of the corner of my eye and there was a water moccasin curled up beside the toilet on the cement floor. It was damp, it was cold and that’s the kind of climate they like. Water moccasins, cottonmouths, they are similar snakes, and you can die from their bite.85

The British Columbia Court of Appeal determined that it was not a violation of the Charter to surrender Mr. Gwynne to the United States and cautioned that to refuse to surrender a person because of prison conditions, would “require the Minister to embark upon a comparative examination of the penal systems in the United States on a state by state basis with a view to determining at what point that the Canadian conscience would not be shocked by surrender of the fugitive.”86 While the person sought may argue that to surrender him or her to face harsh prison conditions in China would be unjust or oppressive or “shock the conscience,” the Minister and the reviewing courts are reluctant to become involved in how a requesting state manages its prisons.

3.9 Torture

Torture hangs like a cloud over many of the considerations of extradition to China. Article 3 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment87 (“CAT”) prohibits extradition if there are “substantial grounds” for believing that the person sought would face torture upon being sent to the

85 Ibid at Appendix A the affidavit of Mr. Gwynne.
86 Ibid at para 46.
requesting state. Both Canada and China are signatories to the CAT, which is troubling given allegations that Chinese authorities resort to torture in criminal investigations. Adherence to CAT means for Canada that it is unable to surrender a person sought to China if there were realistic and substantial grounds for believing that the individual would be tortured.

If a person sought could demonstrate to the Minister or reviewing courts that he or she would face a specific and substantial risk of being tortured upon surrender to the requesting state, then surrender must not occur. The more difficult question in respect of extradition to China is whether the systemic risks of torture in China are such that extradition from Canada to China would always shock the conscience.

Another issue in respect of torture is how the Minister should deal with a request which is based upon evidence that is allegedly derived from torture and where there are allegations that the prosecution in the requesting state will rely upon evidence that was obtained through torture. The Ontario Court of Appeal addressed these issues in France v. Diab. 88

Mr. Diab, a university professor teaching in Ottawa, was sought by France for prosecution relating to allegations that, decades earlier, he planted a bomb outside a synagogue that killed four people and wounded dozens. Mr. Diab argued that the evidence upon which his extradition was sought was obtained through torture. The court addressed the issue of how the Minister should address such allegations by adopting a two-step approach. The first step requires that the person establish a “plausible

88 2014 ONCA 374 [Diab].
connection” between the evidence and the use of torture.\textsuperscript{89} If the first step is met, the second step requires that the Minister must satisfy him or herself though the record or assurances sought by the requesting state that there is “no real risk” that the torture based evidence will be used in the foreign proceeding.\textsuperscript{90} Inherent in this test is that the Minister must not order the surrender of the person sought if the torture derived evidence will be used in the foreign prosecution.

\textbf{3.10 Diplomatic Assurances in Extradition}

One way for the Minister to honour treaty obligations while complying with the duty to refuse to order surrender if it would be unjust or oppressive to do so is to seek diplomatic assurances from the requesting state. Diplomatic assurances are based on trust between nations because an assurance is essentially a promise that the country giving the assurance will act in a certain manner. The difficulty with assurances in extradition is that once the person sought is physically returned to the custody of the requesting state, there are no guarantees that the assurance will be respected. While an aggrieved country could attempt to force compliance with diplomatic or economic sanctions or acts of aggression, one cannot undo the act that violated the assurance.

In respect of torture, if the Canadian Government has concerns that an extradited person will be tortured upon return to China, the bluntest assurance would be that Chinese Government promises that the individual will not be tortured. However, the problem of seeking assurances against torture from a regime that has previously engaged

\textsuperscript{89} \textit{Ibid} at para 229.  
\textsuperscript{90} \textit{Ibid}.
in torture is described by the SCC in *Suresh v. Canada (Minister of Citizenship and Immigration)*.\(^91\)

It may be useful to comment further on assurances. A distinction may be drawn between assurances given by a state that it will not apply the death penalty (through a legal process) and assurances by a state that it will not resort to torture (an illegal process). We would signal the difficulty in relying too heavily on assurances by a state that it will refrain from torture in the future when it has engaged in illegal torture or allowed others to do so on its territory in the past. This difficulty becomes acute in cases where torture is inflicted not only with the collusion but through the impotence of the state in controlling the behaviour of its officials. Hence the need to distinguish between assurances regarding the death penalty and assurances regarding torture. The former are easier to monitor and generally more reliable than the latter.

In evaluating assurances by a foreign government, the Minister may also wish to take into account the human rights record of the government giving the assurances, the government’s record in complying with its assurances, and the capacity of the government to fulfill the assurances, particularly where there is doubt about the government’s ability to control its security forces. In addition, it must be remembered that before becoming a Convention refugee, the individual involved must establish a well-founded fear of persecution (although not necessarily torture) if deported.\(^{92}\)

The Court’s insight into the dilemma of seeking assurances from a country that has engaged in an illegal process such as torture exposes one of the difficulties with engagement in extradition with China. Specifically, can a country that acts illegally and in contravention of international law and conventions be expected or able to honour its word that it will not continue to act illegally?

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\(^{91}\) 2002 SCC 1.

\(^{92}\) *Suresh v. Canada (Minister of Citizenship and Immigration)*, 2002 SCC 1 at paras. 124, 125.
Canada has been party to broken assurances in the past. The Arar Commission was established to investigate the fact that Mr. Arar, a Canadian citizen, was tortured for 10 months while in Syria because he was suspected of having terrorist connections. His torture occurred despite assurances provided by the Syrian Government that he would not be tortured. The Commission found that:

…the assurances from totalitarian regimes that they will not torture detainees are of no value and should not be relied upon for the purposes of article 3 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment of Punishment.93

Based on this statement by the Arar Commission, concern is warranted that diplomatic assurances from China should be treated with suspicion. Courts in England have attempted to establish a framework to evaluate the credibility of assurances provided by a requesting state. The court developed a number of factors to examine whether assurances provide a sufficient guarantee that the person sought will be protected against the risk of ill-treatment.94 The factors include, whether the assurances are specific or general; whether the assurances concern treatment which is legal or illegal; the length and strength of bilateral relations between the sending and receiving states, including the previous record on abiding by assurances; and whether compliance with the assurances can be objectively verified through diplomatic or other monitoring channels.95

95 Ibid at para 61 citing Othman at para 189.
Despite the risks posed by reliance upon diplomatic assurances, some commentators argue that the creation of minimum standards for diplomatic assurances and a manner to regulate and enforce assurances could actually reduce instances of torture.⁹⁶ Further, diplomatic assurances are used extensively by the Canadian Government in immigration cases in circumstances when individuals are deported from Canada to a foreign state. As such, assurances have the potential to alleviate concerns of the Minister and reviewing courts that surrender of an individual to a requesting state will be “unjust or oppressive”, “shock the conscience” or contrary to the Charter.

3.11 Chapter Conclusion

Extradition law balances Canada’s international obligations to fight transnational crime with maintaining sovereignty and upholding Canadian constitutional values of fairness and protection of human rights. It is with this understanding of the fundamentals of the domestic component of Canadian extradition law and the relevant considerations of the courts and the Minister that this paper now turns to an examination of the criminal justice system in China.

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4.0 Overview of the Chinese Legal System

4.1 Introduction

In recent years, China has adopted a number of initiatives in an effort to modernize its criminal justice system. These efforts include implementation of legislative reforms in respect of its Criminal Procedure Law (“CPL”) and attempts to increase training of judges and lawyers. While, in theory, the reforms appear aimed at improving transparency and providing for fairer proceedings, critics argue that the Chinese criminal justice system remains biased and unfair. This chapter provides a cursory review of the origins of the Chinese legal system to give context to the considerations relevant to extradition from Canada to China. Two of the key areas of debate regarding the reformation of the Chinese legal system centres upon the concept of the “rule of law” and the influence of the CPC on the judicial system.

4.2 Brief History of the Chinese Legal System

4.2.1 Imperial China

To understand the context of the current issues facing the Chinese legal system, it is helpful to understand its origins. Arguably, China has a 4,000 year legal tradition that was not based on the “rule of law”97 or a concept of separation of powers. Legal power was concentrated in the Emperor and laws were enacted to protect the empire. There was no separation of powers between the will of the Emperor and those adjudicating civil or criminal disputes. When legal disputes of a high level occurred, the Emperor was involved.98 For lesser matters, county officials made decisions, but those decisions were

97 The rule of law is generally accepted to mean that all people and institutions are subject to and accountable to law that is fairly applied and enforced.
to reflect the central government’s mandates. The Imperial structure contained no
custom of separation of powers between the “judges” and the government, nor any
notion of judicial autonomy.

Confucianism also influenced Chinese legal development and leaves its imprint on
the current Chinese understanding of the role of the legal system. Confucian thought
regards law as an instrument of last resort because, in a harmonious society, individuals
should be able to resolve their disputes through friendly negotiation, mediation and
mutual compromise without the need to resort to a third-party decision maker. Confucianism honours virtue more than law and holds that a legal system should aspire to
provide rule of man. Rule of man has been described as a system of law based on
relationships to others that considers decisions within context and does not allow for the
idea of an individual with universal rights in all situations.

The traditional Chinese legal system was based on li which focuses upon the virtue
of the leaders and respects social relationships as opposed to fa which is to follow a
systematic set of laws. Being aware of the influence of Confucian thought on modern
Chinese legal issues furthers understanding of perceptions of rights and law in China
where collective rights are put above individual rights. Awareness of the differences
between the foundations of the Chinese legal system and Canadian legal systems is useful

Fordham Int’l L.J. 1000 at 1004.
100 Yujan Feng, “Legal Culture in China: A Comparison to Western Law” (2009) NZACL Yearbook 15 at
6.
543.
102 Jay Pottenger, “The role of [clinical] legal education in legal reform in the People’s Republic of China:
to appreciate the gulf between the concepts. For example, subordination of individual
dependent on the collective in China differs from the Canadian concept that rights of the
individual are, albeit with some limitations, paramount and enshrined in the Charter.
These fundamental differences can pose hurdles to effective cooperation between the
Canadian and Chinese legal systems.

4.2.2 Creation of the People’s Republic of China

After the formation of the People’s Republic of China in 1949, an attempt was
made to reform the judicial system to reflect the legal system in the Soviet Union. In
1954, the CPL was drafted, but not enacted, in an attempt to modernize the criminal
justice system. The CPL was further revised in 1963, but was not put into force.
However, any progress in reforming the justice system was abruptly and completely
halted with the start of the Cultural Revolution in 1966.

4.2.3 The Cultural Revolution’s Effect on the Chinese Legal System

Between 1966 and 1976, the Cultural Revolution all but destroyed the legal system
in China. Legal training was suspended and the judiciary almost entirely ceased to
operate. Instead of aspiring to implement the rule of law, Mao Zedong stated in 1968
that China should, “depend upon the rule of man, not the rule of law”. Mao’s call to
embrace the rule of man can be thought of as a way for him to further centralize his

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103 Section 1 of the Charter provides: The Canadian Charter of Rights and Freedoms guarantees the rights
and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably
justified in a free and democratic society.
104 Percy R. Luney, Jr., “Traditions and Foreign Influences: Systems of Law in China and Japan” (1989) 52
Law & Contemp. Probs. 2 (Spring 1989) at 132.
105 Ibid at 133.
1039 at 1045.
power and harkens to the legal systems in place under Imperial China when matters were resolved by the will of the Emperor.

For the two decades between 1957 to the end of the Cultural Revolution, China was essentially lawless. Although criminal courts continued to operate in some capacity, there was no functioning “legal order”. 107 During the Cultural Revolution, there were only 2,500 to 3,000 lawyers in the entire country and the Ministry of Justice was abolished. 108 It is from the darkness of the Cultural Revolution that China’s current legal system emerged.

4.2.4 Post-Cultural Revolution Reform of the Legal System

In 1976, after the end of the Cultural Revolution, the reconstruction and modernization of the judicial system began as a result of the efforts to grow the Chinese economy. In 1979, the CPL, based in large part on the 1963 draft CPL, was enacted. The judicial reforms of 1978 at the Third Plenary Session of the 11th Central Committee of the Chinese Communist Party were part of the massive economic reform that commenced in China at that time. 109 As stated by Pitman Potter:

The plenum reflected a tentative policy consensus about the need to reform the state-planned economy and build a legal system that would support economic growth and restore for the regime the monopoly on legitimate coercion that had been lost during the Cultural Revolution. 110

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107 Pottenger, supra note 102 at 65.
108 Ibid.
109 Keyuan, supra note 106 at 1039.
With the rapid economic modernization and growth from 1979 to the 1990s, the 1979 CPL quickly became outdated. As such, in 1993, the CPL was again amended and presented as a draft at the seventeenth meeting of the Standing Committee of the National People’s Congress.\textsuperscript{111} The draft was accepted by the National People’s Congress and a new CPL that offered sweeping changes and reform was passed on March 17, 1996, and came into effect on January 1, 1997.\textsuperscript{112} Some of the most significant developments of the new CPL were that it: established a principle that only a court can establish guilt or innocence; granted rights to victims to be a party to a case and initiate proceedings; and allowed an accused to retain legal assistance once an investigation is commenced.\textsuperscript{113}

4.3 The Chinese Judiciary

It is beyond the scope of this paper to provide a detailed analysis of the structure, history and current issues facing the judiciary in China. However, a basic outline is useful to provide the scale of the system and to better understand why reform is difficult and why even formal pronouncements of judicial reforms may not translate to a fairer court system throughout China.

It estimated that China has at least 200,000 judges which represents the greatest number of judges, in absolute numbers, of any country in the world.\textsuperscript{114} On a per capita basis, China has 19.7 judges for every 100,000 people which is greater than the United States.\textsuperscript{115} Judges in China are appointed and funded by the People’s Congress at a

\textsuperscript{111} Yong Zhang, “Recent Development in Chinese Criminal Justice” (2000) 8:1 Asia Pac. L. Rev. at 79.
\textsuperscript{112} Ibid.
\textsuperscript{113} Ibid.
\textsuperscript{115} Ibid.
concurrent level to the court. This means that, for example, the provincial level of
government appoints and funds the provincial judges in its province. As such, there
will be tension between the centralized government and the local authority in a region on
the basis that the judges may have an incentive to adjudicate matters in a way that best
serves the local region as opposed to the objectives of the central government. While
the lack of independence of local judges may have a greater impact on civil matters than
criminal matters, it still demonstrates the lack of independence of the Chinese judiciary
which is relevant to the consideration of extradition from Canada to China.

4.4 Political Interference by the CPC in the Chinese Legal System

Political interference by the CPC into the Chinese legal system can result in both
wrongful convictions and suspects escaping justice. As an example of the later, Zhao
Yuming was suspected of embezzlement from the Guiyan Chemical and Construction
Company. However, due to political interference by the local government of Guiyan,
the arrest of Zhao could not be enforced despite an arrest warrant issuing from the court.
The legal system was frustrated because the local government, which was responsible for
enforcing the decision of the police and court to arrest Zhao did not want him arrested or
the matter to proceed. From a western perspective, the Zhao case appears distasteful.
However, in the Chinese one-party state a different analysis of separation of powers and
the rule of law may be required in understanding the political interference in criminal

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116 Keyuan, supra note 106 at 1047.
117 Potter, supra note 125 at 15.
118 Keyuan, supra note 106 at 1048.
119 Ibid.
matters. Scholars of Chinese law argue that one must accept the influence of the CPC on the judiciary as summarized by Zhu Suli as follows:

Accordingly, I conclude, first that the influence of the CCP upon the judiciary is general and diffuse; it comes not only from party institutions and party leaders, but also through many other avenues. Second, although the CCP has its own ideology and exercises significant influence on the judiciary, taken as a whole this ideology is not necessarily incompatible with the general view of justice shared by ordinary people. The organizational principles of the CCP are in conflict with the operation of professional logic in the legal/judicial system, but in concert with China’s social development, the legal/judicial profession in China is institutionalizing itself.120

Further, scholars have described the CPC’s influence and control as ubiquitous and that it penetrates every aspect of society.121 Even before the creation of the CPC, political involvement in the judiciary existed. In Imperial China, the Emperor was the ultimate court. Prior to 1949, the Nationalist Party also sought to control the judicial system calling for the “partyization of the judiciary” and creating measures to exert direct control by the government over the judiciary.122 The control by the Chinese Government over the judiciary continued under the CPC and has been explained as follows:

In a government system based on the unity of power, the subordination of judges to politicians and of law to politics extended to the core of judicial decision-making. Judges were viewed as simple agents of the central power, and therefore it was difficult to imagine that a judge might issue a decision fundamentally at odds with the official political position.123

121 Ibid at 535.
122 Ibid at 536.
123 Song, supra note 98 at 147.
Frank Upham restates the above observations and argues that there is no ideological tension in China between the judges and the government in that “Chinese judges are supposed to follow Party leadership.” The upshot of the relationship of the CPC and the judiciary is that measuring the judiciary through the same lens as a judicial system in a political system based on separation of powers is not meaningful. As such, discussions of improvements to independence of the Chinese judiciary should be grounded in the perspective of a judicial system that is infused with the governing politics. From the extradition perspective, knowledge of these deep differences in origins and structures, may orient the discussion to focus on what can be changed and improved and where placing safeguards will have the greatest impact in creating effective extradition that conforms to Canadian extradition law.

4.5 Chinese Concept of the Rule of Law

Formally, the Chinese Government argues that it is moving towards the rule of law. However, scholars point to the fact that in a system without separation of powers, there can be no true rule of law. The Chinese Government requires that the court system supports the Government. At its barest, the relationship between the Chinese Government and law has been described as, “law is not intended to provide a limit on state power but rather is a mechanism by which state power is exercised.”

Scholars argue that to free the judiciary from political influence, China must adopt and embrace the rule of law. While it appears non-controversial that adherence to the

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rule of law can increase capacity for judicial independence, it is important to acknowledge that, in China, discussions of the rule of law may connote a different meaning than western ideas of this concept. The reluctance of the CPC to embrace the rule of law may be caused by both the potential disconnect between the acceptance of the rule of law as an ideal and also as a result of purposeful attempts by the CPC to retain flexibility in legal and political matters and not be subjected or accountable to laws. An unflattering, but realistic statement of the CPC’s application and interpretation of the “rule by law” is set out by one commentator as follows:

Greater institutionalization also means increasing importance being put on enforcing the law and containing corruption. In sharp contrast to the Maoist era when the law was reduced to irrelevance, the Communist Party has resorted to rule by law….To be sure the party and its top leadership remain above the law and there is no indication that they are individually or collectively willing to subject themselves to the law. But it does occasionally allow one of their own to face the force of the law where it is in the interest of the current top leadership for this to happen.126

This observation suggests that the reforms to the Chinese justice system are not driven by the Party’s desire to move toward judicial independence, rule of law or democracy, but instead to improve the perception of legitimacy of the CPC and, as such, pre-empt the need for actual reforms that could threaten the Party.127

Some observers believe that the Chinese Government is actually moving in the wrong direction in respect of developing adherence to the rule of law. Jerome Cohen, a

127 Ibid at 872.
leading scholar on the Chinese legal system, has written that despite the statements of the Chinese Government praising the rule of law since Xi Jinping took power, in practice, rights and freedoms necessary to facilitate the respect for the rule of law are being attacked.128

Despite formal pronouncements about improving the rule of law and associated increases to procedural fairness, the essential problem in China is that the rule of law does not co-exist well with the Chinese government’s tradition of a guerrilla policy-making style, which dates back to the 1930s. This strategy involves continual, improvisation and adjustments that prioritize flexibility and accepts “pervasive uncertainty” to maintain flexibility.129 In its pure form, the rule of law is not flexible and adaptable and would hold the CPC accountable to law. This accountability is at odds with the CPC’s strategy of administering the system of rules to maintain power and control and the Party’s primary obsession of maintaining stability.130

Whether democratic countries with fair judicial systems can engage with totalitarian countries which oppress legal rights and the rule of law is an open question. This paper argues that while China’s issues regarding a lack of procedural fairness, which is compounded by a lack of judicial independence, pose a serious hurdle to Canada’s treaty engagement with China in extradition, sufficient safeguards enacted in a treaty could overcome this obstacle. Given the extreme differences in the origins and current

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130 Ibid at 184.
state of the Canadian and Chinese legal systems, too much focus on the lack of rule of law may miss an opportunity to move China forward to increased procedural fairness through increased engagement.

4.6 Chapter Conclusion

Comparing western legal systems based on the rule of law to the Chinese legal system is like comparing apples to durians. While both are fruit and provide nutrients, their appearances are unlike. Further, when one explores what is at the core, the Chinese offering is malodorous to western senses. One must understand the complex relationship between the CPC and the Chinese legal system, including the pervasiveness of the CPC in all aspects of China. Further, the complex cultural and historical understanding of the concepts of law and dispute resolution is crucial if one wants to provide meaningful suggestions to bring the Chinese legal system in line with western standards.

Reforms formally announced by the Chinese Government may be insufficient on their own to improve China’s legal system to a level that will satisfy western concepts of the rule of law and separation of powers. However, given the rapid expansion of China’s economy in a relatively short time, it is possible that legal reforms will follow. Accordingly, encouraging China to comply with Canadian standards of procedural fairness in extradition may provide an additional incentive to assist the Chinese Government towards moving towards a fairer legal system.
5.0 The Motivations and Benefits of an Extradition Treaty between Canada and China

5.1 Introduction

Despite concerns and obstacles to an extradition treaty between China and Canada, there are benefits to engagement. From the Chinese perspective, the Government of China is in the process of aggressively targeting government corruption and repatriation of corrupt officials and their stolen funds. By granting China’s wish for an extradition treaty, Canada appeases the Chinese Government which potentially translates into an improved relationship and increased economic benefits to Canada. Additional benefits of a Canada-China extradition treaty include global benefits such as improved international cooperation to combat transnational crime. Canada’s engagement with China in extradition also exposes China to the Canadian court and political systems that shows a greater respect for procedural fairness and human rights which may, in the long term, provide a positive influence on Chinese policies regarding legal reform.

5.2 Motivations for Canada to Enter an Extradition Treaty with China

China has repeatedly expressed a desire to have extradition treaties with western countries, including, Canada.131 Canada’s Conservative Government under Stephen Harper had an unabashed focus on growing the economy. Canada already trades extensively with China132 and China has invested US$54 billion in Canada and imports

132 In 2011, China was Canada’s 3rd largest market for exports (3.74%) after the U.S. (73.71%) and the U.K. (4.2%) and the 2nd largest source of imports to Canada (10.8%) after the U.S (49.52%): Government of Canada: Foreign Affairs and International Trade (March 17 2012), online: <http://international.gc.ca/economist-economiste/performance/state-point/state_2012_point/2012_5.aspx?lang=eng&view=d>.
from China into Canada represent 11.2% of Canada’s total imports.\textsuperscript{133} Canada sees a huge potential as a future source of investment in China, especially in the energy sector from which 90% of the Chinese investment is directed following the acquisition of Nexen Inc. by the Chinese state-owned CNOOC in 2011.\textsuperscript{134} Recent actions by the Canadian Government indicate its increasing cooperation and engagement with China. In 2014, for example, the two countries reached an agreement to establish the first North American renminbi\textsuperscript{135} clearing centre in Toronto.\textsuperscript{136}

On October 1, 2014, the \textit{Foreign Investment Promotion and Protection Agreement} ("FIPPA") came into force. According to the Government of Canada, the purpose of FIPPA is to take advantage of China as a destination for foreign direct investment in a broad range of sectors in China, including, transportation, biotechnology, education, finance, information technology, manufacturing and natural resources.\textsuperscript{137} The stock of Canada’s direct investment in China was valued at C$4.9 billion at the end of 2013, while the direct investment by China into Canada was $16.6 billion at the end of 2013.\textsuperscript{138} Given the significant economic relationship between Canada and China it is evident that despite differences in criminal justice systems or adherence for procedural fairness the


\textsuperscript{134} Ibid.

\textsuperscript{135} Renminbi is the name of the Chinese currency.


\textsuperscript{138} Ibid.
two nations have strong connections. Arguably, entering into an extradition treaty would enhance the relationship between Canada and China. It is also likely that with increased commerce and involvement also comes a greater possibility of transnational crime and criminals moving between Canada and China.

5.3 Current Treaties between Canada and China in Criminal Matters

On July 29, 1995, Canada and China entered into the Treaty Between Canada and the People’s Republic of China on Mutual Legal Assistance in Criminal Matters\(^{139}\) (the “Canada-China MLA Treaty”) which is a bilateral agreement to cooperate in sharing evidence related to criminal matters. The Canada-China MLA Treaty allows, and demands, Canada and China to gather and produce evidence located in the requested country to the country making the request in order to assist in criminal investigations and prosecutions. The preamble to the agreement presents a rosy view of the reason for the agreement which is to “strengthen their close cooperation in the field of mutual legal assistance in criminal matters on the basis of mutual respect for sovereignty and equality and mutual benefit.”\(^{140}\) In reality, the Canada-China MLA Treaty has been infrequently used.

Mutual legal assistance (“MLA”) has been defined as a process by which states seek and provide assistance in gathering evidence for use in criminal cases through formal diplomatic requests.\(^{141}\) Like extradition, MLA is a combination of the political and legal, with the request for assistance initiated by a request from a foreign state to the


\(^{140}\) Ibid at Preamble.

Minister. The Minister is then responsible for implementing and administering the statute and the relevant treaties.\textsuperscript{142} The Minister’s delegate reviews the request to ensure that it complies with the relevant treaty.\textsuperscript{143} The request is then sent to a prosecutor to go before a superior court judge to obtain an order for the requested assistance. If the evidence gathering order is issued by the judge and the evidence is collected, the matter returns before the Minister to make the final determination whether the requested assistance can be provided to the requesting state.

While the Canada-China MLA Treaty has been used sparingly, it provides an example of Canada’s formal engagement with China in criminal justice matters. As explored in Chapter 7 of this paper, on one occasion, the Canada-China MLA Treaty was used by China to request evidence held by Canadian police authorities for use in China in respect of the murder of Amanda Zhou, a Chinese citizen murdered in Canada. The Canada-China MLA Treaty and its application to the Amanda Zhou case demonstrates that Canada has prior experience in cooperating with the Chinese Government in a criminal matter. Importantly, in that case China provided and honoured diplomatic assurances.

\textsuperscript{142} \textit{Mutual Legal Assistance in Criminal Matters Act}, R.S. 1985, c. 30 (4\textsuperscript{th} Supp.) (“MLACMA”), section 7(1) The Minister is responsible for the implementation of every agreement and the administration of this Act. 7(2) When a request is presented to the Minister by a state or entity or a Canadian competent authority, the Minister shall deal with the request in accordance with the relevant agreement and this Act.

\textsuperscript{143} MLACMA s. 8(1) If a request for mutual legal assistance is made under an agreement, the Minister may not give effect to the request by means of the provisions of this Part unless the agreement provides for mutual legal assistance with respect to the subject-matter of the request. 8(2) If a request for mutual legal assistance is made by a state or entity whose name appears in the schedule, the Minister may give effect by means of the provisions of this Part to a request with respect to any subject-matter.
In addition to the Canada-China MLA Treaty, Canada and China have signed a deal targeting the return of fugitives’ seized assets. The Agreement Between the Government of the People’s Republic of China and the Government of Canada Regarding the Sharing of Forfeited Assets and the Return of Property, while not yet ratified, addresses the return of property of Chinese citizens who fled to Canada. Recent reports in the media indicate that Canada and China are on the verge of finalizing this agreement. The development of this agreement suggests increased cooperation between Canada and China in fighting transnational crime which hints at the potential of an increased relationship by Canada with China in coordinating the fight against transnational crime and a future extradition treaty between the countries.

5.4 Canada’s Deportation of Individuals to China

The Government of Canada and courts reviewing deportation orders see fit to allow individuals to be deported from Canada to China under Canadian immigration law. There is an air of hypocrisy to the Government of Canada’s position to deport an individual to China if it is unwilling to extradite a person to China. In both cases, the

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146 Ibid.


148 In popular media, deportation under immigration law is often incorrectly referred to as extradition. In the most basic of terms, deportation is the expulsion of a person from a country for some reason of domestic ineligibility. Extradition is the surrender of a person to a foreign country at the request of the foreign country.
individual may face the same criminal justice system. For example, the high profile case of the Canadian Government’s deportation of Lai Changxing, despite his claims he would be tortured if he was returned to China, raises many of the same issues that are present in the consideration for extradition from Canada to China.

Mr. Lai was accused by the Chinese Government of masterminding a multibillion-dollar smuggling network that allegedly imported consumer goods. The immigration process in Canada took over ten years, concluding with confirmation of Mr. Lai’s deportation order by Mr. Justice Shore of the Federal Court of Canada. Mr. Lai claimed that he would be tortured, or like his brother and accountant, meet a mysterious death in prison at the hands of the Chinese authorities. In upholding the Minister of Citizenship and Immigration’s decision to order Mr. Lai’s deportation, Shore J. found that the assurances provided by the Chinese Government to the Government of Canada were sufficient to ensure that Mr. Lai’s deportation to China would not shock the conscience of Canadians or violate the Charter. The assurances obtained in respect of Mr. Lai were, according to Mr. Justice Shore, “strict, clear and unequivocal…” The court was aware that once the person is deported from Canada there is no real control held by the Canadian Government to ensure the protection of the deported individual. The issue of trust in respect of diplomatic assurances was poetically stated by Justice Shore as follows:

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150 Lai v. Canada (Minister of Citizenship and Immigration), 2011 FC 915 [Lai].
151 Ibid at para 44.
A child, who, once, wanted to outwit his teacher, asked his teacher, “Is the bird which I have in my hand alive or dead?” The child thought if the teacher answered, “The bird is alive, he would crush the bird; and if the teacher would say it is dead, he would let it live. The teacher answered with a great understanding for both the child and the bird, “The life of the bird is in your hands, my child.”

So it is with the Chinese assurances. The life of the Applicant [Lai] is in the Chinese Government’s hands.\(^\text{153}\)

While one may not agree with Canada’s position regarding deporting Mr. Lai to China, the case provides an example of a court sanctioned decision to remove an individual from Canada to China and sheds light on what diplomatic assurances might be required to send an individual from Canada to China to face the Chinese justice system in a manner that conforms to the *Charter*.

### 5.5 Motivations for China to Enter an Extradition Treaty with Canada

The Chinese Government has expressed that it wants to enter into extradition treaties with western countries.\(^\text{154}\) China ratified an extradition treaty with Australia on April 24, 2008, although the treaty is not yet in force.\(^\text{155}\) China has also sought to have extradition treaties with France and New Zealand.\(^\text{156}\)

Corruption is seen as a threat to the CPC and, accordingly, the Chinese Government has aggressively targeted corrupt officials and their embezzled funds for return to China.

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\(^{153}\) *Ibid* at paras 8 and 9.
\(^{155}\) Heather Timmons, “Corrupt Chinese officials who have fled to Australia remain out of Beijing’s reach”, *Quartz* (February 9, 2015), online: <http://qz.com/340913/corrupt-chinese-officials-who-have-fled-to-australia-remain-out-of-beijings-reach/>.
The illegal outflow of money from China is on a massive scale. It is estimated that from 2002 to 2011, US$1.08 trillion left mainland China illegally. Other estimates are that US$120 billion has been embezzled by approximately 10,000 corrupt officials who have fled China between 1990 and 2008. A report published by China’s central bank provides information that up to 18,000 officials and employees of state-owned enterprises have fled China with in excess of US$123 billion between the mid-1990s and 2011. While the exact figures vary by source, the consensus is that a huge quantity of money and corrupt officials have fled China to places like Canada and the Government of China wants them back.

In 2015, the Chinese Government released a list to Interpol of the top 100 officials wanted by the government on corruption related charges. Of those 100 allegedly corrupt officials, 26 are said to be living in Canada. As part of its efforts to repatriate corrupt officials and money, China has initiated Operation Fox Hunt and its successor program, Operation Skynet, as aggressive attempts to coordinate various government departments to locate corrupt Chinese officials living abroad and to coerce and compel

157 According to the most updated report by Global Financial Integrity, a U.S.-based group, see, Joanne Lee Young, “Purchase of $51M Vancouver mansion the latest example of wealthy Chinese buyers fuelling B.C. real estate boom”, The National Post (March 10, 2015), online: <http://news.nationalpost.com/2015/03/10/bc-real-estate-boom-wealthy-chinese-buyers/>

158 Lewis, supra note 11 at 290.

159 Ibid.


161 Ibid.

them to return to China. It is logical to presume that the Chinese Government’s high-profile anti-corruption stance suggests a desire to have an extradition treaty with Canada in order to have access to fleeing corrupt officials.

5.6 General Benefits of an Extradition Treaty between Canada and China

Improved cooperation in criminal matters between Canada and China also offers a broader benefit for the entire world. Increasing globalization means expansion of trade, production and human migration, but also provides opportunities for criminals to spread beyond borders. The rise of transnational crime has increased the demand for effective cooperation in providing mutual legal assistance in criminal matters, which arguably means an increased demand for extradition treaties. Engagement between Canada and China in extradition has the potential to improve a coordinated response to global crime by the international community.

5.7 Chapter Conclusion

Given China’s efforts to reach out to countries for assistance in prosecuting crimes committed in China and Canada’s efforts to expand its economic ties with China, both countries have motivations to enter into an extradition treaty. An example of the cooperation between the two nations occurred in the prosecution of the murder of Amanda Zhou.

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Despite what could be seen as a positive outcome of the Amanda Zhou case, it is important to understand that many scholars think it unfathomable that a western country would consider partnering with China in an extradition treaty. Jerome Cohen, a leading scholar of Chinese criminal law, commented in August 2015, that he could not imagine a worse time for the United States and China to negotiate an extradition treaty, because China has failed to meet the minimum standards of international due process of law.\textsuperscript{165} Cohen goes further by citing examples of torture and kidnapping of defence lawyers and stating that laws are secondary to lawlessness in China and the new legislation is restricting rights and reducing procedural fairness.\textsuperscript{166}

There is a gulf between the desire for an extradition treaty and engaging in effective extradition. Even if an extradition treaty was created between Canada and China, a workable framework that complies with international human rights standards in conformity to Canadian law is required to allow extradition. The remainder of this paper examines the obstacles and remedies to those obstacles in respect of an extradition treaty between Canada and China.

\textsuperscript{165} Cohen, \textit{supra} note 128.
\textsuperscript{166} \textit{Ibid.}
6.0  The Chinese Legal System: Reforms and Concerns

6.1  Introduction

While there may be benefits to an extradition treaty between Canada and China, cooperation presents concerns and obstacles from the Canadian perspective. Formally, China has undertaken massive reforms of its legal system, most notably, regarding changes to the CPL. In reality, there remain many concerns with the Chinese legal system and its protection of procedural fairness and respect for human rights. The formal reforms to the CPL may not result in a more just legal system for a number of reasons including a disjunction between the legislation and its implementation. Canada’s decision to engage with China in extradition should be based on the realities of the Chinese legal system as the concern should be the actual treatment faced by the person extradited from Canada to China.

The main concerns from a procedural fairness and human rights perspective noted by observers of the Chinese legal system include: the use of the death penalty; the lack of procedural fairness in investigations and criminal trials; and the use of torture both during the investigative and incarceration phases of the criminal justice system. While a complete review of the state of the Chinese legal system and its reforms is beyond the scope of this paper, this chapter briefly addresses some of the relevant reforms to the Chinese criminal justice system and the significant problems that remain.

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6.2 Death Penalty

In 2014, China executed 2,400 people, which is more than three times the executions carried out by all other countries in the world combined.\textsuperscript{168} China overtly uses the death penalty as a part of its criminal justice system, even parading condemned prisoners as a public spectacle immediately before execution.\textsuperscript{169} China imposes the death penalty for non-violent offences and white-collar crimes.\textsuperscript{170} There are even allegations levelled against the Chinese Government that Falun Gong members, imprisoned for their religious beliefs, are murdered in order to harvest their organs to sell to “transplant tourists” for profit.\textsuperscript{171} Given these horrors, one might think that the death penalty would be central to a consideration of Canada engaging in an extradition treaty with China. However, the concern can be effectively addressed through diplomatic assurances or treaty provisions given the clear language of the \textit{Extradition Act} and unequivocal decision of the Supreme Court of Canada in \textit{Burns} that Canada cannot extradite unless it obtains assurances that the person sought will not be executed.

Further, if one accepts the concept that incremental changes can influence larger systemic attitudes, it is plausible that if China is as eager as it says it is for extradition with Canada, it will provide assurances to Canada that it will not use capital punishment.


\textsuperscript{169} Christopher Bodeen, “China Parades Killers to Execution In Live Broadcast Hours Before Death”, \textit{The National Post} (March 1, 2013), online: <http://news.nationalpost.com/2013/03/01/china-parades-killers-to-execution-in-live-broadcast-hours-before-death/>.

\textsuperscript{170} Margaret K. Lewis, “Controlling Abuse to Maintain Control: The Exclusionary Rule in China” (2011) 43 N.Y.U. J. Int’l & Pol. 629 at 656 noting that death penalty reforms are attempting to reduce the number of non-violent offences that attract the death penalty.

\textsuperscript{171} Matas, \textit{supra} note 5.
This requirement may in turn influence the Chinese Government’s attitude way from using the death penalty.

6.3 Lack of Procedural Fairness and Attempted Reforms

To state that China’s criminal justice system lacks elements of procedural fairness is not controversial. Observers of the Chinese legal system have reported that defence lawyers have frequently been the subject of kidnapping, torture, illegal detention, arrest and prosecution, loss of employment, disbarment and many other forms of intimidation.\(^{172}\) Defence counsel are regarded “almost as an alien force” and remain excluded and suppressed by prosecutors and government legal departments.\(^{173}\) Despite an expanding movement of “rights defenders” willing to challenge the authority of the Chinese Government, the CPC appears determined to maintain its grip on power.\(^{174}\)

The problems with procedural fairness in the Chinese legal system are not easily nor quickly remedied as they are inextricably linked to the political structure. Scholars observe that China’s criminal process does not come close to meeting North American standards of fairness “both regarding pre-trial procedures and trial and appellate procedures.”\(^{175}\) Other issues in respect of China’s weak or non-existent rule of law, use

\(^{172}\) Cohen, supra note 128.


\(^{174}\) Potter, supra note 125 at 115.

of torture to force confessions and lack of transparency\textsuperscript{176} have created a criminal justice system that is plagued with procedural unfairness.\textsuperscript{177}

In the face of these issues, the Chinese Government is making attempts, at least formally, to modernize its legal system. The CPL was originally drafted in 1979 and was substantially reformed in 1996-1997 and again in 2012. Some of the CPL revisions in 2012 (the “CPL 2012”), give the appearance of progress toward greater procedural fairness. For example, Articles 50 of the CPL 2012 provides that it is unlawful to rely on evidence that is obtained through torture, coercion, inducement, deceit or other unlawful means.\textsuperscript{178} Article 50 also provides an accused with the right not to self-incriminate. However, critics cite inconsistencies within the CPL 2012 itself that call into question the effect of the reforms. For example, as observed by Margaret Lewis, it is difficult to square the right not to self-incriminate in Article 50 with Article 93 of the CPL 2012, which requires that a suspect answer interrogators truthfully regarding guilt or innocence.\textsuperscript{179}

Another attempt at increasing procedural fairness is found in Article 53 of the CPL 2012, which states that a confession must be corroborated to found a conviction and the proof of those confessions is to a standard of beyond a reasonable doubt.\textsuperscript{180} Additional

\textsuperscript{176} Clarke, \textit{supra} note 2.
\textsuperscript{177} Staff, “Civil servant rallies resistance to China’s re-education camps” \textit{Globe and Mail} (March 11, 2013) A1.
\textsuperscript{180} Joshua Rosenzweig et al, “The 2012 Revision of the Chinese Criminal Procedure Law: (Mostly) Old Wine in New Bottles”, \textit{CRJ Occasional Paper} (17 May 2012), online:
positive formal reforms that purportedly increase procedural fairness include a change to Article 37 of the CPL 2012, which simplifies the procedure for a lawyer to meet a client without police supervision.\(^1\)

However, despite the legislative reforms to the CPL in 2012, in reality, there are many hurdles to achieving procedural fairness in the Chinese judicial system. The so-called “three difficulties” facing Chinese criminal lawyers are: problems meeting with clients; collecting evidence about the cases; and, obtaining disclosure from the prosecution.\(^2\) These difficulties highlight the issue of the lack of procedural fairness in China as well as the differences between criminal proceedings in Canada versus China. While Article 37 was supposed to allow accused better access to lawyers,\(^3\) in reality, defence counsel continue to have difficulty meeting with clients without police supervision and obtaining proper disclosure from the prosecution.\(^4\)

Defence lawyers in China complain of a lack of procedural fairness including an inability to have illegally gathered evidence thrown out of court.\(^5\) One Chinese defence lawyer complained that in a recent case, his client was beaten in dark room while his eyes were covered, so there was no way for the client to provide information about the

\(^1\) Hong Lu, Bin Liang, Udu Li & Ni (Phil) He, “Professional Commitment and Job Satisfaction: An Analysis of the Chinese Judicial Reforms from the Perspective of the Criminal Defence” (2014) China Review Vol. 14 No. 2, Special Issue: Doing Sinology in Former Socialists States (Fall 2014) pp. 159-181 at 164.


\(^4\) Lu, supra, note 181 at 165.

attakers and ask for the evidence to be excluded from a trial.\textsuperscript{186} The same lawyer expressed more generalized and chilling concerns that local authorities are building facilities where interrogations can be held without surveillance to facilitate illegal interrogation techniques such as torture.\textsuperscript{187}

Another cause of procedural unfairness that is hard to fathom from a western legal perspective is codified in Article 306 of the CPL, which provides that defence counsel can be charged with bringing false evidence in a criminal proceeding. “Big Stick 306”, as it is known, hinders the willingness of defence counsel to provide evidence in support of an accused for risk of becoming the target of police investigation and has often been used against defence lawyers who defend serious criminals.\textsuperscript{188} The effect of Article 306 is subtle because it has the potential to chill the advocacy of a lawyer to vigorously defend his or her client. It is difficult, if not impossible, to measure the negative influence of Big Stick 306 on the fairness of the Chinese legal system. However, if lawyers are afraid to put forward evidence to defend a client for fear of state reprisals, the system appears objectively unfair.

The formal hopes of the CPL reforms and its less than optimistic reality are summarized by Jerome Cohen as follows:

The 1979 codes of criminal law and procedure, their revisions in 1996-97, and their more recent amendments have symbolized and articulated an improving system of criminal justice, one that is staffed by increasingly educated and trained judges, prosecutors, police and defense lawyers and that features impressive legal institutions, procedures and even buildings. Torture is banned in principle, time limits purport to govern

\textsuperscript{186} Ibid.
\textsuperscript{187} Ibid.
\textsuperscript{188} Lu, supra note 181 at 166.
every stage of the criminal process, lawyers are now often allowed to advise and defend accused in the investigation stage of a case as well as at trial, important witnesses are generally supposed to participate in contested trials and be subject to cross-examination, and only a court can determine criminal guilt. Judges now wear Western-style judicial robes and even wield gavels in the courtroom.

Yet criminal justice remains the weakest link in China's legal system if one focuses not on laws and appearances, but on implementation and practice. As mentioned earlier in this essay, it is sobering to note how little the essentials have changed in comparison with the less sophisticated pre-Cultural Revolution system. The administration of criminal justice is still dominated by the police and the Party. The police still have enormous, virtually unfettered discretion in dealing with what they deem to be anti-social elements of all types. Some of the measures they impose are totally without legal foundation and often violate constitutional and legislative norms. Human rights activists, dissidents, protesters, petitioners, and their lawyers and families are frequent targets of illegal intimidation, threats, house arrest, kidnapping, beating, “black jails” and temporary internal exile, as suggested above.189

Perhaps the best measure of the fairness of a judicial system is whether innocent people are found guilty. Systemic problems in China’s legal system contribute to wrongful convictions. Margaret Lewis describes an incident in rural China in which a man was accused and convicted of murder. He was initially sentenced to death, but was exonerated when the “victim” returned to the town 10 years after the alleged “murder.”190 This example is powerful in exposing both the use of torture and the flaws in the Chinese justice system especially given the accused in this case “confessed” to the crime after being interrogated by the police who used torture to obtain the confession.

190 Lewis, supra note 170 at 630.
6.4 Lack of Independent Judiciary

Worthy of mention in an analysis of problems of fairness in the Chinese judicial system is the lack of independence of the Chinese judiciary. Judges are appointed by the CPC and the law itself is subject to protecting and promoting the power of the CPC. Formally, China’s leadership embraced the “rule of law” in the court reforms of 1997 which lead to a five year plan of reforming the courts by the Supreme People’s Court. However, as discussed above, in Chapter 4, the Chinese Government’s concept of the rule of law does not accord with the western concept. While fundamental changes in the courts’ power is occurring, it is not increasing relative to other state actors and, the CPC continues to limit the courts formal power. “Bottom up” pressures on the court from the media, including increased scrutiny of injustice is playing a role in making judges act fairly. However, despite the progress of the courts to provide better justice, the lack of judicial independence is troublesome for Canada’s engagement with China in extradition because ultimately the judges are the gatekeepers of procedural fairness in a courtroom. For example, observers report that the legislative unfairness facing defence counsel in China is compounded due to the lack of an independent judiciary, because judges will not intervene and assist.

The Supreme People’s Court (“SPC”), the highest court in China has attempted to improve and develop the judiciary through a series of undertakings. Between 1998 and

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193 Ibid at 634.
194 Ibid at 629.
195 Lu, supra note 181 at 165.
2008, Xiao Yang, the President of the SPC, attempted to improve training and the quality of judicial personnel. Some of the reforms initiated by the SPC included the Five Year Reform Platform that recognized problems with judicial independence and stated that causes included local protectionism, bureaucracy, low professional standards and lack of resources.

While the reforms to the judicial system undertaken since 1979 appear to represent progress, critics argue that the steps did not reduce political interference with the judiciary in any meaningful way. Further, scholars argue that the Chinese judicial system cannot operate as a legitimate independent source of restraint on government behaviour while China is a one-party socialist state.

Various reforms have established practical changes to the selection of judges, who prior to the late 1990s, did not have legal training and were often retired military personnel. Prior to 1995, there were no formal educational requirements for judges, which appears supported by statistics gathered in 1997 that only 5.6% of the judges in China held a bachelor’s degree and 0.25% held a master’s level degree. Reforms have attempted to increase the professionalism of judges in China. For example, a qualification exam for individuals wishing to be judges was first administered in March 2002. The educational reforms of the judiciary are aimed at raising the quality of

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197 Grimheden, supra note 99 at 1008.
198 Tsang, supra note 196 at 874.
199 Potter, supra not 110 at 466.
200 Keyuan, supra note 106 at 1051.
201 Ibid.
202 Song, supra note 98 at 145.
judges. The higher standards for quality of judges may be achieving their goals as in 2005, research indicates that 40% of judges have a bachelor’s degree.

When observers write about the reforms to the legal system in China during economic modernization, it is important to understand that judicial reforms lagged behind legislative reforms. The *Judges Law* was enacted in 1995 in an attempt to improve the quality of judges so that they could, in theory at least, “independently exercise their judicial authority within the law”. Reforms such as the *Judges Law*, pronouncements from the SPC and even the Chinese Constitution provide that the courts must exercise judicial power independently. However, what is fascinating about the issue of judicial independence is that the interpretation of the legislation by the CPC is that any reference to “courts” is a reference to the courts collectively and not individual judges. Accordingly, “independent” decisions of a judge or panel can be overruled as the independence is in the judicial organ and not individual judges. This interpretation means that judges are susceptible to both external interference from the Party and internal interference of the court as administered by the government.

More recently, regulations were passed by the Supreme People’s Court in attempt to reduce political interference with judges. Specifically, one regulation, which is

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203 Keyuan, *supra* note 106 at 1052.
204 Keyuan, *supra* note 106 at 1045.
206 Keyuan, *supra* note 106 at 1045.
207 *P.R.C. Const.* ar. 126, translated (1991), see Keyuan, *supra* note 106 at 1047 footnote 44.
208 Keyuan, *supra* note 106 at 1047.
209 Ibid.
210 Susan Finder, “Official Interference or Leadership”, *Supreme People’s Court Monitor* (September 6, 2015), online: <http://supremepeoplescourtmonitor.com/2015/09/06/official-interference-or-leadership/>.
translated as, “Implementing Measures for People’s Courts Carrying Out the Provisions on Recording, Reporting and Pursuing Responsibility of Leading Cadres Interfering with Judicial Activities or Tampering with the Handling of Specific Cases” establishes, as the name suggests, a system to record, report and investigate where party members interfere with certain cases. However, while the intention of the regulations is to reduce the involvement of local officials in court cases, it is clear that CPC control is still present in the court process as officials can still provide views “for consideration.” The above-mentioned regulation is another example of the tension between legislative advancements to judicial independence and the reality that the Chinese Government openly retains the right to influence the judicial process. This legislative interpretation provides another example of how the reality of the formal enactments and legislation in China do not always result in actual improvements.

While criticism of the Chinese judicial system is warranted and the prospects for a genuine rule of law society in China have been described as “bleak” it is important to recognize that no justice system is without flaw. History provides examples of non-independent judiciaries that have were considered fair for matters that were not political or sensitive to the ruling government such as Spain under Franco and the courts of Singapore. It is possible that if China made an extradition request to Canada for the return of a person for prosecution for a crime which did not challenge or threaten the authority of the CPC, the request and proceeding could be fair. Accordingly, while the Minister and courts must remain cognizant of the frailties of the Chinese judiciary, there

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211 Ibid.
212 Cohen, supra note 128.
213 Liebman, supra note 193 at 636 and 637.
should not be a blanket assumption that every criminal proceeding in China will be unfair, simply because systemically judges are not independent from the CPC.

Even in Canada, with its myriad of protections for an accused and a codified system to enhance procedural fairness, wrongful convictions occur such as in the cases of Ivan Henry\textsuperscript{214} and David Milgaard.\textsuperscript{215} Given the potential for unfairness in any justice system, the better question in respect of improvements to the Chinese criminal justice system may be not whether the system is free from abuse, but whether, given safeguards placed in an extradition treaty, the tests set out under Canadian extradition law could be met to make extradition to China possible.

\textbf{6.5 Torture and Prison Conditions}

Torture and inhumane prison conditions can both be considered violations of human rights. There are documented reports that Chinese authorities engage in torture as part of the criminal justice system and that Chinese officials use torture to force confessions during interrogations.\textsuperscript{216} Amnesty International reports that Chinese police authorities routinely use torture to obtain confessions including cuffing the hands and legs of suspects for long periods of time as well as depriving the suspects of sleep, food and medical treatment.\textsuperscript{217}

\textsuperscript{214} On October 27, 2010, the British Columbia Court of Appeal acquitted Mr. Henry of ten counts of sexual assault for which Mr. Henry had served 27 years in prison, see \textit{R. v. Henry}, 2010 BCCA 462.

\textsuperscript{215} On April 14, 1992, the Supreme Court of Canada quashed the conviction of David Milgaard for the 1970 murder of Gail Miller as his conviction constituted a “miscarriage of justice”. Mr. Milgaard spent 23 years in prison prior to being acquitted. See \textit{Reference re Milgaard (Can.)}, [1992] 1 S.C.R. 866.

\textsuperscript{216} Xiaofeng, \textit{supra} note 52 at 456.

In respect of prison conditions in China, there are reports that some prison conditions in China are deplorable and include beatings with tubes filled with sand and solitary confinement for up to a month.218 The issue of torture and inhumane prison conditions in China touches on at least three aspects of a consideration of a proposed Canada-China extradition treaty. Specifically, the issue of torture is relevant to: the quality of the evidence gathered to support a Chinese request for extradition; the reliance on assurances that the person sought will not be tortured once returned to China; and, a generalized concern that Canada should not assist a regime that condones or tolerates state-sanctioned torture.

If information supporting a Chinese request for extradition is found to be obtained through torture, the Canadian extradition process is tainted and would offend both evidentiary standards regarding the veracity of the evidence and principles of natural justice.219 An extradition judge should not order committal on evidence that is found to be manifestly unreliable. Further, an extradition judge could well dismiss the request for extradition as an abuse of process if it is determined that the ROC contained torture-derived evidence.

In respect of diplomatic assurances, as discussed above in Chapter 3 of this paper, can a country that acts illegally be trusted to honour Canadian requests to provide human prison conditions to inmates or not torture individuals? Obtaining assurances from a country that engages in torture presents a serious problem because the party giving the

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218 Radio Free Asia, supra note 82.
219 United States of America v. Khadr, 2011 ONCA 358, in which the Ontario Court of Appeal stayed and extradition request as an abuse of process based on the fact that Mr. Khadr was arrested and tortured by Pakistani officials as a result of the United States imposing a US$500,000 bounty for Mr. Khadr’s arrest.
assurance has acted illegally. As such, the principles of good faith and comity upon which extradition relationships are normally based are called into question.

Perhaps both the most obvious and nuanced issue in respect of China’s human rights record in respect of torture and harsh prison conditions, is whether Canada should assist a country that engages in systemic torture and human rights abuses. Canada is a signatory to the CAT. As a signatory to CAT, Canada must be wary not to violate its international obligations by engaging with China in a request for extradition in which there are substantial grounds for believing that the person sought would be in danger of being subjected to torture. Specifically, Article 3 of CAT provides:

1. No State Party shall expel, return or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture.

2. For the purpose of determining whether there are such grounds, the competent authorities shall take into account all relevant considerations including, where applicable, the existence in the State concerned of a consistent pattern of gross, flagrant or mass violations of human rights.

Given the unequivocal language of Article 3 of CAT, if China is deemed to have flagrant violations of human rights, as many scholars state, Canada would be in violation of its CAT obligations if it were to extradite an individual to China to face prosecution.

220 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment Entered into force 26 June 1987, 1465 U.N.T.S. 85, online: <http://www.ohchr.org/EN/ProfessionalInterest/Pages/CAT.aspx>. Note: China is also a signatory to CAT but has made a declaration, under Article 28 of CAT, that they do not recognize the competence of the committee against torture to investigate allegations of widespread torture within their boundaries.

221 Ibid at Article 3.
Despite the concerns regarding China’s use of torture, Canada has forged strong economic and cultural ties with China. It appears hypocritical to refuse to provide international assistance in criminal matters while partnering with the Chinese Government for economic purposes. Further, isolation in matters of human rights does not provide an opportunity to positively influence Chinese policy in human rights and legal reform. As long as the request for extradition can be evaluated on a case-by-case basis to consider that it has not run afoul of Canadian and international human rights standards, there are benefits to cooperation with China. Viewed in a different light, if Canada refuses to assist China in its fight against corruption, but Canada’s economy benefits from the influx of the corrupt funds of the individuals fleeing to Canada from China, is the Canadian Government signalling that Canada is a safe haven for Chinese fugitives and a place to shelter stolen money beyond the reach of the Chinese Government?

6.6 Chapter Conclusion

The Chinese legal system suffers from corruption and abuse. Observers of China’s criminal justice system have suggested that China’s attempts to reform the CPL are not effective. The systemic use of torture in China is not only a human rights violation, but results in an unfair criminal justice system.

Political engagement with China in respect of entering an extradition treaty exposes the Canadian Government to political risk. In addition to the political dangers for politicians, there is a broader risk of eroding Canadian principles of fundamental justice.


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and Canada’s stature on the world stage as a champion of human rights. Amnesty International posits that, in respect to Canada’s relationship with China, Canada has already subordinated its position on human rights to economic interests.\textsuperscript{223} However, engagement with the Chinese Government in extradition also provides an opportunity to introduce and reinforce acceptable norms of procedural fairness and human rights standards to the Chinese legal system. Further, to not provide assistance to the Chinese Government in the investigation and prosecution of crime risks that criminals may escape punishment for serious offences.

7.0 Case Study of the Amanda Zhao Murder Trial

7.1 Introduction

This chapter reviews the interaction between the Governments of Canada and China under the Canada-China MLA in the criminal investigation and prosecution of Zhang Han and Li Ang for the murder of Amanda Zhao. Ms. Zhao was Chinese citizen studying in Canada when she was murdered. The case is noteworthy in that it is the first time that a suspect has gone to trial in China for a serious crime committed in Canada or the United States.224 The case also provides insight into the issues, pitfalls and controversies that arise in the course of engagement between the Canadian Government and the Chinese Government in criminal matters.

7.2 Background of the Amanda Zhao Murder

On October 20, 2002, Amanda Zhao’s body was discovered in a suitcase near Stave Lake, British Columbia. She had been strangled. Ms. Zhao was a 21-year old Chinese citizen studying English in Canada. Ms. Zhao lived with her boyfriend, Mr. Li, and Mr. Li’s cousin, Mr. Zhang. Both Mr. Li and Mr. Zhang were Chinese citizens who were also studying in British Columbia.225

On the morning of October 10, 2002, Mr. Li reported to police that Ms. Zhao had gone to buy cooking oil on the previous night and had not returned. In the days between his initial contact with the police and the discovery of Ms. Zhao’s body, Mr. Li returned

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225 Linda Nguyen, “China to try two men arrested in 2002 B.C. strangling case”, The Vancouver Sun (October 14, 2009), online: <http://www.canada.com/story_print.html?id=e01c59f2-8cdf-4d50-bf2c-9060b004bb8bb&sponsor=>.
to China. The lack of an extradition treaty between Canada and China meant that Canada was unable to request that Mr. Li be extradited from China to stand trial in Canada. \(^{226}\) Mr. Zhang remained in Canada. The Canadian police authorities turned their investigation to Mr. Zhang and he was questioned extensively.

In his initial interviews with police, Mr. Zhang denied that either he or Mr. Li were involved or had knowledge of Ms. Zhao’s disappearance. As the investigation progressed, Mr. Zhang changed his story and told the RCMP that Mr. Li had murdered Ms. Zhao, and that he had assisted Mr. Li in disposing of the body. Mr. Zhang also stated that he had lied to the police during his previous interviews. The statements made by Mr. Zhang were video and audio recorded and transcribed. The RCMP also filmed Mr. Zhang while he re-enacted the murder and led the police to where he and Mr. Li disposed of Ms. Zhou’s remains. Based on his confession, the Canadian authorities charged Mr. Zhang with being an accessory after the fact to Ms. Zhao’s murder.

### 7.3 Canadian Prosecution of Mr. Zhang

At the trial of Mr. Zhang, a *voir dire* was held to determine the admissibility of the confession provided by Mr. Zhang to the RCMP. On June 10, 2004, Mr. Justice Williamson of the British Columbia Supreme Court held that Mr. Zhang’s confession was obtained in breach of his *Charter* rights because he was not provided access to counsel and he was offered inducements by the police to confess. As such, the confession was excluded under s. 24(2) of the *Charter*. In the absence of confession, Mr.

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\(^{226}\) Staff, “China eyes its cards in B.C. murder case”, *The Vancouver Province* (March 8, 2007), online: <http://www.canada.com/theprovince/news/story.html?id=cc0a8639-5d51-4041-aac2-0c268db6cc89>.  

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Zhang was acquitted and the Canadian proceedings concluded. Mr. Zhang returned to China.

7.4 Chinese Request for Evidence

Chinese authorities arrested Mr. Li upon his return to China. Mr. Zhang was also arrested by Chinese authorities upon his return to China. In early 2009, pursuant to the Canada-China MLA Treaty and the MLACMA, China made a request to the Government of Canada for all of the materials in the RCMP murder investigation file, including the taped confessions of Mr. Zhang. On September 22, 2009, the Minister obtained diplomatic assurances from the Government of China that the evidence would not be used in a prosecution of Mr. Zhang in China. The Canadian Government required additional information from China, presumably regarding the fate of Mr. Li if convicted, before it would send the information to the Chinese authorities.

On September 1, 2010, a supplemental request was made to the Canadian Government by the Chinese Government. In the supplemental request, the Chinese Government provided assurances that Mr. Li would not be executed if convicted in China. The supplemental request for an evidence gathering order was approved by the Minister.

The Attorney General, acting under s. 18 of the MLACMA applied, and was granted, an order to gather the evidence from the police. The order required that the RCMP produce the evidence it had in its possession regarding Mr. Zhang’s confessions, including the statements made by Mr. Zhang and the video recordings. The judge did not
provide notice of the sending hearing\textsuperscript{227} to either Mr. Zhang or Mr. Li. The judge did not believe they were “interested parties” because the evidence could not be used against Mr. Zhang and the information sought by the Chinese Government was not created by Mr. Li. Further, it was Mr. Zhang’s Charter rights, not Mr. Li’s, that were violated when the RCMP obtained the evidence. At the sending hearing the judge ordered that the gathered evidence could be sent to China based, in part, on the assurances provided by the Chinese Government regarding the use of the evidence.

7.5 Re-opening of the MLACMA Sending Hearing

In 2011, after the evidence was already sent to China, Mr. Li obtained counsel in British Columbia and applied to re-open the sending hearing arguing that he should have been given notice as an interested party. The judge re-opened the sending hearing, but ultimately held that he was satisfied that the use of the evidence would only be for the purpose of prosecuting Mr. Li. It would not offend fundamental principles of justice to send evidence that was obtained in violation of the Charter because, while Mr. Zhang’s Charter rights were violated, the evidence could not be used against him in China.

The application to set aside the sending order was dismissed and the evidence, which was already in China, was able to be used by the Chinese authorities, subject to the assurances provided to Canada.

\textsuperscript{227} A sending hearing under ss. 19-22 of the MLACMA, requires that the evidence gathered under the evidence gathering order be reviewed by a judge to ensure that the evidence gathered accords with the terms of the evidence gathering order. The sending hearing also provides the opportunity for “interested parties” to make submissions to the Court regarding why the evidence should not be sent, or that special conditions should be placed on the use of the evidence in the requesting state.
7.6 The Criminal Proceedings in China

The trial in China against Mr. Li proceeded, although not without controversy. In September 2012, Mr. Li was convicted of Ms. Zhao’s murder and sentenced to life in prison. Mr. Li’s family complained that the trial in China, which lasted only one day, was unfair and included three disputed confessions, including one purportedly made by Mr. Li in 2009. Ms. Zhao’s family expressed comfort with the life sentence imposed on Mr. Li for the death of their only daughter.

The relief felt by Ms. Zhao’s family was short-lived. In 2014, the Chinese Court of Appeal changed Mr. Li’s conviction from murder to manslaughter and reduced his sentence, finding that the evidence did not support a first-degree murder charge. In a 30-page ruling, the court held that Mr. Li killed Ms. Zhao, but that there was no premeditation because the pair were romantically involved and her death was the result of a pillow fight gone awry. Mr. Li’s sentence was reduced to seven years and he is eligible for release on June 27, 2016.

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230 Ibid.

231 Ian Young, “I strangled her by accident in a blindfolded pillow fight: A killer’s explanation that only Beijing’s high court buys”, *South China Morning Post* (July 9, 2014), online: <http://www.scmp.com/comment/blogs/article/1550066/i-strangled-her-accident-blindfolded-pillow-fight-killers-explanation/>.

232 Ibid.

233 Gordon Hoekstra, “Burnaby student Amanda Zhou’s killer has sentenced [sic] reduced from life to only seven years”, *The Vancouver Sun* (June 30, 2014), online: <http://chinawatchcanada.blogspot.ca/2014/06/amanda-zhaos-killer-has-sentenced.html>.
The appeal hearing in China was not open to the public and there are allegations that Mr. Li’s father, a senior People’s Liberation Army officer, influenced the outcome of the proceeding. It is possible that the reduction of the sentence and the appearance of improper influence by Mr. Li’s father may inhibit future cooperation between Canada and China in criminal matters. If the allegations that Mr. Li’s father was able to influence the outcome of the appeal are true, it supports concerns held by critics of the Chinese legal system that court proceedings in China are vulnerable to political influence and corruption even in a high-profile and non-political murder trial.

7.7 Chapter Conclusion

The Amanda Zhao case highlights the benefits and pitfalls associated with providing assistance to the Chinese Government in criminal proceedings and is relevant to consideration of extradition between Canada and China. By sharing the evidence, Canada assisted with a proceeding that used the evidence in a trial that lasted only one day in which Mr. Li’s family alleged that confessions were extracted by “unimaginable torture at the hands of the Chinese police.” Further, the allegations that Mr. Li’s sentence was ultimately reduced because of political influence smacks of an unfair and non-independent judiciary.

However, there are positive elements to take away from the cooperation between Canada and China in the case of Amanda Zhou. Had the evidence not been sent from

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\[^{234}\text{Ibid.}\]
\[^{235}\text{Ibid.}\]
\[^{236}\text{Mark MacKinnon, “Family of accused in Amanda Zhao killing says Canadian trial would have been more just”, The Globe and Mail (September 23, 2012), online: <http://www.theglobeandmail.com/news/world/family-of-accused-in-amanda-zhao-killing-says-canadian-trial-would-have-been-more-just/article4562747/>.}\]
Canada to China, a young girl’s murder might have gone unpunished. Further, China honoured its diplomatic assurances not to use the evidence against Mr. Zhang and not to seek the death penalty for Mr. Li. Arguably, Canada’s involvement and the resulting diplomatic assurances may have spared Mr. Li and Mr. Zhang from the death penalty. These aspects of effective cooperation between the Governments of Canada and China builds trust for future MLA requests between Canada and China and bodes well for an extradition relationship between Canada and China.
8.0 Proposed Extradition Treaty between Canada and China

8.1 Introduction

This chapter proposes safeguards for inclusion in a draft Canada-China extradition treaty. The safeguards are proposed as a remedy to concerns regarding the Chinese legal system. While all extradition treaties contain some provisions to protect domestic sovereignty of the requested state, the proposed conditions are more restrictive and provide a greater opportunity for the Minister to refuse an extradition request from China on the basis that it would not conform to Canadian values or comply with current Canadian extradition law.

The safeguards are compiled and set out as a proposed Canada–China extradition treaty in Appendix A to this paper. Many of the proposed safeguards are taken from the United Nations Model Treaty on Extradition (the “UN Model Treaty”).237 Other safeguards are novel and attempt to anticipate the major hurdles to extradition from Canada to China. The form of some of the provisions are derived from the diplomatic assurances used in the immigration proceeding in which Lai Changxing was deported from Canada to China.

8.2 Fairness of the Criminal Proceeding in China

Provisions that protect an individual’s right to procedural fairness are important to alleviate concerns of the Minister and reviewing courts regarding the lack of fairness in the Chinese justice system. As described above, a fundamental principle of extradition

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law is respect for the differences of the requesting state’s legal system.\textsuperscript{238} However, there are limits to the differences that will be tolerated. Arguably, China’s record on procedural fairness falls below the acceptable standard upon which extradition from Canada could be ordered. As such, minimum protections of procedural fairness are required of the legal system in China in order to ensure that surrender would not “shock the conscience” of Canadians.

While difficult to measure the “fairness” of a criminal proceeding, some guidance is provided by the Ontario Court of Appeal. In \textit{United States of America v. Nadarajah}\textsuperscript{239} the court held that:

\begin{quote}
[48] Procedural fairness and fundamental justice at the surrender stage of the extradition process require that: (1) the person whose extradition is sought know the case against him or her; (2) the Minister provide the person sought with a reasonable opportunity to adequately state his or her case against surrender; (3) the Minister give due consideration to all relevant factors in deciding whether to order surrender; and (4) the Minister give sufficient reasons for the decision to surrender: \textit{Whitley v. United States of America} 1994 CanLII 498 (ON CA), (1994), 20 O.R. (3d) 794 (C.A.), affirmed 1996 CanLII 225 (SCC), [1996] 1 S.C.R. 467; \textit{United States of America v. Lake} 2006 CanLII 29924 (ON CA), (2006), 212 C.C.C. (3d) 51 (Ont. C.A.), affirmed 2008 SCC 23 (CanLII), [2008] 1 S.C.R. 761.\textsuperscript{240} \\
\end{quote}

Modifying the \textit{Nadarajah} principles from an extradition proceeding to specific application to concerns of procedural fairness levelled against China, one can derive the

\begin{footnotesize}
\begin{enumerate}
\item \textit{United States of America v. Nadarajah}, 2010 ONCA 859, appealed to the S.C.C. on different grounds.
\item \textit{Ibid} at para 48.
\end{enumerate}
\end{footnotesize}
following safeguards to protect a person from a lack of fairness in the Chinese legal system:

a) The person sought, once removed to China, must know the case against him or her. This means that some form of disclosure be provided to the accused or at the least he or she not be held without charge. This would likely be best accomplished through access to counsel to advocate for disclosure.

b) The Chinese courts must provide the accused with a reasonable opportunity to adequately state his or her case against the charges. This requirement means access to counsel for the accused without interference.

c) The Chinese courts must give due consideration to all relevant factors in deciding guilt or innocence. This factor requires that the judiciary provide a fair hearing to the person sought once removed to China that is free from political interference.

d) The Chinese court will provide sufficient reasons for the decision against the accused. This factor can be interpreted to protect a person from “trial” by ad hoc or administrative tribunals which are not public. Specifically, this safeguard is aimed at protecting the person sought from being incarcerated under the Administrative Punishments241 which formerly included re-education through labour where people can be incarcerated for up to 4 years without trial.242

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241 See: Potter, supra note 125 at 111, for a discussion on the Chinese Government’s processes for social control including administrative punishment and re-education through labour camps. See also: Matthias von Hein, “No end to China’s notorious re-education camps”, DW (January 15, 2014), online: <http://www.dw.com/en/no-end-to-chinas-notorious-re-education-camps/a-17362570>.

242 Law on Administrative Punishments of the People’s Republic of China, adopted March 17, 1996, effective October 1, 1996. See: Human Rights Watch, “China: End Re-Education Through Labour Without Loopholes”, Human Rights Watch (November 15, 2013), online: <https://www.hrw.org/news/2013/11/15/china-end-re-education-through-labor-without-loopholes> which states that while formally, the administrative punishment of the RETL was abolished in November 2013, human rights observers claim that some of the camps have been converted to drug rehabilitation centres which also use forced labour and detention and that the Chinese Government may replace the RETL with other forms of arbitrary arrest and detention.
While the principles arising from Nadarajah do not transfer perfectly between the Canadian and Chinese legal systems, they at least provide a framework from which to craft safeguards to protect the rights of the person sought once extradited from Canada to China. It is noteworthy that some of the safeguards derived from Nadarajah, such as access to counsel, were recognized as requirements before the Canadian Government would order the deportation of Lai Changxing from Canada to China in an immigration proceeding.\footnote{Lai, supra note 150.}

\section*{8.3 The UN Model Extradition Treaty}

The UN Model Treaty provides both mandatory and optional grounds upon which a request for extradition may be refused by the requested state. Many of the grounds set out in the UN Model Treaty are codified in ss. 44 and 46 of the \textit{Extradition Act}. In considering extradition from Canada to China, the UN Model Treaty highlights basic considerations for the Minister in determining whether to approve a treaty request including:

Extradition \textbf{shall} not be granted in any of the following circumstances:\footnote{The UN Model Treaty, Article 3 – N.B. Only the relevant sections of the model treaty are included. Article 3 of the UN Model Treaty includes 7 grounds upon which a requested state must refuse extradition.}

\begin{itemize}
  \item [a)] If the offence for which extradition is requested is regarded by the requested State as an offence of a political nature [emphasis added];
  \item [b)] If the requested state has substantial grounds for believing that the request for extradition has been made for the purpose of prosecuting or punishing a person on account of that person's race, religion, nationality, ethnic origin, political opinions, sex or status, or that that person's position may be prejudiced for any of those reasons [emphasis added];
\end{itemize}
c) If the offence for which extradition is requested is an offence under military law, which is not also an offence under ordinary criminal law; and

d) If the person whose extradition is requested has been or would be subjected in the requesting state to torture or cruel, inhuman or degrading treatment or punishment or if that person has not received or would not receive the minimum guarantees in criminal proceedings, as contained in the *International Covenant on Civil and Political Rights*, article 14.245

Extradition may be refused in any of the following circumstances:

a) If the offence for which extradition is requested carries the death penalty under the law of the requesting state, unless that state gives such assurance as the requested State considers sufficient that the death penalty will not be imposed or, if imposed, will not be carried out;

b) If the person whose extradition is requested has been sentenced or would be liable to be tried or sentenced in the requesting State by an extraordinary or *ad hoc* court or tribunal; and

c) If the requested state, while also taking into account the nature of the offence and the interests of the requesting state, considers that, in the circumstances of the case, the extradition of that person would be incompatible with humanitarian considerations in view of age, health or other personal circumstances of that person.246

The mandatory and optional grounds for refusing a request for extradition set out in the UN Model Treaty provide a minimum level of protection for a requested state’s sovereignty when determining whether to accept or refuse an extradition request. Some of these fundamental protections take on greater importance in engagement in extradition with the Chinese Government that with some other governments. For example, while including the right to refuse a request for an offence of a political nature is standard in

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245 UN General Assembly, *International Covenant on Civil and Political Rights*, 16 December 1966, United Nations, Treaty Series, vol. 999, p. 171, online: <http://www.refworld.org/docid/3ae6b3aa0.html>. Note: Article 14 provides fundamental procedural fairness rights such as the presumption of innocence and access to legal counsel.

246 The UN Model Treaty, Article 4. N.B.: Only the relevant sections of the model treaty are included. Article 4 of the UN Model Treaty includes 8 grounds upon which a requested state may refuse extradition.
extradition treaties, the clause is particularly relevant to extradition with China because of the Chinese Government’s control over the legal system and police apparatus.

In the same vein as protecting political beliefs is the right to refuse a request for extradition on the basis that there are substantial grounds to believe that the request was made for the purpose of prosecuting for religious beliefs. Abuses in China related to practitioners of Falun Gong are well documented. Accordingly, a mechanism to allow Canada to refuse a request on the basis that it seeks to prosecute a person for his or her religious beliefs is essential to maintain Canadian Charter values.

8.4 Diplomatic Assurances Provided in Immigration

Canadian immigration law provides some guidance as to the diplomatic assurances might be required to remove an individual from Canada to China. In the immigration context, Canada has required China to provide assurances before it will deport an individual from Canada. Canada’s deportation proceeding in respect of Chinese national, Lai Changxing, involved years of hearings and ultimately generated a number of assurances provided by the Chinese Government that satisfied the Federal Court of Canada that Mr. Lai’s deportation could occur.247

Mr. Lai allegedly was a mastermind of a $3 billion dollar smuggling ring that involved cars, cigarettes, oil and other goods through Xiamen in the 1990s.248 As a wanted criminal in China, Mr. Lai was subject to removal from Canada under the

247 Lai, supra note 165.
Immigration and Refugee Protection Act. While Mr. Lai fought his deportation from Canada for years, ultimately, it was the diplomatic assurances provided by the Government of China that satisfied the Federal Court of Canada that Mr. Lai could be deported. These assurances, which were described by Mr. Justice Shore of the Federal Court as “strict, clear and unequivocal” are summarized by Mr. Lai’s lawyer, David Matas, as follows:

- The Canadian side can know where Lai Changxing is detained. At the request of the Canadian side, the Chinese side will arrange, as swiftly as possible, visits by Canadian embassy or consular officials resident in China to Lai’s place of detention, including living quarters, and the Canadian officials can meet with him. An interpreter chosen solely by the Canadian side can accompany the Canadian officials.

- During Lai Changxing's detention and at the request of the Canadian side, the Chinese side will, if necessary, provide videoconferencing facilities so that Lai Changxing can contact Canadian embassy or consular officials, resident in China.

- Under the Code of Criminal Procedure and the Act Concerning Attorneys of the People's Republic of China, Lai Changxing has the right to commission a lawyer licensed to practice law in China to defend him. He also has the right to refuse to be defended by a lawyer so commissioned and to choose another lawyer. Lai Changxing has the right to meet with his lawyer without being monitored.

- When the court holds open hearings of Lai Changxing's criminal case of alleged smuggling under the Code of Criminal Procedure and the Criminal Code of the People's Republic of China, the Canadian side may send embassy or consular officials, resident in China, to attend the hearings.

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249 Immigration and Refugee Protection Act, S.C. 2000, c. 27.
250 Lai, supra at note 165 at para 6.
• After Lai Changxing returns [to China] for his trial, the Chinese judicial authorities will make synchronized audio and video recordings of the court hearings and pretrial interrogations and record the identities of all court officials present at Lai’s trial and all pretrial interrogators. Upon request, the Canadian side will be able to consult the relevant audio and video recordings (and other information).

• Under the Prisons Act and the Detention Centre Regulations of the People’s Republic of China, all detainees receive the necessary medical examinations. If the Canadian side submits a reasonable request, the Chinese side will allow an independent medical establishment legally qualified [to operate] in China to examine Lai medically.

• Because medical examination reports are private, the Canadian side may see the contents of the medical examination report with Lai’s consent...”251

The assurances provided by the Chinese Government to Canada in Mr. Lai’s case are instructive as they highlight the concerns regarding the potential mistreatment of Mr. Lai upon his return to China. Mr. Lai expressed to the Minister of Citizenship and Immigration and the Federal Court that there was a substantial risk that, upon his return to China, he would be tortured and killed by the Chinese authorities. The assurances provided by the Chinese Government present practical methods to mitigate the risk of Mr. Lai’s torture or mistreatment such as audio and video recording Mr. Lai’s interviews with police authorities and providing him access to medical examinations.

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251 David Matas, “Canada - Haven or Hideout? The case of Lai Changxing”, Council on Foreign Relations (undated), online: <http://www.cfr.org/content/bios/Matas_CFRWinstonLord_CanadaLaiChangxing_09.06.11.pdf>.
From the assurances provided in Mr. Lai’s deportation case, the following safeguards for use in a proposed Canada-China extradition treaty may be distilled:

a) the person sought will have access to independent medical treatment;

b) the person sought will have access to consular officials of the requested state upon request of the surrendered individual; and

c) interrogations must be video and audio recorded.

It is of note that Mr. Lai was sentenced to a life sentence upon his conviction in May 2012\textsuperscript{252} and that Canadian officials monitored Mr. Lai’s court proceedings.\textsuperscript{253} The Chinese Government’s compliance with diplomatic assurances regarding Mr. Lai’s treatment augers well for future respect for assurances. The case of Mr. Lai’s deportation from Canada to face the Chinese criminal justice system demonstrates that, given sufficient safeguards and cooperation between the Governments of Canada and China, effective extradition is possible.

8.5 Refusal of Extradition Based on Nationality

The bulk of the proposed safeguards in the draft Canada-China extradition treaty provide solutions to issues raised by the perceived human rights abuses and lack of procedural fairness in the Chinese criminal justice system. A proposed clause that allows

\textsuperscript{252} Malcolm Moore, “China's most-wanted man jailed for life over £3 billion fraud”, \textit{The Telegraph} (May 18, 2012), online: <http://www.telegraph.co.uk/news/worldnews/asia/china/9274384/Chinas-most-wanted-man-jailed-for-life-over-3-billion-fraud.html>.

Canada to refuse an extradition request of a Canadian national, may be more politically motivated than a response to specific concerns regarding the Chinese legal system.

A clause that allows refusal of an extradition request for citizens of the requested state is not unprecedented. For example, the draft of the Australia-China Extradition Treaty,²⁵⁴ which has not yet become law in Australia, provides that the requested state has the option to refuse an extradition request on the basis that the person sought is a national of the requested state.

In the Canada-China extradition context, a clause that provides Canada with the option to refuse to extradite a Canadian citizen to China effectively narrows the pool of persons sought for extradition to those who are allegedly fleeing from China and using Canada as a safe haven. The right to refuse the extradition of nationals, while potentially difficult to justify legally or morally as the purpose is not grounded in human rights or procedural fairness norms, is likely politically expedient and would appease critics of a proposed Canada-China extradition treaty.

8.6 Reciprocity

The Government of China has not been a cooperative treaty partner in honouring its international agreements, despite having an appetite to engage in agreements and treaties around the world. China has a history of being consistently uncooperative with countries that want to investigate unlawful activities in China.²⁵⁵ What has been described as a

²⁵⁵ Cohen, supra note 128.
“legal firewall” protects Chinese illegal activities from investigation from the West.  

As a result of inconsistent cooperation, incompatible legal systems and China’s secrecy laws, criminals from China can effectively operate beyond the reach of Western law enforcement.

Reciprocity is a concept in international law that has been described in general terms as “returning like behaviour with like.” Whether China would respond to a Canadian request for extradition is a valid factor for Canada’s consideration when evaluating the merits of an extradition treaty with China. An effective bilateral extradition treaty should not provide a one-direction turnstile that only assists China with securing the return of fugitives to face prosecution in China.

A reciprocity clause in a Canada-China extradition treaty would provide that the Government of Canada could be able to trust China to honour a request to return an individual who has allegedly committed a crime in Canada and fled to China. The scenario is not hypothetical. In 2012, Gu Wei Wu was wanted by Canadian authorities in Ontario in relation to a brutal kidnapping and murder. Mr. Gu fled to China and, without an extradition treaty, there was no way for a prosecution to commence in Canada. Likewise, in the case of the Amanda Zhou murder, once Mr. Li fled Canada to China

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257 Ibid.

258 Francesco Parisi & Nita Gheinnie, “The Role of Reciprocity in International Law”, George Mason University (undated), online: <http://www.law.gmu.edu/assets/files/publications/working_papers/02-08.pdf> at 1.

there was no mechanism to seek Mr. Li’s extradition from China to face prosecution in
Canada. The circumstances of the cases of Mr. Gu and Mr. Li demonstrate that effective
extradition agreements require both parties to be willing to act on requests if the
requirements of the governing extradition treaty and the domestic elements of the
requested state’s extradition law are satisfied. Accordingly, a clause requiring reciprocity
increases the chance that both Canada and China will respect the treaty and provide a
meaningful contribution to improving cooperation and increasing efficacy on
international crime prevention.

8.7 Chapter Conclusion

The proposed safeguards to a Canada-China extradition treaty come from different
sources but have a common purpose. The safeguards provide additional confidence that
extradition from Canada to China can occur in a manner that will not shock the
conscience or otherwise be unjust or oppressive. This confidence is important to the
Minister and the courts reviewing the Minister’s decision or hearing evidence on
committal. The safeguards also highlight the issues that are most likely to be raised in
challenging an extradition request made by the Chinese Government to the Canadian
Government.
9.0 Conclusion

Canada’s cooperation with the Chinese Government in extradition requires Canada to assist a political system that condones human rights abuses and a legal system that has demonstrated, by western standards, an abysmal lack of consistent procedural fairness. However, the risks of Canada not engaging with China in extradition include a lost opportunity to better fight international crime and the potential for Canada to become a safe-haven for Chinese criminals. Further, Canada’s engagement with the Government of China in extradition provides an opportunity to influence, however minimally, Chinese policy on the use of the death penalty, procedural fairness and curtailing the use of torture as part of its police investigations and penal system.

Recent moves by the Chinese Government to enact legislation that provides greater rights to those accused of crime and its attempt to root out political corruption\(^{260}\) indicate a willingness, at least formally, to improve the legal system. Critics argue that the formal changes cannot create a fair criminal justice system in the absence of judicial independence and acceptance of the rule of law. While the system is not without flaw and the path to effective extradition between Canada and China has many obstacles, consideration of extradition between the countries is worthy of further exploration. Areas of additional research include the impact of legislative reforms on the behaviour of judges adjudicating criminal matters, the actions of investigative authorities and the treatment of those facing prosecution to assess if the reforms are, in reality, improving the system. Further inquiry into the rights of an accused during a criminal proceeding and

\(^{260}\) Tom Philips, “China urged to pardon corrupt party brass”, *The Province* (March 16, 2015) at 17.
the right of defence counsel to mount defences and argue for the exclusion of evidence tainted by torture will also help to evaluate the fairness of the Chinese legal system and better inform an analysis of extradition from Canada to China.

On a final note, while moving forward with extradition between Canada and China should not occur without careful consideration, officials with the Government of Canada would be wise to recognize that the time is ripe to pursue this venture. The Chinese Government’s current political appetite to fight corruption, enter into extradition treaties with western countries, and reform its legal system creates a constellation of factors that provide a unique opportunity to negotiate an extradition treaty that conforms to Canadian values, increases global cohesion in combatting international crime and potentially raises the standards of the Chinese criminal justice system.
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Appendix A

Proposed Extradition Treaty between the Government of Canada and the Government of the People’s Republic of China

This Appendix sets out proposed safeguards for use in a Canada-China extradition treaty. The origins of each of the proposed articles is examined in Chapter 8 of this paper. The proposed treaty only includes provisions considered most relevant to extradition between Canada and China. It should be noted that Canadian extradition treaties contain many additional provisions addressing the logistics and procedural requirements of dealing with a request for extradition. This Appendix does not reproduce those provisions and focuses upon the safeguards that would allow, or require, the Minister of Justice to refuse a request for extradition from the Government of China

ARTICLE 1

Mandatory Refusal based on Gender or Belief

Extradition shall not be granted in any of the following circumstances:

a. If the offence for which extradition is requested is regarded by the requested state as an offence of a political nature;

b. If the requested state has substantial grounds for believing that the request for extradition has been made for the purpose of prosecuting or punishing a person on account of that person’s race, religion, nationality, ethnic origin, political opinions, sex or status, or that that person’s position may be prejudiced for any of those reasons;

c. If the person whose extradition is requested has, under the law of either state, become immune from prosecution or punishment for any reason, including lapse of time or amnesty; and

d. If the person whose extradition is requested has been or would be subjected in the requesting state to torture or cruel, inhuman or degrading

261 UN Model Treaty Article 3.
treatment or punishment or if that person has not received or would not receive the minimum guarantees in criminal proceedings, as contained in the *International Covenant on Civil and Political Rights*, Article 14.

**ARTICLE 2**

**Mandatory Refusal based on Death Penalty**

Extradition shall not be granted in the following circumstances:

a. If the offence for which extradition is requested carries the death penalty under the law of the requesting state, unless that State gives such assurance as the requested state considers sufficient that the death penalty will not be imposed or, if imposed, will not be carried out.

**ARTICLE 3**

**Mandatory Refusal based on Ad Hoc Court**

Extradition shall not be granted in the following circumstances:

a. If the person whose extradition is requested has been sentenced or would be liable to be tried or sentenced in the requesting state by an extraordinary or ad hoc court or tribunal.

**ARTICLE 4**

**Optional Refusal based on Extradition of a National of Requested State**

Extradition may not be granted in the following circumstances:

a. Each state shall have the right to refuse extradition of its nationals; and

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262 Burns, *supra*, note 65.
263 Ibid.
b. If the requested state refuses to grant extradition on the basis of nationality, that state shall, at the request of the requesting state, submit the case to its competent authorities for the purpose of instituting criminal proceedings in accordance with its domestic law. For this purpose, the requesting state shall provide the requested state with documents and evidence relating to the case.

ARTICLE 5\textsuperscript{265}

Optional grounds for refusal based on humanitarian grounds

Extradition may be refused in the following circumstances:

a. The requested state, while also taking into account the nature of the offence and the interests of the requesting state, considers that, in the circumstances of the case, the extradition of that person would be incompatible with humanitarian considerations in view of age, health or other personal circumstances of that person.

ARTICLE 6\textsuperscript{266}

Assurances as a Pre-condition of Surrender

Extradition may be refused unless the requesting state provides the following assurances to protect the rights of the person sought upon return to the requested state:

a. The requested state can know where the person sought is being detained. At the request of the requested state, the requesting state will arrange, as swiftly as possible, visits by embassy or consular officials of the requested state to the person sought’s place of detention, including living quarters, and those officials can meet with the person sought. An interpreter chosen solely by the requested state can accompany the officials;

b. During the person sought’s detention, and at the request of the requested state, the requesting state will, if necessary, provide videoconferencing facilities so that the person sought can contact embassy or consular officials of the requested state;

\textsuperscript{265} UN Model Treaty Article 4.
\textsuperscript{266} These proposed grounds are taken primarily from the assurances provided by the Chinese Government to the Government of Canada in the case of Lai Changxing.
c. Pursuant to the laws of the requesting state, the person sought has the right to commission a lawyer licensed to practice law in the requesting state to defend him or her. The person sought has the right to refuse to be defended by a lawyer so commissioned and to choose another lawyer. The person sought has the right to meet with his lawyer without being monitored; and

d. Embassy or consular officials of the requested state may attend the court proceedings of the person sought in the requesting state;

e. Upon return to the requesting state for trial or sentencing, authorities in the requesting state will make synchronized audio and video recordings of the court hearings and pretrial interrogations and record the identities of all court officials present at the person sought’s interviews and trial and pretrial matters. Upon request, the requested state will be able to consult the relevant audio and video recordings;

f. The person sought, subject to the regulations of the requesting state, may receive necessary medical examinations. If the requested state submits a reasonable request, the requesting state will allow an independent legally qualified medical professional to examine the person sought; and

g. The contents of the medical examination report will only be able to be viewed by the requested state with the permission of the person sought in order to protect the person sought’s privacy.

ARTICLE 7267

Channels of communication and required documents

a. A request for extradition shall be made in writing. The request, supporting documents and subsequent communications shall be transmitted through the diplomatic channel, directly between the ministries of justice or any other authorities designated by the Parties.

b. A request for extradition shall be accompanied by the following:

   i. In all cases,

      1. As accurate a description as possible of the person sought, together with any other information that may help to establish that person’s identity, nationality and location;

   267 UN Model Treaty Article 5.
2. The text of the relevant provision of the law creating the offence or, where necessary, a statement of the law relevant to the offence and a statement of the penalty that can be imposed for the offence;

c. If the person is accused of an offence, by a warrant issued by a court or other competent judicial authority for the arrest of the person or a certified copy of that warrant, a statement of the offence for which extradition is requested and a description of the acts or omissions constituting the alleged offence, including an indication of the time and place of its commission;

d. If the person has been convicted of an offence, by a statement of the offence for which extradition is requested and a description of the acts or omissions constituting the offence and by the original or certified copy of the judgment or any other document setting out the conviction and the sentence imposed, the fact that the sentence is enforceable, and the extent to which the sentence remains to be served;

e. If the person has been convicted of an offence in his or her absence, in addition to the documents set out in paragraph 2 (c) of the present article, by a statement as to the legal means available to the person to prepare his or her defence or to have the case retried in his or her presence;

f. If the person has been convicted of an offence but no sentence has been imposed, by a statement of the offence for which extradition is requested and a description of the acts or omissions constituting the offence and by a document setting out the conviction and a statement affirming that there is an intention to impose a sentence; and

g. The documents submitted in support of a request for extradition shall be accompanied by a translation into the language of the requested state or in another language acceptable to that state.
ARTICLE 8\textsuperscript{268}

Information Free From Torture

The information submitted in the request, must contain a specific explanation that the information was provided by that witness freely and voluntarily.\textsuperscript{269}

ARTICLE 9\textsuperscript{270}

Request for Additional information

If the requested state considers that the information provided in support of a request for extradition is insufficient either to support the request for extradition or in a description of the sources of information, it may request that additional information be furnished within such reasonable time as it specifies including guarantees that the information in support of the request is obtained in accordance with the laws of the requested state.

ARTICLE 10

Reciprocity

Extradition may be refused on the basis of the requesting state’s past failure to comply with the terms of this agreement to the satisfaction of the requested state.

\textsuperscript{268} This proposed safeguard is created in an attempt to guarantee that evidence supporting the request is not obtained through torture.

\textsuperscript{269} This is a proposed safeguard not found in the UN Model Treaty.

\textsuperscript{270} This proposed safeguard is created in an attempt to guarantee that evidence supporting the request is not obtained through torture.