Executive and Judicial Discretion in Extradition

Between Canada and the United States

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ABSTRACT

This dissertation examines the historical development of judicial and executive discretion in successive extradition treaties, statutes and cases in Canada and the United States, and the ways in which extradition law has shifted from an initial emphasis on judicial discretion to a marked emphasis in recent years on executive discretion. In particular, Canada’s *Extradition Act* (1999) delineates a relationship between the executive and judiciary in which most discretionary decision-making powers are assigned to the Minister of Justice rather than to the courts. Under the new legislation, which is largely a codification of the several opinions of LaForest J. of the Supreme Court of Canada, superior court judges, despite all their experience and training in the law, are put in the position of administrative clerks with little or no significant judicial discretion. It is argued that by granting increased powers to the Minister, the Act compels both the Minister and the courts of appeal to exercise their discretion more often, more carefully and more fairly than they have used it in the past in considering whether to order surrender for extradition from Canada to the United States. Judicial review should be considered an automatic part of the extradition process. Indeed, where the Minister fails to exercise discretion with respect to areas that traditionally have fallen under his domain – such as the discretion to refuse extradition without assurances that the death penalty will not be sought, or to refuse extradition in light of abuse of process – the Supreme Court of Canada has of late shown a willingness to use judicial review to halt extradition. Given the recalcitrance of the Minister to use his expanded discretion, the Act may need to be redrafted to grant back to extradition judges discretionary powers that they traditionally enjoyed, including the power to assess whether the conduct underlying charges brought in an extradition request are of a political character.
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PREFACE

As a law student at the University of Calgary in 1990, I was required to complete an advanced criminal law practicum for Calgary lawyer Don McLeod, who assigned me to do background legal research on the Charles Ng case, in which the accused was alleged to have serially murdered at least eleven men, women and children and buried them in a backyard in rural California. The State of California made it clear that if Ng was returned to the United States, prosecutors would seek the death penalty. The Treaty on Extradition between Canada and the United States provides that where a person is sought for a crime that is punishable by the death penalty, the requested country has the discretion to refuse to surrender the accused unless the requesting country gives an assurance that the death penalty will not be sought. The Ng case was sufficiently gruesome on its facts that the Supreme Court of Canada held that punishment for such crimes was a matter for the trial judge and jury in the receiving jurisdiction to determine. The Court decided that it would not shock the conscience of Canadians to send Charles Ng back to California to face trial for a series of murders even though, if found guilty, a jury would likely recommend the death penalty.

I represented several refugee claimants, including the first group of Chinese students to seek refugee status in the wake of the Tiananmen Square “massacre,” as it was

then known. 4 The students had all been outspoken at a May, 1989 rally in Calgary against their homeland, only to discover that their activities had been photographed and documented in the Chinese press. The students could not afford lawyers, and at that time law students could appear as their agents in hearings of the Refugee Board and even in the Federal Court. 5 It was argued that if these students were ever required to go home, they would face criminal charges for their activities in Canada, which might be termed treasonous or seditious in China, notwithstanding the legality of their actions under Canadian law. I also represented two American clients in refugee hearings – Joel Slater and Howard Pursley. Slater had renounced his United States citizenship years earlier while in Australia, and claimed to be stateless – grounds for claiming Convention refugee status. The Canadian Immigration and Refugee Board issued a departure notice, but Slater failed to leave the country. He was then ordered removed, and immigration officers arrested him and took him to the border. A short time later, he returned to Canada, where he was arrested and held in custody. Once again his refugee claim failed and this time he was ordered deported.

Howard Pursley claimed to have been beaten up by federal agents in Texas. He fled north to Canada via Idaho, allegedly uttering NSF cheques en route. Texas did not want to extradite Pursley, but made it clear to Canadian immigration officials that they would be


happy to receive him in Texas. His credible basis application for refugee status failed, and a departure notice was issued giving him notice to leave the country by a specified time. When he failed to comply in time, a removal order was issued, and he was arrested and driven to the Montana border. Under United States law, he was not subject to interstate rendition from Montana to Texas in the absence of a formal application from Texas.

After living in Montana for a few weeks, Pursley returned to Canada and at the border once again claimed refugee status. This time, he was ordered deported. Escorted by a Canadian immigration officer, he was flown to Dallas, Texas, where the local police awaited his arrival. This amounted to a form of disguised extradition, for without a formal application from the Governor of Texas to the United States Secretary of State, Pursley could not have been extradited legally.

In 1990, I articulated for the controversial Victoria lawyer Douglas H. Christie and had occasion to do research for the Zundel6 and Finta7 cases, each of which eventually involved issues of returning the accused to his homeland. Ernst Zundel was accused of spreading hate literature in Germany (albeit from a Canadian address), and Imre Finta was charged with having committed war crimes in Eastern Europe during the Second World War. Both defendants were acquitted of criminal charges and allowed to stay in Canada. In the meantime, Germany convicted Zundel in absentia of Holocaust denial, basing the conviction on literature emanating from his Canadian-based Samisdat organization. Later, when the Government of Canada outlawed his anti-Semitic, Holocaust-denying website, Zundel, a long-time permanent resident of Canada who had been denied Canadian

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citizenship, married an American and moved to Tennessee, from where he continued running his website. In 2003, the United States returned him to Canada, his visa having lapsed. Certified a security risk to Canada by the Minister of Citizenship and Immigration and the Secretary of State, his claim for refugee status was dismissed. He remained in custody until his deportation to his native Germany.

Once called to the bar in British Columbia in 1991, I represented several clients facing extradition, including Gerald Gervasoni, who was charged with first degree murder in Florida, a retentionist state. The Minister determined through informal diplomatic channels that the United States would not be seeking the death penalty in the strangulation death of Gervasoni’s girlfriend. Following her death, Gervasoni moved to Canada and under an assumed name lived for 12 years on Saltspring Island, British Columbia, where he became a popular member of the Junior Chamber of Commerce, participating in amateur sports including baseball and hockey. He was finally identified by a television viewer watching a replay of a program about the young woman’s murder on America’s Most Wanted. After the extradition hearing determined that there was no legal bar to returning Gervasoni to Florida for trial, the then Minister of Justice, Alan Rock, ordered Gervasoni to be surrendered. Although his staff had been informed “informally” that the United States did not intend to seek the death penalty, the Minister had not obtained anything in writing pursuant to Article 6 of the Treaty, nor could the representative of the Department of Justice provide information as to who had provided the verbal assurance. The British Columbia Court of Appeal held that the Minister had the discretion to rely upon the

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8 Eventually reported as Gervasoni v. Canada (Minister of Justice) (1996), 119 W.A.C. 141 (B.C.C.A.), leave to appeal to S.C.C. refused 137 W.A.C. 240n, 204 N.R. 398n.
representations of the United States, however informal, suggesting that should the Minister's reliance on the vague and unspecified American assurances prove to be ill-founded, there would likely be diplomatic intervention at some level.

The Florida prosecutor in the Gervasoni case had a reputation that included allegedly putting notches in his belt with every successful execution. A journalist from Osceola County who had been in the prosecutor's office reported that he kept on his office wall photographs of the hapless individuals who had been electrocuted consequent to his prosecution (seven in 1997 and counting), and that he sometimes wore a yellow necktie embroidered with an electric chair. Whether this was tasteless black humor, true sadism or merely urban legend seemed moot when he declared to the press after Gervasoni's surrender that he hadn't quite decided yet whether he was seeking the death penalty, and wouldn't be rushed since he had 45 days to make up his mind. When that statement, widely published in the press, came to my attention, I protested to counsel for the Minister of Justice, and a round of quiet diplomacy eventually led the prosecutor to reverse himself.

Sometimes extradition legislation has an effect far beyond what Parliament initially intended, as was reflected in the many criminal cases in which the "Sheppard Test" was applied to preliminary hearings. The Extradition Act describes the extradition hearing being analogous to a preliminary inquiry. The extradition case U.S.A. v. Sheppard\(^9\) described the test for the standard of evidence as being the same duty "as that which governs a trial judge sitting with a jury in deciding whether the evidence is 'sufficient' to

justify him withdrawing the case from the jury.”

In the 1990’s, other extradition cases slowly lowered the evidentiary threshold required for extradition, most markedly in *U.S.A. v. Wagner,* where David Wagner was charged with the 2 a.m. abduction and robbery of a woman in Redmond, Washington. The woman had selected Wagner’s mug shot from a photo line-up – the only evidence against him in that particular case. Wagner’s employer testified, with reference to work sheets, that Wagner had reported to work on Saanich Peninsula at 8 a.m. that morning, riding up on his bicycle as he usually did. The extradition judge found the evidence that he was on Vancouver Island at the time of the alleged crime – a day’s return journey away from Redmond – was “powerful.” Nonetheless, Oppal J. issued an order of committal for surrender, saying that he was limited to consideration of the evidence presented by the United States in the authenticated record. The Minister ignored the judge’s clear suggestion that Wagner had a credible alibi, saying that that issue was for the American trial court to consider. In reviewing the Minister’s decision, the British Columbia Court of Appeal interpreted the *Sheppard* test virtually out of existence.

Ryan J.A. took the remarks of Ritchie J. in *Sheppard* out of context. Ritchie J. had stated that the extradition judge is to decide “whether the evidence is ‘sufficient’ to justify him withdrawing the case from the jury and this is to be determined according to whether there is any evidence upon which a reasonable jury properly instructed could render a

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10 See *Extradition Act*, S.C. 1999 c. 18, s. 29 (1): A judge shall order the committal of the person into custody to await surrender if: (a) in the case of a person sought for prosecution, there is evidence admissible under this Act of conduct that, had it occurred in Canada, would justify committal for trial in Canada on the offence set out in the authority to proceed and the judge is satisfied that the person is the person sought by the extradition partner.

Instead of focusing on sufficiency of the evidence to support a possible verdict of guilty, Ryan J.A. focused on the words “any evidence,” holding that if there was “any” admissible evidence against the accused (as opposed to “no” evidence), extradition should follow. The photographic line-up, however suspect, constituted “some” evidence, the court ruled. In an application for leave to appeal to the Supreme Court of Canada, I argued that the decisions of the Minister and the Court of Appeal to ignore strong alibi evidence in favour of scant and deficient affidavits that imported a defective identification process offended “the Canadian sense of what is fair, right and just” and therefore violated sections 6 and 7 of the Charter.

Oppal J. in Wagner had conceded this point, but found that the standard of proof set out in the Extradition Act was saved by s. 1 of the Charter.

Unfortunately, Wagner’s application for leave to appeal came at a time when the Supreme Court of Canada was not disposed to hear appeals in extradition matters. The decisions of the various courts of appeal became the variable standard for extradition across the country. In British Columbia, the standard of evidence required for extradition (and by extrapolation for preliminary inquiries) was reduced from that set by Sheppard (whether there is evidence to justify putting the case before a jury for trial) to the ridiculously low threshold set in Wagner (whether there is any evidence that could be put to a jury).

In the 1990’s, extradition law was in flux not only in terms of shifts in the attitude of the Supreme Court towards the death penalty and the standard of evidence required to make out a prima facie case, but also in terms of shifts in attitude of successive ministers of

\[\text{\textit{U.S.A. v. Sheppard, supra, note 9, at 434, per Ritchie J. See pp. 205-206 infra.}}\]

\[\text{\textit{Citing Jamieson v. Minister of Justice of Canada et al. (25 August 1974), Montreal Registry No. 500-10-000321-933 (Quebec C.A.) per Fish J.A. at 14, 16-17, 19-20, 31, 34.}}\]
justice. In *U.S.A. v. Witney*,\(^1\) for example, Allan Rock stated that some 30 letters from the community expressing support for a convicted robber who had escaped from lawful custody in the United States years earlier were sufficient to raise a humanitarian concern, given Mr. Witney’s long-standing reputation as a restaurateur in Victoria. Three years later, in *U.S.A. v. Stewart*,\(^2\) I presented Mr. Rock’s successor, Anne McLellan, with 300 letters from the community expressing similar sentiments with respect to a popular building inspector in neighbouring Saanich who faced 30 years in prison and a maximum million dollar fine for alleged extortion and “bank fraud” in the amount of $3,600 – an American federal offence under anti-racketeering legislation. The allegation had been brought against Stewart, formerly the vice-president of a Sacramento bank, by a person already accused of the crime. Ms. McLellan was unmoved by wave after wave of letters of entreaty not to send Stewart back to face at least a year of incarceration as he awaited trial. The bank that was the complainant in the case had already received by a default order some U.S.$53,000 in savings and pension funds that were held in Mr. Stewart’s name, rendering him unable to afford an American lawyer. In its judicial review of the Minister’s order to surrender, the British Columbia Court of Appeal determined that Stewart could not be extradited for extortion – the American law did not require evidence of a threat or intent to threaten as was required in Canada, but only a subjective fear on the part of the putative victim. Ultimately, Stewart came to a plea-bargain arrangement and waived extradition, returning to the United States to face charges for ordinary fraud.

\(^{1}\) Unpublished reasons of the Minister of Justice, Allan Rock, 23 March 1995.

Stephen Schrang, a Canadian, and his wife Diane, an American, worked for a tent-treating plant in St. Louis which primarily produced tents for use in the United States military establishment. The owner of the company made it clear that he was interested in selling the operation, and the Schrangses put up their life savings as a down-payment on the company, which on the books had several million dollars owing to it in accounts receivable for tents produced during Operation Desert Storm in 1991. Unknown to the Schrangses, the former owner had skimped on the water-proofing for the Desert Storm tents, reasoning that since the tents were to be used in the desert, they would not need to meet the usual stringent waterproofing requirements of the United States military. Since there was also a very tight deadline, the tents went out uninspected. However, spot checks by the U.S. Department of Defence found the tents defective. That was why the United States had not paid the bill.

The Schrangses bought the factory and warehouse, which contained hundreds of barrels of fire-retardant chemicals and mould inhibiter – but no waterproofing. The former owner offered to work for the Schrangses as their foreman, since he knew the procedures required to prepare the tents for market. Unknown to Stephen Schrang, the new “foreman” continued producing defective tents. When it became clear that the United States was not going to pay the substantial outstanding bill for the tents, the Schrangses declared bankruptcy, and after unsuccessful attempts to resell the company, locked up the factory and warehouse with all barrels of chemicals intact. They had no resources to dispose of the dozens of barrels of toxic chemicals and other hazardous wastes. The Schrangses moved back to Canada with their two sons, living on the Nitinat Reservation on western Vancouver Island.

Unfortunately, in the year after the Schrangses padlocked the factory door and walked away, vandals broke into the warehouse and set fire to it. The St. Louis fire department
was able to put out the blaze and secure the building. However, vandals broke into the warehouse a second time, and this time the fire reached the barrels and resulted in a toxic spill. At that point, the Schrangs, as the sole two officers of the corporation, were charged with abandonment of toxic waste and hazardous substances. The United States initiated an application for extradition against Stephen Schrang, but not against Diane. Over the next two years, Stephen fought extradition, finally losing his application for judicial review.16 Although she was not the subject of the extradition proceedings, immediately after the Court of Appeal decision came down in her husband’s case, Diane was arrested by Canadian immigration officials in Nitinat for a supposed immigration violation.

Recognizing that the immigration officials were attempting to use a disguised form of extradition, I brought an application for habeas corpus with certiorari in aid on behalf of Diane Schrang, appearing before Melvin J. in the Supreme Court of British Columbia in Victoria. At the time the application was brought, the judge seemed prepared to grant an order, but wanted evidence as to Ms. Schrang’s status. Counsel for the Department of Justice received word that the immigration officials had not yet reached the ferry terminal. All the more reason, I urged the court, to make an order now, before the judge lost jurisdiction. In a bizarre play-by-play description of what was going on in the outside world, the court heard five minutes later that immigration officials had arrived at the ferry terminal. Then it was reported that ferry traffic had been held back as the immigration officers’ car boarded the ferry. Five minutes after that, it was reported that Diane Schrang had been handed over to a United States marshal. At that point, Melvin J. declared the whole exercise moot, since Ms. Schrang was no longer in Canadian custody, and was no

longer in British Columbia, the deck of the American ferry being deemed United States
territory despite the fact that the boat was still docked at the Sidney ferry terminal. Thus
Immigration Canada effected a disguised extradition with the apparent full knowledge, if
not the tacit blessing, of the court. Diane Schrang’s transfer by Canadian immigration
officials to the United States marshal was accomplished without any formal extradition
application or hearing. Since she was married to a Canadian, and her two children were
Canadian-born, her deportation/extradition at the whim of immigration officials seemed an
abuse of process. Their two children remained in Canada with friends until the dust settled.

Unfortunately, that took an inordinate length of time. Despite her United States
citizenship, Diane Schrang was treated as if she were an illegal immigrant, who under
American immigration procedure may be detained without a hearing for a maximum of two
weeks in any one immigration holding centre in the United States. Initially, she was held at
the federal detention centre in Olympia, Washington. A Washington lawyer initiated a
habeas corpus application there, but on the twelfth day she was shipped out to another
immigration holding centre in New Mexico. There, another attempt was made to free her,
whereupon after two weeks she was shipped to another immigration holding centre in
Oklahoma. Lawyers in Oklahoma went to bat for her, but again too late: after two weeks
she was shipped to St. Louis, Missouri, where her husband was already in custody awaiting
trial. Upon hearing her travail, the judge proposed that, should Diane decide to plead
guilty, she would receive a sentence of “time served.” The subtext was that this would
allow her to be reunited with her children, whose welfare had been kept relatively in the
dark during a month and a half of convoluted incarceration. Diane agreed to those terms.
Naturally, her guilty plea had a major impact on her husband’s options.
These cases gave me a rough – and sometimes very rough – introduction to extradition law and related procedures in immigration law. Several elements of extradition became readily apparent, and appear linked in a chain of consequences: 1) the jeopardy of the person sought is heightened since he or she is regarded as a “fugitive” by the requesting country; 2) in general, Charter rights governing trial do not extend to extradition cases, and the legal protections of anyone exposed to extradition proceedings in Canada are limited; 3) extradition judges regard their judicial discretion in extradition hearings to be virtually non-existent; 4) the Minister of Justice is not predisposed to exercise discretion in favour of the fugitive once the extradition judge has ordered committal for surrender; and 5) the various courts of appeal and the Supreme Court of Canada are not generally disposed to interfere with a surrender decision of the Minister. For these reasons, it seemed necessary to approach extradition from a different perspective – that of academic legal research – to discover why apparent injustice and abuse of process seems so prevalent in extradition-related cases, and why the courts and the Minister seem so reluctant to apply even the discretionary remedies supplied them by the Treaty and the *Extradition Act.*
ACKNOWLEDGEMENTS

The years spent as a doctoral student at the University of British Columbia have been among the most rewarding and inspiring of my life. I especially wish to thank my supervisory committee, Professor Michael Jackson Q.C., Professor Peter Burns Q.C., and Dr. Wesley Pue, Associate Dean of Law for Graduate Studies and Research, who gave invaluable suggestions for abbreviating and enhancing the text. The external examiner, M. Cherif Bassiouni, is the unchallenged leader of international criminal law and American extradition practice. The university examiners, Dr. Lorraine Weir of the Department of English and Dr. Andrew Irvine of the Department of Philosophy, gave fresh perspectives and prescriptions, and the Faculty of Graduate Studies made my research possible with successive University Graduate Fellowships, a Social Sciences and Humanities Research Council (SSHRC) Fellowship, and two Walter and Cordula Paetzold Fellowships.

As a visiting scholar at the University of Washington School of Law in Seattle from 2000-2002, I researched American case law, legislation and publications. Later, assisted by a SSHRC Federalism and Federations Supplement, I was able to travel extensively in the United States, visiting federal and state archives and the government offices of 25 states, including Alaska, and conducting research at the U.S. National Archives in Washington, D.C. and College Park, Maryland. I visited the offices of the Department of Justice in Ottawa and the United States Department of Justice in Washington, D.C. Where appropriate, archival materials and information from the various government offices have been incorporated into this text.

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CHAPTER ONE
INTRODUCTION

1. “Extradition” Defined

This dissertation examines the levels of discretion accorded the judicial and executive branches of government in extradition between Canada and the United States through the history of extradition in North America, from the United States War of Independence to its current “War on Terror.” It posits that Canada’s new Extradition Act (S.C. 1999, c. 18) creates a startling imbalance between the roles of the executive and the judiciary in that it severely limits the judicial discretion traditionally enjoyed by extradition judges, and assigns to the Minister of Justice unparalleled executive discretion of a type that the Minister has in the past shown little inclination to use. The net effect of these changes is that extradition in Canada has been reduced from a traditionally judicial to an essentially administrative process.

Extradition is the formal process by which one country demands of another the return or transfer of custody of an accused or convicted person to face justice.¹ More narrowly, it is the actual surrender of such a person by one state to another on request.² Although not defined in either the extradition provisions of the United States Code³ or the Canadian

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¹ I.A. Shearer, Extradition in International Law (Manchester: University Press, 1971).
Extradition Act, the general process had become well understood even before Thomas DeQuincey first coined the term from the French extradition ("delivering up") in 1839.⁴

The broad purpose of extradition is the repression of crime.⁵ Historically, extradition is a form of executive privilege designed to accommodate requests from one country to another to apprehend and deliver a person charged with or convicted of a crime. Bilateral treaties between countries often included extradition clauses. However, early attempts of the executive to turn over alleged fugitives from justice to foreign states for trial and punishment were not as straightforward as they seemed. For many decades after the American War of Independence, neither Britain nor the United States extradited fugitives, each arguing that unquestioning acceptance into its sovereign territory of fugitives from foreign jurisdictions was fundamental to its existence as an independent state. In fact, the extradition of Jonathan Robbins, also known as Thomas Nash, from the United States to Great Britain under the Jay Treaty met stiff opposition from the public and from Congress, and may have been responsible for unseating America's second president, John Adams. Through Secretary of State Timothy Pickering, Adams had directed a district judge in South Carolina to deliver up Robbins, an alleged mutineer, to Great Britain. Upon his surrender, Robbins, who claimed to have been an American who had been impressed into naval service by the British against his will, was taken by the British to Jamaica, where he was summarily tried, hanged and gibbeted – his dead body draped from a yard-arm as an "example" – much to the consternation of the American public.

It was argued then, and continues to be the law, that the provisions of the various treaties could not be implemented in the absence of enabling legislation. From 1842 on, the

⁵ Preamble, Extradition Act.
Ashburton-Webster Treaty was complemented by enabling statutes by the United States, Great Britain, and eventually Canada. It fell to the courts to interpret the provisions of the enabling legislation and the Treaty even though it was the domain of the executive to apply the law. The legislation set out the different roles of the judiciary and the executive, effectively codifying the law and practice of extradition courts and the executive as they developed.

Extradition procedure has been governed by long-standing “rules” (more accurately assumptions, principles and maxims) which have survived in rudimentary form in treaties and legislation. These “rules” include:

- The rule of a pre-existent treaty: A bilateral treaty or multilateral convention or agreement is usually a “condition precedent” to extradition.

- The rule of executive prerogative: Extradition is ultimately an executive decision exercised in accordance with the law.

- The rule of enabling legislation: Treaties are not enforceable without the existence of domestic legislation that authorizes the executive to act.

- The “extraditable offence” rule: A crime alleged against an individual facing extradition must be listed or described in an agreement or treaty.

- The rule of dual criminality: Crimes alleged against an individual facing extradition must be criminal in the laws of both nations.

- The rule of non-inquiry: Where an extradition treaty exists, the fairness of the laws and judicial system of the requesting state is assumed.

- The rule to extradite or prosecute. When an extradition request is made, the requested state may choose either to extradite or prosecute the accused.

- The rule against double jeopardy: Extradition must not be granted where the accused has already been prosecuted or punished for the same offence.

- The rule of specialty: Prosecution of an extradited person is restricted to the specific charges alleged in the extradition request.

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The "political offence" exemption: Persons are not to be extradited to face prosecution for crimes of a strictly political character.  

a) Extradition Agreements

The countries involved in the extradition process, called "extradition partners" in the Canadian Act, but formerly (and usefully) known as the "requesting nation" and the "requested nation," must have concluded some sort of agreement or "arrangement" before extradition can take place. An extradition agreement or arrangement may be in the form of a bilateral treaty or a multilateral convention. Both Canada and the United States are signatories to some 20 international conventions that provide for extradition in some form.  

As of 2003, the United States is a signatory to about 104 bilateral extradition treaties, while Canada is a

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7 Most of these rules are now incorporated in various forms in the current Canada-United States Extradition Treaty, although the effect of many of the rules has been muted by judicial precedent and executive practice, and in Canada by the 1999 Extradition Act.


9 Bassiouni, supra, note 8, Appendix II, pp. 925-929.
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signatory to about 70\textsuperscript{10} including the one with the United States.\textsuperscript{11} In addition, the United States is a signatory to two specific multilateral extradition treaties.\textsuperscript{12}

b) Executive Prerogative

Concluding, enforcing and honouring extradition treaties, agreements and arrangements is the prerogative of the Minister of Justice in Canada\textsuperscript{13} or the Secretary of State in the United States. Both Canada and the United States have created executive agencies for the administration of extradition matters, including legislative drafting: in Canada the “International Assistance Group” (IAG), a division of the Department of Justice, and in America the “Office of International Affairs” (OIA), a division of the Department of State.\textsuperscript{14}

c) Enabling Legislation

In Canada and the United States, the existence of a treaty does not of itself authorize the executive to extradite. A domestic extradition statute is required to enable and facilitate any extradition treaty. This issue was thoroughly debated in the United States at the end of the 18\textsuperscript{th} century, with George Washington himself expressing doubts that the extradition provisions of the Jay Treaty of 1795 could be implemented without an enabling statute. In the words of LaForest J.: “A treaty does not alter the law of the land. A statute is required to implement it. From the standpoint of domestic law, therefore, extradition is a creature of

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\textsuperscript{13} Extradition Act, s. 7.

While Canada has its 1999 *Extradition Act*, the American extradition provisions are found under Title 18, Chapter 209, Sections 3181-3196 of the *United States Code*.

The United States is specifically prevented by the extradition provisions of the *Code* (but not by the Constitution) from extraditing persons to countries with which it does not have an extradition agreement. However, it has from time to time applied a double standard by requesting extradition from countries with which it does not have a treaty. One notorious example is the reported attempt by the United States to extradite Osama Bin Laden from Afghanistan in 1998. If President Bush was correct in his assessment of Bin Laden’s direct influence on global terrorism, Bin Laden’s timely extradition might have prevented the holocaust at the World Trade Center on 11 September 2001, and America would not subsequently have gone to war. Of course, from the viewpoint of anyone in the United States sought for trial by the Taliban, or by Saddam Hussein’s Iraq, come to that, the perils of having an extradition agreement with regimes deemed so notorious would have outweighed the perils of not having an extradition agreement at all.

d) **Extraditable Offences**

Conduct for which extradition is sought or granted must conform to a definition of “extraditable offences” agreed to by the two countries. The Jay Treaty initially allowed extradition for two offences: murder and forgery. Article 10 of the *Ashburton-Webster Treaty* of 1842 expanded the definition to include most serious violent crimes, and appended a Schedule. Subsequent amendments expanded the Schedule, which was incorporated into the

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Extradition Treaty between Canada and the United States of America in 1971 with some 30 categories of serious crime. In 1988, the Schedule was abandoned in favour of the current, more generalized definition of “extraditable offence” which is geared to the maximum sentence for the offence. Articles 1 and 2 now specify that the Treaty applies to persons who have been charged with or convicted of an offence punishable by the laws of both countries “by a term of imprisonment exceeding one year.” Thus the notion of “extraditable offences” has grown as broad as the concept of criminality itself.

e) Dual Criminality

Originally, the crime alleged by the requesting state had to match the specific crime in the requested state. This was fine if the crime was clearly defined, like murder, but what if the crime in one jurisdiction was “theft” and in the other “larceny”? Was kidnapping in one jurisdiction the same as abduction in another? Is sexual assault in Canada the same as rape in the United States? The courts spent an inordinate amount of time deliberating on such questions, often splitting hairs in the process. Eventually, Canada and the United States appeared to have solved the problem by resorting to a “conduct” model: if the conduct described in the allegation in the requesting country matched a crime for which the person could be held criminally liable in the other country, dual criminality was made out. Under sections 3 and 15 of the Extradition Act, the determination of which Canadian crime matches an American allegation is made by the Minister, who completes an “authority to proceed” based on a description of the American conduct and the corresponding Canadian crime. It is the responsibility of the extradition judge to ascertain whether the conduct in fact fits the crime and therefore obeys the principle of dual criminality.
f) The Rule of Non-Inquiry

Where a treaty exists, judges of both countries are specifically prohibited from inquiring into the fairness of the legal system of the requesting country or to consider the treatment which is likely to be encountered there. In Canada this kind of inquiry is now the domain of the Minister, not the courts. Whereas in America there remains an interplay between executive discretion and the role of the judiciary in interpreting the legal rules and exemptions with respect to allowing supportive evidence, in Canada the new Act precludes the exercise of judicial discretion in these areas. There is virtually no interaction between the executive and the courts, and the statute specifically attempts to pigeon-hole the discretionary roles of the Minister and extradition courts so that they do not even intersect.

g) To Extradite or Prosecute

This principle is derived from aut dedere aut judicare, M. Cherif Bassiouni’s and Edward M. Wise’s emendation of Hugo Grotius’ 17th Century axiom aut dedere aut punire — “to extradite or punish.” By “punire” Grotius meant to punish under the laws of the land, in other words, to prosecute. Bassiouni and Wisereframed the maxim to better reflect the tenor of Grotius’ argument and the principle arising from it, on the presumption that prosecution at trial and the judgment of a court precede punishment.

In U.S.A. v. Cotroni (1989), the Supreme Court of Canada set out a list of factors to be considered in weighing whether the Minister should order surrender rather than allowing the province having jurisdiction to prosecute. Although several Canadian cases, including

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17 Re Burley (1885), 1 U.C.L.J. (N.S.) 20 at 50, per Hagerty J.; Re Schmidt, supra, note 2 at 209, per LaForest J.
18 Grotius, De Jure Belli ac Pacis, ch. 21, s. 5(1) (2d ed. Amsterdam 1631). See Bassiouni and Wise, supra, note 6 passim.
Cotroni, have paid lip-service to the notion that where both countries have an equal claim to prosecute for a specific offence, the person being extradited should be prosecuted domestically rather than sending him abroad, in practice this rarely if ever happens, the attorneys general of the provinces being all too eager to give up the expense of prosecution to their American counterparts. Thus in U.S.A. v. Reumayr (2003),\(^{20}\) where the accused was charged in Canada with plotting (in Canada) to blow up the Trans-Alaska Pipeline in the hope of boosting oil prices so the value of his oil portfolio would go up, most of the factors appeared to favour a Canadian prosecution rather than extradition to New Mexico, where the “plot” was disclosed by Reumayr’s confidante, an inmate and former friend. In fact the only specific American interest was the putative target. However, the British Columbia Court of Appeal, apparently confusing the Cotroni test with the Kindler\(^{21}\) test of whether the expected American penalty (30 years consecutive on three counts of aiding and abetting an attempt to blow up the pipeline) would “shock the conscience of Canadians,” decided that Reumayr should face the American music.\(^{22}\)

h) Double Jeopardy

The defence of double jeopardy must be raised not in the extradition court before an extradition judge but before the Minister. As Dambrot J. said rather cryptically in U.S.A. v. Drysdale (2000): “I note that where a person sought advances a meritorious claim of double jeopardy, the Minister has ample jurisdiction to vindicate it.”\(^{23}\) Although in the past judges had discretion to admit or refuse evidence concerning what constitutes a prior conviction or

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acquittal, under the current Act judges have no discretion to determine this question, partly because the new system precludes the examination by extradition judges of foreign law. It can be argued that where the Minister examines the facts and refuses to extradite on the basis of double jeopardy, he merely exercises his statutory and treaty obligation rather than his discretion. However, where the Minister fails to make this determination where appropriate, his decision to extradite is open to judicial review not because of his failure to exercise discretion, but because he has failed to apply the law to the facts – a typically judicial rather than executive exercise.

i) The Rule of Specialty

It may be argued that judges must by treaty determine whether the "rule of specialty" applies to a specific case – that is to say, whether the person, upon his return for trial, is prosecuted for charges other than those for which he was returned. Although judges in both the United States and Canada may be receptive to arguments that a prosecution faced by an accused is for a crime other than that for which he has been extradited, this defence must be raised not at an extradition hearing (to raise the issue would be to impugn the integrity of the requesting state), but at trial once the individual is returned. Even then, it is a matter of executive discretion of the requested state to allow prosecution for other crimes. However, courts of appeal are in a position to allow judicial review where the Minister's surrender order exceeds the scope of the order for committal of the extradition judge. For example, in *U.S.A. v. Reumayr* (2003), a Canadian was committed by the extradition judge to be surrendered for

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24 In the * Reyat* case, the United Kingdom agreed to allow prosecution in British Columbia of Inderjit Singh Reyat for murder in connection with the Air India bombing even though he was originally extradited from the U.K. for murder only in connection with the nearly simultaneous bombing of Narita airport.

25 *Supra*, note 20.
“aiding and abetting” an attempt to blow up the Trans-Alaska Pipeline. The judge found that there was insufficient evidence to support extradition for an actual attempt. Nonetheless, the Minister signed a surrender order for both possession of explosives and the attempt itself. The British Columbia Court of Appeal found that the Minister’s surrender order was too broad. The Minister’s reasons do not address the question of whether the difference between the offences in the committal order and those in the surrender order is one of form or substance. The question has important implications for the appellant’s prosecution in the United States because, as LaForest J. noted in McVey, at p. 7, he can only be prosecuted by the United States as the requesting state for the offence for which his surrender was made. Prosecution for other offences is barred following surrender. In my view, the statutory scheme does not authorize extradition for offences that substantively exceed the offences that are supported in the committal proceedings. It would defeat the purpose of the committal hearing if the Minister’s discretion extended to surrender for offences substantively beyond those supported by evidence at the committal hearing.\(^{26}\)

The Court set aside the surrender order and remitted the matter back to the Minister for reconsideration.\(^{27}\)

j) The Political Offence Exemption

In American extradition practice, the purported fugitive can still raise the “political offence exemption” in a judicial forum and have the court consider its application to the facts of the case at bar.\(^{28}\) In Canada, this is precluded by the new Act, which grants to the Minister the discretion to consider whether the political offence exemption applies.\(^{29}\) Even though the wording of the Act appears mandatory where political offences are concerned (the Minister “shall refuse to make a surrender order”) – the section still allows the Minister to exercise discretion in that he need refuse only if “satisfied” that the alleged offence is “a political

\(^{26}\) *Ibid.*, at para. 42.

\(^{27}\) *Ibid.*, para. 43-44.


\(^{29}\) Section 46(1)(c).
offence or an offence of a political character.” To make matters worse, the restriction on recognized “political offences” contained in section 46(2) of the Act specifies that any politically-motivated conduct that involves violence, explosives, or substances which are likely to cause bodily harm or substantial property damage – or any attempt, conspiracy, aiding or abetting, or assisting another to do such conduct – “does not constitute a political offence or an offence of a political character.” Few political offence will fall outside this broad restriction. Nor can extradition judges intervene – or even properly make a “record” for the Minister’s consideration: judges hearing an extradition application in Canada no longer have the discretion to determine the admissibility of evidence in support of the political offence exemption, or even to hear such evidence. As Krivel et al. state,

Under the new Act, there is no provision involving the extradition judge in the consideration of political crimes. The issue has been made an entirely ministerial matter under s. 46 of the new Act. Any evidence to be submitted to the Minister of Justice in this respect would follow the usual practice for making submissions to the Minister, i.e., by way of writing or through an application for an oral hearing (the right of the person sought to make submissions is set out in s. 43).  

However, applications for oral hearings have in the past rarely if ever been approved or even countenanced by the Minister, and it is hard to fathom how one would be held or who would hear it. The Minister, after all, is not a court.

**k) Other Procedures**

Extradition is easily confused with other procedures designed to achieve similar ends:

- Deportation: The return to their native land or the land they came from of individuals found by a tribunal to be in the country illegally.

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30 Krivel, Beveridge and Hayward, supra, note 8, p. 184. Elaine F. Krivel, Q.C. is former Director of Federal Prosecution Service in Toronto; Thomas Beveridge is Director of the International Assistance Group of the Department of Justice in Ottawa; and John W. Hayward was formerly a prosecutor with the Department of Justice.
. **Refoulement**: The return to their native land or the land they came from of individuals deemed by immigration officials to be undesirables.

. Disguised extradition: The return of an accused or convicted person by immigration officers of one country to federal authorities in another, without due process.

. Abduction: The illegal arrest, detention and transportation of an individual across international borders to a place where he is wanted for alleged crimes.

. Unlawful seizure: Connivance between the officials of two states to secure surrender of an accused or convicted person without due process.

. Rendition: The surrender of an accused or convicted person from one state to another where both states fall under the same sovereign power.

. Extraordinary rendition: Transportation of a person in transit to a third country against his will or without his knowledge for the purpose of interrogation or exile.

Of these, rendition, deportation and *refoulement* are legal processes; abduction, unlawful seizure and extraordinary rendition (a term coined by U.S. Secretary of State Colin Powell in reference to the Maher Arar case, but also broadly applicable to Haitian president Aristide,

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31 *Disguised extradition* is difficult to attack or remedy since the individual is often swept away to the jurisdiction where she or he is sought before application for injunction or habeas corpus can be brought. Even where the individual remains in Canada, remedy is difficult in cases of alleged disguised extradition where there are concurrent immigration proceedings. In *U.S.A. v. Quintin* (2000), 4 Imm. L.R. (3d) 255 (Ont. S.C.J.), Dambrot J. remarked (at 272-27):

> The claim made by the applicants that their immigration proceedings were a disguised form of extradition, however meritorious, simply has nothing to do with the functions that I am required to perform in applying the *Extradition Act*, or the fairness of the proceedings before me. Their remedy, if any, lies elsewhere: in civil proceedings against the government; in proceedings attacking deportation; and perhaps even in submissions to the Minister.

32 Quasi-official *abduction* has long been considered a problem in extradition between Canada and the United States if only because of the convenience of sending “enforcers” of one kind or another across the border to bring alleged miscreants to justice. Modern urban legends exaggerate the propensity of casino operators in places such as Las Vegas, Reno and Atlantic City to hire strongmen to “fetch” Canadian debtors, but on occasion law enforcement officials and even sheriff’s posses have taken it upon themselves to perform a similar function.

33 The most common forms of rendition in North America are *interstate rendition* (also called “interstate extradition”), whereby one American state surrenders an accused or convicted person to another American state pursuant to various statutes and agreements among the states of the Union and by the Unified Criminal Codes of each state; and *Commonwealth rendition* whereby one British Commonwealth country surrenders an accused or convicted person to another such country. Commonwealth rendition to and from Canada was governed by the *Fugitive Offenders Act* R.S.C. 1985, ch. F-32, until that Act was incorporated into the *Extradition Act* in 1999. Canada now treats Commonwealth countries like any other country in terms of extradition proceedings. The *Extradition Act* recognizes Commonwealth countries listed in the schedule as “extradition partners” without the necessity of separate bilateral agreements.
who without his knowledge or consent was transported to Central African Republic rather than to the United States, as he had expected) are patently illegal; and disguised extradition in its various manifestations at least invites allegations of abuse of process.

2. Executive vs. Judicial Discretion

The more one delves into extradition law, the more disparity one finds between what seems fair for the individual and what actually happens when the courts or the executive use—or fail to use—the discretion bestowed upon them by Treaty or statute. To the layman, and even to defense counsel, the deck seems to be stacked against a person who is sought for extradition. This is partly because extradition is an agreement or arrangement between sovereign nations, and individuals caught in its implacable machinery have significantly fewer rights than persons charged and prosecuted under domestic criminal law.

The Act assigns extraordinary discretionary powers to the Minister of Justice and few discretionary powers to extradition judges. Many of the central issues involved in extradition, formerly examined by judges, can no longer be examined ab initio in the extradition hearing. As Anne Warner LaForest has observed, “It is difficult to understand why the judicial role has been retained in the new Act, as the extradition judge has little, if anything, to do.”

Although the Supreme Court of Canada recognized in 1997 that “one of the most important functions of the extradition hearing is the protection of the liberty of the individual,” the new Act removes most of the traditional protections of the individual from extradition judges and leaves their application to the discretion of the Minister of Justice, the

very person who is most committed to expediting extradition as one of Canada’s main “international obligations.” From the standpoint of the individual facing extradition, it’s not so much a matter of the fox is being found in the chicken coop as it is the chickens being paraded through the fox’s den.

Who, seriously, has the duty or responsibility to provide a remedy, where one is called for, to prevent injustice or to preserve the rights of an individual facing extradition for prosecution in a foreign land? Who most appropriately has the discretion? More to the point, will the considerable discretion now accorded the Minister of Justice by the Act be used judiciously not only in favor of international obligations but also in favor of individual rights? If the Minister refuses to exercise his or her legislated discretion in extradition matters, as has happened time and time again in the past two decades, will the courts leap into the breach and provide a remedy? Will extradition judges, who have clear statutory mandate to apply constitutional remedies to ensure a fair hearing, use their judicial discretion to apply this mandate to broader abuse of process, even though their doing so invites appeals by the Minister of Justice and the Attorney General? In order to import a semblance of judicial process into extradition procedure, judicial review of the Minister’s expanded discretionary powers should now be considered an essential part of every extradition defence.

36 Extradition law supportive of international obligations over individual rights in both the United States and Canada has evolved comparatively recently. See Gary Botting, “Competing Imperatives: Individual Rights and International Obligations in Extradition between Canada and the U.S.A.” (LL.M. Thesis, University of British Columbia Faculty of Law, 1999).
The terms "executive discretion" and "judicial discretion" do not share the same presuppositions. American dictionaries define discretion as the "power of free decision or latitude of choice within certain legal bounds."\(^ {39} \) Administrative discretion, which incorporates executive discretion, has been defined in Canada as "consideration not entirely susceptible of proof or disproof in relation to which the agency must make decisions."\(^ {40} \) The *Oxford English Dictionary* defines discretion as "liberty or power of deciding, or of acting according to one's own judgment or as one thinks fit; uncontrolled power of disposal."\(^ {41} \) Examples of this usage include the 1399 Rolls of Parliament, which refer to the King's own discretion in applying mercy and grace;\(^ {42} \) and Edmond Burke's *Economic Reform* of 1780, where he talks of "a discretion, wholly arbitrary."\(^ {43} \) Neither administrative nor judicial decision-making would brook "wholly arbitrary" discretion – and even executive discretion cannot be arbitrary if it works an injury to an individual facing extradition. Clearly this definition of discretion has more relevance to the exercise of executive discretion not to extradite than the converse. Nations requesting extradition may feel outraged at the Minister's decision not to comply with the request – but there is no appeal or judicial review procedure to countermand such exercise of discretion, however arbitrary. The only recourse is political, on the broad canvas of international comity: the next time an extradition proceeding is initiated in the other direction, to what extent will mutual cooperation be the order of the day?

\(^ {39} \) *Merriam Webster's Collegiate Dictionary*, 11\(^ {th} \) ed. (2003), s. v. "discretion."
\(^ {40} \) *The Dictionary of Canadian Law*, 2d ed. (Toronto: Carswell, 1995), s.v. "Administrative Discretion."
\(^ {41} \) *Oxford English Dictionary*, s.v. "Discretion."
a) Executive Discretion

Shortly after the Second World War, Lord Halsbury's very precise description of discretion as applied to "authorities" was adopted by Kellock J. in the Supreme Court of Canada in a high-profile tax case, *Wrights Canadian Ropes Ltd. v. Minister of National Revenue*:

"When it is said that something is to be done within the discretion of the authorities...it is to be done according to the rules of reason and justice, not according to private opinion, ... according to law, and not humour. It is to be, not arbitrary, vague and fanciful, but legal and regular." 44

Note that this case pertained to proceedings initiated against a government minister who, through the officers in his department had exercised executive discretion of a type not dissimilar to that involved in extradition cases. There, the Minister of National Revenue had an obligation to assess and collect taxes and tariffs on behalf of the government and the Canadian people. However, a double standard is discernible. Although the Minister of National Revenue has the discretion to look at individual cases and, where he deems it just, necessary or political expedient, has the power to cut a given individual or corporation some slack, he does without fear of appeal. On the other hand, where the Minister denies a remedy to an individual or corporation, has had happened in *Wright's Canadian Ropes*, the Minister and his staff cannot be arbitrary. Similarly, in extradition cases, the Minister of Justice is charged with cooperating with the process of extradition in order to enhance international relations and "comity" with other nations. Like the Minister of National Revenue, he is governed by a double standard: while he is compelled to consider all statutory reasons and excuses that might benefit the accused, he retains total discretion to be as arbitrary as he

pleases in refusing to surrender an individual to an alien nation. It is here where political
expedience and comity between nations comes into play. The Minister has the discretion to
examine and override individual cases and, wherever he deems it just, necessary or political
expedient. He may choose whenever he likes, with relative impunity, to depart from the strict
interpretation of law and refuse to extradite. From this decision, there is no appeal. But he
and his government make that decision at his own political peril on the international scene.

The new Extradition Act appears to give to the minister broad powers to exercise
discretion in favour of the individual. Theoretically, these provisions should encourage the
Minister to exercise executive discretion to protect individuals caught, sometimes unfairly, in
the implacable machinery of extradition. However, past practice has demonstrated that the
Minister is not often disposed to exercise his discretion in favour of the individual, opting
instead for the heady international esteem that comes with fulfilling “international
obligations.” In the past, Ministers of Justice in Canada have as a matter of policy refused to
exercise their discretion even when to do so was clearly within their mandate. For example, as
a matter of policy, successive Ministers refused to seek Article 6 assurances from the United
States that persons facing the death penalty would not be executed if extradited. Not since the
19th Century has either a Minister or the courts ruled that an offence was of a political
character; and never has a Minister elected to prosecute rather than extradite, although he is
empowered by the Treaty to make that choice and is obliged to consider all factors relevant to
making such a decision. Unfortunately, successive Ministers have bound themselves to appeal
court decisions that address the way extradition judges should govern themselves. For
example, the principle that the trial of offences should be left to the requesting state, often
cited by Ministers as justification for surrendering an individual, was a directive by the Supreme Court of Canada to extradition judges, not to the Minister.45

Although executive discretion has long been characterized as a political rather than judicial decision, the Minister is still bound by certain standards, including those set out in federal and provincial legislation governing judicial review of administrative decision-making. Accordingly, executive discretion is not so much political as administrative. While in refusing to extradite an individual the Minister can be “wholly arbitrary,” he cannot be so when deciding to order extradition, as a decision against the individual, unlike a decision in his favour, is subject to judicial review by the courts of appeal. In deciding to order surrender, the Minister must meet the broad standard set out in s. 18 of the Federal Court Act—a standard that eschews arbitrariness and insists upon “rules of reason and justice” rather than being “arbitrary, vague and fanciful.”

b) Judicial Discretion

Since judges are “authorities,” judicial discretion follows similar principles as those governing administrative or executive decisions, the pre-eminent one of which is reasonableness. For example, in assessing whether an extradition judge had erred in accepting into evidence an inculpatory statement made at the time of a raid of a Vancouver warehouse by Canadian Customs Officers to obtain a cache of smuggled garlic destined for the United States, Donald J.A. remarked in U.S.A. v. Fong (2001), “The decision could have gone either way. Although I might have reached a different conclusion, I cannot say that the extradition judge was wrong. In my respectful view, he applied the Therens test on a

45 Schmidt v. The Queen, supra, note 2 at 209 (C.C.C.).
reasonable view of the evidence.” 46 One Canadian definition of judicial discretion is “the freedom of a judge to summarily decide certain matters which cannot afterwards be questioned.” 47 Hence, the British Columbia Court of Appeal would have been remiss to interfere with the discretionary decision of the extradition judge in Fong, even though the court might itself have reached a different conclusion, given its view of the facts of the case.

One restrictive definition from the OED is directly relevant to judicial discretion:

Law. The power of a court or justice, or person acting in a judicial capacity, to decide, within the limits allowed by positive rules of law, as to the punishment to be awarded or remedy to be applied, … and generally to regulate matters of procedure and administration.

Examples of this usage, dating back to 1292, include references to the discretion, either political or judicial, of Old Bailey, aldermen, justices, judges and arbitrators. 48 Since judges must exercise their discretion within the limits of positive rules of law, the concept of judicial discretion does not extend to the simple application by judges of statutory and treaty requirements that they are obliged to follow, no matter how they may interpret these laws.

Whereas the executive has discretion to decide predetermined political and humanitarian considerations without legal controls, extradition judges carry out their functions in precisely the same way as they would in hearing a criminal or civil case: they follow the statute and the Treaty as these have been interpreted by precedent. Statutory or treaty interpretation is not in itself the exercise of judicial discretion. Judges have no discretion to depart from the way the law has been interpreted by precedent, nor can they indulge in

47 The Dictionary of Canadian Law, supra, note 40, s.v. “Judicial Discretion.”
48 Oxford English Dictionary, s.v. “Discretion,” citing Britton, I, xvi, s. 7; Bacon, Maxims & Uses Cont. Law (1636), 21; Lord Esher in Law Times Report, LXIII (1990), 734/2; Law Reports “Weekly Notes” (1891), 72; E.E. Kay in Law Times Reports LXVII (1892), 151/2.
creative interpretation of statute. The standard was established in Canada in 1954 by *Re Hansard Spruce Mills Ltd.* (1954), 49 where Wilson J. stated:

I think the power or rather the proper discretionary duty, of a trial judge is more limited.... I have no power to override a brother judge, I can only differ from him, and the effect of my doing so is not to settle but rather to unsettle the law, because, following such a difference of opinion, the unhappy litigant is confronted with conflicting opinions emanating from the same court and therefore of the same legal weight.... This view suggests that Judges ought to follow previous decisions of their colleagues unless certain specific situations exist.

Therefore, to epitomize what I have already written in the *Cairney* case, I say this: I will only go against a judgment of another judge of this court if:

a) Subsequent decisions have affected the validity of the impugned judgment;
b) It is demonstrated that some binding authority in case law or some relevant statute was not considered;
c) The Judgment was unconsidered, a *nisi prius* judgment given in circumstances familiar with all trial judges, where the exigencies of the trial require an immediate decision without opportunity to fully consult authority.

If none of these situations exists, I think a trial judge should follow the decisions of his brother judges. 50

Where precedents are contradictory or are not binding on the court by virtue of their being decisions made under a different jurisdiction or by a lower court, or where previous cases can be distinguished on their facts, extradition judges have a measure of discretion to determine which precedent is most persuasive – and the discretion to decide the case at bar in accordance with this determination. Thus the application of principles of common law remains within the scope of judicial discretion at the initial extradition hearing level – including, for example, application of the common law notion of abuse of process. 51

For more than a century, in the absence of anything approximating a code, superior court judges in Canada exercised a broad discretion in extradition matters, creatively importing principles of extradition law from jurists in the United Kingdom, the United States,

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50 Ibid., at 286.
and Europe. This period was followed in the 1970’s through the 1990’s by a period when extradition judges became loath to exercise any discretion whatsoever – an attitude borne of the curious statutory analogy drawn between extradition hearings and preliminary inquiries. At the same time, for more than a decade, a virtually unchallenged executive refused or failed to exercise its discretion to deny extradition requests, despite a barrage of applications in the courts of appeal of almost every province. Surrender for extradition was the order of the day. To add to the confusion, for decades the Supreme Court of Canada consistently supported the development of executive discretion over judicial discretion, and seemed to ignore ministerial orders of surrender that seemed patently unjust. From 1997 to 2001 the Supreme Court imposed a virtual moratorium on extradition cases, consistently refusing to grant leave to appeal. Section 25 of the Act states (tautologously) that in deciding constitutional matters as they apply to the Extradition Act, a superior court judge has the same competence as a superior court judge. However s. 24 limits the superior court judge’s role to the narrow function of a provincial court judge conducting a preliminary inquiry. The usual role of judges to apply statutes of limitation and determine whether the individual faces double jeopardy has now been removed from judicial consideration, even though it could be argued that judges have a legal obligation to determine such issues in extradition cases despite the new legislation. Certainly in this area the new Act itself invites judicial scrutiny in the courts of appeal and the Supreme Court of Canada.

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52 Section 29(1)(a). Compare s. 18(1)(b) of the former Act.
53 Section 46(1)(a).
54 See, for example, s. 47(a), where the Minister “may refuse to make a surrender order” where the Minister is satisfied that the individual faces double jeopardy.
Executive and Judicial Discretion in Extradition between Canada and the United States

Broad executive discretion invites disparity, especially when that discretion is dependent upon legal interpretation and application of the law, processes for which the Minister and Department of Justice are not as well equipped as the courts. Accordingly, the role of the various courts of appeal has been expanded. The appeal courts become the court of first instance in many matters, especially in the process of judicial review of ministerial decisions. In this dissertation, therefore, I have used “judicial discretion” in an expanded sense to include the decision-making processes of appeal court judges and judges of the Supreme Court of Canada – especially in those cases where their discretionary judgments and analyses of the application of the law to the facts conflict with the purported exercise of the discretion of the Minister.

The increased executive discretion accorded by the Canadian Extradition Act compels both the Minister and the courts to exercise their executive and judicial discretion (in the expanded sense) more often, more carefully and more fairly than they have used it in the past, for now the Minister must show to the satisfaction of a reviewing court that each of the statutory requirements and discretionary decisions to be made by the Minister has been considered in the course of his decision. It falls to the courts of appeal and ultimately to the Supreme Court of Canada to monitor the Minister’s deliberations. Recent decisions of the Supreme Court of Canada, which have since been followed by the various courts of appeal, demonstrate that the upper echelon of the judiciary is prepared to keep the Minister responsible where he fails to exercise executive discretion or exercises it improperly.55

The statutory inability of Canadian extradition judges to exercise meaningful judicial discretion at the extradition hearing level – where it really counts – creates several problems,

including the perception that fairness has been sacrificed to efficiency in implementing Canada’s “international obligations.” Although the extradition legislation drafted by the Department of Justice gives the Minister of Justice a vast array of powers, unfortunately there has not been a concomitant body of regulations to limit executive discretion and thereby to minimize disparity and to maximize consistency in application of the law.

3. The LaForest Factor

Official attitudes towards extradition in Canada were shaped largely by Gerard Vincent LaForest, early in his career a Department of Justice lawyer who drew from his experiences to write *Extradition to and from Canada* (1960). LaForest prepared his rather thin first edition as a guide for use by the Canadian Department of Justice. “Since the work was originally prepared for official purposes,” LaForest wrote in the preface, “I have refrained from criticizing the legislation.”

In fact, most books on extradition were written by government lawyers intimately familiar with the extradition process as part of their job description. Early Canadian judgments relied on American authorities such as Samuel Spear’s *The Law of Extradition: International and Interstate* and on Sir G. Edward Clarke’s *A Treatise upon the Law of Extradition*, the classic British text on the subject. For well over a century, the United States Department of Justice relied on John Bassett Moore’s *A Treatise on Extradition and Interstate

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57 Ibid., p. vii.
59 (1885, republished Littleton: Rothman & Co. 1983); See “Extradition Practice” at 9 C.C.C. 264.
60 Clark, *supra*, note 58. See, for the remarks of Lampman, Co. J. in *Re Collins (No. 2)* (1905), 10 C.C.C. 73 at 79.
Rendition, written with the full cooperation of the American government by the pre-eminent civil servant responsible for extraditions in America. Moore was free to draw on government statistics that he himself had earlier published while still in the government’s employ, and was able to quantify extraditions both to and from the United States for the various states. In a pivotal case in extradition law, Re Collins (1905), Lyman Duff J. of the Supreme Court of British Columbia (later to be appointed Chief Justice of Canada) appeared to follow Moore rather than a conflicting majority judgment by two judges of the Upper Canada Queen’s Bench in Re Anderson, thus importing some of Moore’s opinions into Canadian law. A similar phenomenon happened in Canada in the 1990s with respect to LaForest’s book, but in a much less subtle manner.

Like Moore’s tome, LaForest’s book had a clear pro-government bias. Not until 1972 did Canadian judges begin to cite the first edition of LaForest’s text as an authority. Later, in 1976, Dickson J. of the Supreme Court of Canada expressed reservations about counsel relying solely on LaForest as a source. LaForest had asserted that the provision in the Extradition Act for taking depositions “imports into the proceedings section 453 of the Criminal Code.” To counsel’s reliance on this, Dickson J. remarked,

The appellant’s submission is unsupported by authority other than a broad general statement in Extradition to and from Canada (1961), p. 95, by G. La Forest.... The author’s attention does not seem to have been directed to the exercise of a right of

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61 Moore, supra, note 58, vol. 1, sec. 77, p. 89.
63 Re Collins (No. 3) (1905), 10 C.C.C. 80 at 99 (S.C. B.C.)
64 Ibid. Duff J. stated: “I propose to deal with the question as if the view expressed by Mr. Moore (and most favourable to the accused), were correct; and the view expressed by Sir John Beverley Robinson and Mr. Justice Burns a view which cannot be sustained.” See Re Anderson (1860), 20 U.C.Q.B. 124.
65 Initially cited as an authority by Rae J. in Re Whipple (1972), 6 C.C.C. (2d) 517, at 518, and relied on as an authority as to whether bail applies to extradition cases – see Re Barnes and State of Tennessee (1972), 34 C.C.C. (2d) 122 at 128, concluding that a single judge of the Ontario High Court of Justice does have jurisdiction to grant bail in extradition cases, but “only in rare circumstances.”
cross-examination by an accused or his counsel, but rather to the more mechanical aspects of the process.\(^{66}\)

By contrast, counsel’s reference in Vardy’s factum to the Canadian Bill of Rights “was not even faintly pressed during the oral argument on appeal,” Dickson J. stated. LaForest’s propensity to rely on “the more mechanical aspects of the process” – especially on technical arguments favouring meeting international obligations rather than a more creative, liberal, broad and expansive interpretation of the law favouring the individual – was not ameliorated with the second edition, published in Canada by Canada Law Book.\(^{67}\)

After serving on the New Brunswick Court of Appeal, LaForest J. went on to distinguish himself as a justice in the Supreme Court of Canada whose judgments on extradition matters usually carried the day. In this capacity, he was to become the most influential voice in extradition law in Canada. Usually his decisions were endorsed by his colleagues in the Supreme Court of Canada, and were followed religiously in the courts below. After all, LaForest J. had literally “written the book” – and for four decades it was the only book – on Canadian extradition law.\(^{68}\) While a justice in the Supreme Court of Canada, he unfailingly supporting the executive role over that of the judiciary and international obligations over individual rights.

\(^{66}\) Vardy v. Scott (1976), 28 C.C.C. (2d) 164 (S.C.C.) at 171.

\(^{67}\) Aurora, Ont.: Canada Law Book, 1973.

Buoyed by LaForest's several judgements in their favour, successive ministers of justice became increasingly hard-nosed about asserting what they perceived to be their "international obligations" over individual rights. Clearly these "obligations" did not extend to abrogating the duty to seek anticipated treaty protections for persons facing extradition. Yet despite the fact that the Canada-United States Extradition Treaty anticipates requests for the seeking of formal assurances that the death penalty would not be sought in the eventuality of a conviction for capital offences in retentionist states, successive ministers of justice declined to exercise their discretion to seek such assurances.69 With notable exceptions,70 courts of appeal usually supported the Minister's exercise of discretion, saying that the executive had exclusive right to make "political" decisions. For several years at the conclusion of the last century, the Supreme Court of Canada systematically declined to re-examine extradition cases, leading to entrenchment that was not challenged until new minds were able to rethink extradition process71 – and the abuse of that process72 – at the beginning of this century.

In 1991, Anne Warner LaForest greatly expanded on the earlier work by her father in LaForest's Extradition to and from Canada, Third Edition73 (a misnomer, since she is the de facto author, not merely an editor), retaining an establishmentarian orientation and citing many of her father's sometimes controversial but always authoritative Supreme Court judgments up to 1990 (it is, after all, "LaForest's Extradition..."). The "Third Edition" refers

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most often to LaForest J.’s three judgments released simultaneously on 14 May 1987:

Schmidt v. The Queen is referenced on 50 different pages of the text (with as many as half a dozen references on a page⁷⁴), Argentina v. Mellino appears on 37 pages, and U.S.A. v. Allard on 24 pages. LaForest J.’s decision in the later case of U.S.A. v. Cotroni (1989) is referenced on 20 different pages of the text. By contrast, the seminal extradition case of U.S.A. v. Sheppard is referred to only five times, and the majority judgment of Wilson J. in Washington (State) v. Johnson (1988),⁷⁵ the single major case to deal with extradition heard by the Supreme Court of Canada during LaForest’s tenure on which he did not sit, was referred to only 13 times, and not very sympathetically at that: Wilson J. had held, opposite LaForest’s view but consistent with the earlier position of Duff J.,⁷⁶ that courts should be prepared to examine foreign law in the course of extradition deliberations.⁷⁷

Occasionally, LaForest even cites LaForest citing LaForest, as for example when Anne Warner LaForest quotes LaForest J.’s majority judgment in Cotroni citing with approval LaForest’s majority judgment in Schmidt.⁷⁸ This unabashed (and understandable) mutual admiration was subsequently compounded with the reception into Canadian law of many of Gerard Vincent LaForest’s earlier published ideas via the third edition, which LaForest J. quoted at length and with approval in subsequent judgments in the Supreme Court of Canada.⁷⁹ Especially interesting is LaForest J.’s response to the release of the third edition in

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⁷⁴ See *ibid.*, p. 113, for example.
⁷⁶ In *Re Collins (No. 3)*, *supra*, note 63.
U.S.A. v. McVey (1992),\textsuperscript{80} in which he incorporated a significant portion of the text into the majority judgment, thereby rendering it received law.

With Schmidt, McVey remains easily the most frequently cited extradition case in Canada, since it reviews the principles of extradition law synoptically. In the course of the judgment, LaForest J. refers on at least 13 occasions to the third edition, and he cites his own earlier decisions at least 20 times in the course of his 39-page judgment. Predictably (for not one of LaForest’s extradition decisions favoured the “fugitive”), LaForest J. found against McVey, who had been charged in the United States with exporting high-tech electronic components to the U.S.S.R., in the process making false statements to United States Customs.

Given LaForest J.'s insistence that “liberal” treaty interpretation should inure to the benefit of the state rather than the individual, Extradition to and from Canada has from first edition to last been far more helpful to Justice Department officials bent on fulfilling Canada’s “international obligations” than to practitioners attempting to assert the rights of putative fugitives. Legal principles of extradition procedure in Canada in the 1990s thus reflect a conservative establishmentarian tone ironically extolling the virtues of a “fair and liberal interpretation” of extradition treaties in favour of meeting Canada’s international obligations rather than being concerned with a “large and liberal” or “broad and generous” interpretation of competing Charter rights of individuals caught up in the extradition net.\textsuperscript{81} The policy of giving treaty considerations priority over constitutional considerations, spearheaded by LaForest J. and followed sedulously in the lower courts, ignores the fact that in Canada, the Charter is a significant part of the supreme law of the land whereas extradition treaties are not.


\textsuperscript{80} Ibid.

Although in the United States international treaties are regarded as part of "the supreme law of the land" under that country's Constitution, the same is not true for Canada, where the Constitution - including the Charter - has pre-eminence over treaties. Peter W. Hogg remarked:

The Supreme Court of Canada has allowed s. 7 to drift even further away from the "basic tenets of the legal system" in its Charter review of extradition cases.... In Canada v. Schmidt (1987), the Court held that s. 7 would be breached by an extradition order where a fugitive faced a punishment under foreign law which would "shock the conscience" of, or be "simply unacceptable" to, reasonable Canadians. How do judges determine whether or not foreign laws are "shocking" or "unacceptable"? One might think that such determinations would be governed by the Supreme Court of Canada's jurisprudence under s. 12 of the Charter, which prohibits "cruel and unusual" punishments. The Court has upheld extradition orders where fugitives faced drug charges in the United States carrying mandatory penalties of 15 to 20 years imprisonment, despite the fact that the Court has held that a seven-year minimum sentence for similar offences in Canada's Criminal Code is cruel and unusual. This means that long mandatory minimum sentences for drug offences are cruel and unusual, but not shocking or unacceptable! This counterintuitive proposition simply underlines the enormous discretion that the Supreme Court of Canada has assumed for itself under the rubric of fundamental justice.


In each of the three cases, the Court delivered no opinion other than to uphold the extradition order "substantially for the reasons" of the court of appeal. With respect, this seems a perfunctory disposition of such important issues. If the Supreme Court of Canada does not fully agree with the reasons of the court below it should provide its own reasons.

He added with respect to the Ross decision in the British Columbia Court of Appeal, Finch J.A. politely indicated that he found it difficult to apply the Schmidt test, and he sensibly suggested that the notion of the "reasonable man," however useful in

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\(^{82}\) U.S.A. v. Davis (3 February 1999), B.C.S.C. CC950165 (Vancouver Registry), per Oppal J., at para. 21.
\(^{83}\) Hogg, supra, note 81, pp. 893-894.
\(^{86}\) [1996] 1 S.C.R. 469.
\(^{87}\) Hogg, supra, note 81, p. 894, fn. 101.
determining standards of care, was not useful in assessing sentencing guidelines. In affirming the decision of the Court of Appeal, the Supreme Court of Canada did not address this opinion, rather they disposed of the case “substantially for the reasons” of Taylor J.A., with whom Finch J.A. had concurred.\footnote{Hogg, \textit{supra}, note 81, p. 894, fn. 104.}

Thus the Supreme Court of Canada was able to preserve LaForest J.’s troublesome \textit{Schmidt} test for future reference – and possible posterity.\footnote{See, for example, \textit{U.S.A. v. Burns, supra}, note 69, para. 66-69; and \textit{U.S.A. v. Cobb, supra}, note 37.}

Considering that \textit{LaForest’s Extradition to and from Canada, Third Edition} was for a decade the text quoted again and again by various Canadian courts, especially the Supreme Court of Canada, as the primary accessible academic authority on the subject of extradition, the book has glaring inaccuracies (most of them repeated from the first edition into the second, and later imported into the third) that must be addressed. Possibly in an attempt to preserve the \textit{imprimatur} of her father, Anne LaForest seems to have deferred to some of the stock phrases and insupportable assertions of the earlier editions, at the expense of accuracy. For example, on page 2 she states (without variation from the earlier editions):

Thus, in so far as they were used at all, the provisions of the Jay Treaty of 1794 providing for the mutual exchange of offenders between the United States and Great Britain must, because of their thousands of miles of common boundary, have been largely confined in practice to the British North American colonies and the United States.

This statement shows no insight into the nature of Article 27 of the Jay Treaty, which contains the sum of all of the provisions that she alludes to. As we shall see in the next chapter, these provisions were doomed, by exercise of Article 28, to have a shelf life of 12 years from the time of ratification, from October 1795 to October 1807. During that period of time, the United States was more closely allied to France than to Britain, with whom France was at war. Tensions between Britain and the United States ran high, because America continued to trade
with France, and English privateers and ships of war plundered American ships for stores and crew members, whom they often impressed into service for Her Majesty, much against their will. As for the thousands of miles of common boundary, the frontier was defended during this period by stalwart United Empire Loyalists, many of whom were unutterably opposed to American Independence – and had had to give up most of their possessions in the United States to re-establish themselves in what is now Canada. This was hardly conducive to the spirit of cooperation between the British North American colonies and the United States. Many U.E. Loyalists – a huge percentage of the population of what was to become Canada – considered themselves “fugitives” from the United States. The last thing the successive governors of British North America would contemplate doing during this time was to send an alleged fugitive offender back to the United States to stand trial.

However, there is no need to speculate as to the application of the provisions of the Jay Treaty since it is well known that, as a matter of public policy, there were no incidents of the United States asking for any fugitive to be returned during this period, and for many years thereafter. The American view of extradition was based on reciprocity: since America welcomed fugitives and refused to return them to countries who requested them, she was hardly in a position to request other nations to return fugitives to the United States. As Thomas Jefferson declared, America was not only “home of the free” but “home of the fugitive.”

Anne Warner LaForest’s contribution to the Canadian Encyclopedic Digest is far more accessible to the contemporary practitioner than her earlier text, and one of her recent

92 Supra, note 10.
articles recognizes the perilous course the drafters of the 1999 *Extradition Act* took in attempting to codify the law as it had evolved largely under the tutelage of her father:

The reality is that Canada has gone further than virtually any other country in facilitating extradition. It has done so in the absence of strong empirical support for the view that such an incursion on the liberty of the fugitive was needed and in circumstances where Canada extradites its nationals.\(^93\)

If the Department of Justice has used her father’s judgements to turn extradition into an administrative rather than judicial exercise, Anne Warner LaForest, until recently Dean of Law at the University of New Brunswick, would appear to be trying to rectify that wrong.\(^94\)

Three texts published in the new millennium are noteworthy. The fourth edition of M. Cherif Bassiouni’s *International Extradition: United States Law and Practice* (2002)\(^95\) reviews in great detail the contemporary state of American law, proposes changes to the law, and links extradition to other aspects of international law in a readable and accessible format. In *Extradition, Politics, and Human Rights* (2001),\(^96\) Christopher H. Pyle ably demonstrates in case after case that the rule of non-inquiry – the faith exhibited by ministers and judges in the legal protections provided by requesting states – is a legal fiction that in its very expression tends to bring the administration of justice into disrepute. Finally, *A Practical Guide to Canadian Extradition* (2002),\(^97\) co-authored by Elaine F. Krivel, Thomas Beveridge and John W. Hayward – like LaForest J. all veterans of the Department of Justice – provides a repetitious, section-by-section, clause-by-clause, not-very-“practical” analysis of Canada’s 1999 *Extradition Act*.

\(^{93}\) Anne Warner LaForest (2002), *supra*, note 34, pp. 140-41.
\(^{95}\) *Supra*, note 8.
\(^{97}\) Krivel *et al.*, *supra*, note 8.
4. Overview

The following chapter provides a brief history of extradition in North America, beginning with the executive prerogative that led to the drafting and eventual ratification of the short-lived extradition provisions contained in the Jay Treaty (1795-1807). From 1807 to 1842, when there was no treaty in place, extradition was dominated in Upper Canada by the opinions of Chief Justice Sir John Beverley Robinson, whose suspect judicial interpretation of extradition law, including the extradition of escaped slave Nelson Hackett back to Arkansas, led to the Ashburton-Webster Treaty in 1842. After the passage of enabling legislation, judicial interpretation took on a life of its own, and the subsequent rise in the exercise of judicial discretion lasted well into the twentieth century. However, with the Great Depression came a period of assertion of pre-eminent executive discretion which in turn led to a breakdown in cooperation between Canada and the United States in extradition matters following the Second World War.

In the 1970s, the executive agencies of both Canada and the United States saw the need for a new approach to extradition that would place more discretionary power in their hands and less in the hands of the courts. Chapter Three examines one of the main sticking points of treaty negotiation – the traditional political offence exemption by which the courts often held that a person who committed a “crime of a political character” was not subject to extradition. Negotiators for the U.S. Secretary of State wanted to beef up exceptions to the political offence exemption by including in the list of exceptions politically motivated violent crimes such as murder, abduction, and (more presciently) acts of terrorism, including hijacking. This policy sprang directly out of the increase in hijackings throughout the world, as well as violent protests against the Vietnam War where alleged perpetrators of violent
crimes in the United States sought refuge, often in Canada. In *Armstrong v. State of Wisconsin*, an alleged bomber was extradited to the United States to face a charge of murder for setting off a bomb that killed a professor as he worked in his university lab adjacent to facilities occupied by the Reserve Officers Training Corps (ROTC), the target of several anti-war protests. In *Re Hernandez*, an alleged assassin of a police captain attempting to bring order at an anti-ROTC rally at the University of Puerto Rico in San Juan similarly fled to Canada, from where he faced extradition by the United States, which acted as agent for Puerto Rico. Leonard Peltier was extradited from Canada in 1976 for his alleged role in the protest (sometimes characterized as a revolt) at Wounded Knee, South Dakota, in which two FBI agents were shot dead. There is no doubt that the affidavit evidence led at Peltier’s extradition hearing was suborned. However, he was surrendered to the United States authorities on the strength of the tainted affidavits, and has been serving time ever since in a penitentiary in Fargo, North Dakota, despite numerous appeals from the Innocence Project and thousands of supporters not only from among American and Canadian First Nations peoples, but from people of all walks of life.

Even as treaty negotiations sputtered through five years of fitful negotiations, both the United States and Canada agreed on a new system of mutual cooperation whereby each government represented the other in extradition proceedings. By 1976, the process of extradition was back on track. **Chapter Four** deals with the fine balance between executive and judicial discretion struck in the Canada-United States Extradition Treaty. Who can best determine whether a person facing extradition also faces double jeopardy, parallel prosecution, or prosecution for an offense of a political character? The Treaty seems to suggest that both

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the courts and the executive have specific roles to play, but more often is vague as to whether specific anticipated duties should be the domain of the executive or the judiciary. The Treaty provides for treatment of minors differently from adults, for example, implying that this is a discretionary domain of the executive. Similarly, the Treaty invites the exercise of executive discretion to request assurances that the death penalty will not be sought by retentionist jurisdictions, a factor in the notorious cases of Kindler,\textsuperscript{100} Ng,\textsuperscript{101} Gervasoni,\textsuperscript{102} and Burns.\textsuperscript{103} However, fugitives are invited to "prove" that the offences with which they are accused are of a political character, a clear evidentiary consideration that anticipates judicial considerations. In the United States, courts still determine this question, whereas in Canada, the new Extradition Act assigns this duty (and many others that were traditionally considered by the courts) to the Minister of Justice.

On the other hand, the Treaty requires the executive of both signatory countries to adhere to the rule of specialty, by which a person cannot be tried for a crime for which he has not been specifically extradited without first obtaining the permission of the country in which he was found. The Treaty encourages mutual cooperation between the executive authorities of the two nations, including provisions for joint extradition and multiple extraditions. It also provides rules that are undoubtedly the exclusive domain of the judiciary, such as rules governing seizure and sufficiency of evidence, arrest, and provisional arrest. Each of these provisions have come to be defined by case law and treaty interpretation.

\textsuperscript{100} Kindler v. Canada (Minister of Justice), supra, note 21.
\textsuperscript{102} Supra, note 67.
\textsuperscript{103} Supra, note 67.
Chapters Five and Six deal with the current legislative scheme in Canada’s Extradition Act (1999), showing the ways in which executive discretion has been expanded and judicial discretion diminished at virtually every level. The legislative scheme of the new Act contemplates five distinct steps toggling back and forth between the executive and the judiciary:

1. **Executive Discretion**: the Authorization Process
2. **Judicial Discretion**: the Extradition Hearing
3. **Executive Discretion**: the Minister’s Initial Surrender Decision
4. **Judicial Discretion**: the Judicial Review and/or Appeal Process
5. **Executive Discretion**: the Minister’s Final Surrender Decision

These five steps are bound to be followed in every case unless at some point along the way the person sought capitulates or decides to waive extradition.

Chapter Five examines the first and second steps – the authorization process in which the Minister of Justice issues an “authority to proceed” to the Attorney General; pre-hearing applications; and the extradition hearing itself, which resembles a preliminary hearing. Under the new Act, judges have a diminished role in both the pre-hearing process and the hearing, since the evidence they are allowed to hear is severely restricted, their discretion to examine foreign law has been removed, and their Charter jurisdiction has been limited by case law following *Re Schmidt* to procedures or proceedings that occur or have effect specifically within Canada.

Chapter Six examines the concomitantly increased role of the Minister of Justice in the decision to surrender, and the diminished role of the courts of appeal conducting appeals and judicial reviews. As Doherty J.A. has stated, “The Minister of Justice serves as the
guardian of Canadian sovereignty interests. She effectively controls both ends of the process. No request goes forward without her approval and no sending order is implemented without her approval."  

It is suggested that the new legislation grants entirely too much discretion to the Minister of Justice in determining whether an individual should be surrendered, and that many of the duties assigned to the Minister are judicial in nature. Furthermore, the Minister has an abysmal record for failing to exercise executive discretion, all too often passing the buck back to the courts of appeal for judicial review. To an extent, this was understandable, since until comparatively recently, courts of appeal and the Supreme Court of Canada were all too willing to give the nod to executive discretion. Chapter Six also examines the strange dual process of appeal and judicial review contemplated by the Act, and the way judicial deference trumps judicial discretion in the appeal process.

Chapter Seven examines the shifting sands of extradition law from the perspective of the twenty-first century, including the ramifications of extradition of alleged terrorists on the one hand, and abuse of process on the other. The Supreme Court of Canada has taken steps to clarify the law and has suggested that the courts should not fetter their own discretion and have the right to question the fairness of foreign procedure. It is observed that the only way for the judiciary to redeem itself is to become more proactive in giving clear direction whenever the Minister fails to exercise executive discretion in accordance with his much-expanded statutory role – or exercises his discretion inappropriately.

Chapter Eight reviews the thesis and draws conclusions from the observations made throughout the dissertation, especially as they apply to recent developments in extradition law.

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CHAPTER TWO

EXECUTIVE PREROGATIVE AND JUDICIAL INTERPRETATION:
A BRIEF HISTORY OF EXTRADITION LAW IN NORTH AMERICA

1. The Jay Treaty (1794-1807)

From the outset, there was some question as to whether John Jay’s priorities lay with the judiciary or with the executive. George Washington had appointed him Secretary of State for Foreign Affairs, and later Chief Justice of the United States, a status Jay retained while negotiating with Great Britain to conclude America’s first bilateral treaty to impact on Canada. Armed with the additional high-sounding titles of Plenipotentiary and Envoy Extraordinary to Britain, Jay and his counterpart, British Secretary of State for Foreign Affairs and Leader of the House of Lords Lord William Wyndham Grenville, spent several months in Britain negotiating the Treaty of Amity, Commerce and Navigation, which they finally signed on 19 November 1794. As its official name implies, the Treaty had a broad scope, addressing settlement of the ongoing border dispute with Canada and the treatment and traveling rights of aboriginals. The Jay Treaty, as it came to be called, was also the first American treaty to include a *bona fide* extradition provision:

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1 In 1789.
ARTICLE 27

It is further agreed that His Majesty and the United States on mutual Requisitions by them respectively, or by their respective Ministers or Officers authorized to make the same will deliver up to Justice, all Persons who, being charged with Murder or Forgery committed within the Jurisdiction of either, shall seek an Asylum within any of the Countries of the other, Provided that this shall only be done on such Evidence of Criminality as according to the Laws of the Place where the Fugitive or Person so charged shall be found, would justify his apprehension and commitment for Tryal, if the offence had there been committed. The Expense of such apprehension and Delivery shall be borne and defrayed by those who make the Requisition and receive the Fugitive.3

The Treaty recognized the right of the executive authorities of a nation to receive requests for extradition at the beginning of the process, and to deliver up extradited persons from within their jurisdiction at the end of the process. But in between, the determination of who was subject to extradition was a question of law to be determined not by the executive but by the judiciary and the courts – the only bodies equipped to determine whether evidence of criminality according to the laws of the requested country would justify commitment for trial, the functional equivalent of the “preliminary inquiry” test in modern extradition law.

Article 27, one of the few articles of the Treaty drafted by Jay, seemed to accommodate some of President Washington’s concerns, including his personal aversion to forgers, of whom he had been a repeated victim.4 However, Washington was not impressed with the bulk of the Treaty, feeling that Jay had given up too much for too little. Accordingly, he refused to release the text of the signed Jay Treaty to Congress for ratification. His reluctance to do so may also be indicative of an awareness of a development in law arising

from the first extradition case in United States history, United States v. Lawrence [sic],\(^5\) heard by the Supreme Court in the absence of its Chief Justice, which upheld the decision of district court Judge John Laurance not to hand over Captain Henry Barré to France while the Reign of Terror was at its height. The Supreme Court had held that the liberty of individuals was for the courts to decide rather than the executive.\(^6\)

Eventually, Washington released the signed Treaty to a new session of the House of Representatives. Debate there and in the Senate further delayed ratification until 28 October 1795.\(^7\) This was significant, because Article 28 set a time limit on most of the provisions of the Treaty to 12 years from ratification, “to be computed from the day on which the ratifications of this treaty shall be exchanged.” Hence, most of the Jay Treaty, including Article 27, would expire on 28 October 1807.

Within a year of the ratification, Secretary of State Timothy Pickering advised Vermont Governor Thomas Chittenden to return Ephriam Barnes and James Clarkson Freeman to Lower Canada to face charges of robbery and horse theft—despite the fact that Article 27 specified extradition only for the crimes of murder and forgery. Pickering claimed that President Washington himself had concurred that the state executive had the power to extradite in this way.\(^8\) However, no formal extradition requests were made in England by the United States, and although several requests were made to Pickering with respect to various crew members involved in a mutiny aboard the British frigate Hermione in the Caribbean on 21 September 1797, only one case was successfully brought before an American court pursuant

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\(^5\) 3 U.S. (3 Dall.) 32, 45 (1795).
\(^7\) Ibid., p. 7.
to the provisions of the Jay Treaty: the case of Jonathan Robbins. The mutiny had occurred at a time when Britain’s navy was flexing its muscles on the high seas, arbitrarily impressing the unwary into its service. Robbins admitted that he had been on board the ship, but claimed to be an American sailor, Thomas Nash, who had been impressed into service against his will. Impressment was the subject of a number of complaints from ships captains to the pro-British, Federalist administration of John Adams, and it was politically insensitive of President Adams to request the court to deliver up Robbins to the British authorities, who had specifically requested his extradition under s. 27 of the Jay Treaty. Judge Bee of the United States District Court in South Carolina informed Pickering of his “compliance with the request of the President of the United States,” claiming that he had judged that the evidence against Robbins was “sufficient to sustain the charge on which he had been demanded.” However, it was clear from the nature of his remarks that Bee intended from the outset to pander to the President. In view of the President’s decree,

These affidavits, and the question whether the prisoner was an American, and an impressed seaman or not, were in the opinion of the court altogether immaterial; and Judge Bee, without any hesitation, pronounced the decree for delivering up a fellow-citizen into the hands of a foreign executioner. Poor Robbins was then immediately conveyed on board a British sloop of war, which carried him to Jamaica, where he received the ignominious death of a traitorous assassin.

As Congressman (soon to be Chief Justice) John Marshall wryly stated in the House of Representatives, “The experience of this unfortunate criminal, who was hung and gibbeted,

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evinced to him that the punishment of his crime was of a much more serious nature than mere banishment from the United States.\textsuperscript{14}

M. Cherif Bassiouni made perhaps the most succinct statement of the significance of the Robbins case to American extradition law, especially as regards the competing discretionary roles of the judiciary and executive officers such as the President and Secretary of State:

The case of In re Robbins raised the question of whether Article III of the Constitution permitted judicial review in extradition proceedings. The issue arose because no statutory provision authorizing the court to act pursuant to presidential mandate existed, nor did the treaty make any provision for a judicial hearing or the manner in which the proceedings were to be undertaken. The President ordered the case heard in the United States District Court. The court held that its judicial power under Article III extended to the interpretation and application of extradition treaties, and did not require federal legislation specifically implementing procedures for judicial review in extradition proceedings. Having thereby established its jurisdiction over the subject matter, the court ruled that the terms of the treaty had been satisfied and ordered the relator surrendered to the requesting state.

The central question in Robbins was whether extradition treaties are self-executing, in reliance on international law doctrine, or are non-self-executing and require national legislation for their implementation, in reliance on constitutional law doctrine. The debate lasted from 1794 to 1848. During that period, the proponents of the view that extradition treaties are self-executing prevailed and extradition proceedings were adjudicated by federal district courts on request of the Presidency or the Secretary of State.\textsuperscript{15}

Gerard Vincent LaForest implied in Extradition to and from Canada, long the authoritative text on extradition law in Canada, that “the provisions of the Jay Treaty of 1794 providing for the mutual exchange of offenders between the United States and Great Britain must, because of their thousands of miles of common boundary, have been largely confined in practice to the British North American colonies and the United States.”\textsuperscript{16} However, as a


matter of public policy, there were no incidents of the United States asking for fugitives to be returned from British North America during this period on the basis of the Treaty. American foreign and domestic policy with respect to asylum, shaped initially by Thomas Jefferson while he was Secretary of State, was one that welcomed fugitives and refused to return them to countries who requested them.\textsuperscript{17} Thus the \textit{Robbins} case, directly between Great Britain and the United States, was the only one heard or decided, in either direction, under the Jay Treaty. In fact, Jefferson capitalized on the \textit{Robbins} case, which was catastrophic not only for Jonathan Robbins but also for the members of the United States government who brought pressure on Judge Bee to give him up to the British: the devious Pickering was fired as secretary of state, and President John Adams lost his bid for re-election in 1801. This was huge news at the time, and the political fall-out is well documented. After that, Jefferson came to power, still unutterably opposed to extradition – and equally opposed to cooperating with the British. He remained in power until after the extradition provisions of the Jay Treaty expired on 28 October 1807.

Although Jefferson had the option of renewing the Jay Treaty, he was not keen to do so – especially after the British, by Order in Council, ordered the blockade of American ships doing business with France, in response to Jefferson reneging on an interim renewal agreement.\textsuperscript{18} Thus, in 1807 most of the Articles of the Jay Treaty, including Article 27, were allowed to die a quiet death, as provided for in the Treaty itself.


\textsuperscript{18} Samuel Benfield Steele, \textit{Forty Years in Canada: Reminiscences of the Great North-West with Some Account of His Service in South Africa} (New York: Dodd, Mead & Co., 1915), p. 2. The \textit{Chesapeake} incident, along with British support of Shawnee Indian raids, including supply of arms and ammunition, led directly to the War of 1812.
2. In the Absence of a Treaty (1807-1842)

On page 3 of the LaForest texts, all three editions state that after the provisions of the Jay Treaty expired, “Canada and the United States continued to surrender fugitives to one another.” However, there is no evidence that either country actually delivered up fugitives to the other, even though in Canada courts and judges, consulted for the purpose, had opined from time to time that the executive could legally do so, as in the cases of Re Fisher (1827), and a slave called Jesse Happy (1833), whom Governor Sir Francis Bond Head refused to surrender even though the Chief Justice of Upper Canada, John Beverley Robinson, had said that he could. In fact, the only documented case of Canada actually surrendering anyone to the United States prior to the signing of the Ashburton-Webster Treaty in 1842 was that of Nelson Hackett, a runaway slave who in 1841 was sent back to Arkansas for “stealing” a horse, saddle, watch and coat to help him survive his long trip north to Canada. A neophyte to North American climate and distances, the new Governor of the Province of Canada, Sir Charles Bagot, expressed the opinion that the items were “superfluous to his needs for escape.” To have done otherwise, Bagot wrote to the Colonial Secretary, Lord Standley, would turn Canada into “an asylum for the worst characters provided only that they had been slaves before arriving here.” The LaForests overlooked the fact that there was sufficient outrage over Hackett’s re-enslavement to discourage British officials from repeating this mistake for years. Similarly, the Americans did not actually return anyone to Canada before the new treaty was concluded in 1842.

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19 (1827), first reported in 1872 at Stu. K.B. 245.
In all three editions of *Extradition to and from Canada*, the LaForests state that “in 1819 one Daniel Washburn was extradited from the United States to Canada on a charge of theft.” In fact, Washburn was not extradited, although his case was the first reported attempt by American authorities to detain a Canadian preparatory to his possible extradition to Canada. A confidante alleged that Washburn had taken some Canadian money from a patron of a Kingston, Ontario, pub, then through a friend exchanged an unspecified amount of “Montreal” currency for an unspecified amount of American currency. In the course of his judgment, Chancellor Kent stated, “It is the law and usage of nations, resting on the plainest principles of justice and public utility, to deliver up offenders charged with felony and other high crimes, and fleeing from the country in which the crime was committed, into foreign and friendly jurisdictions.” This *obiter* interpretation of extradition law was wrong in law, for as Jefferson had never tired of saying, even when nations are on friendly terms, there is no obligation in the absence of a treaty to return fugitives to the jurisdiction of the alleged offence. However, the dicta in *Washburn* established a precedent that was followed even in Canada.

Although Chancellor Kent recognized that extradition was the prerogative of the “executive,” he did not determine which authority, state or federal, should actually make the surrender. However, perhaps his most serious error was the assumption that he had the authority to commit the fugitive even in the absence of an extradition request:

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23 *Re Washburn* (1819), 3 Wheeler’s Criminal Cases 473.
27 *Re Fisher* (1827), 1 Stuart 245 (K.B.) at 251, 252, 253, 255, 359.
When a case of that kind occurs, it becomes the duty of the civil magistrate, on due proof of the fact, to commit the fugitive, to the end that a reasonable time may be afforded for the government here to deliver him up, or for the foreign government to make the requisite application for the proper authorities here, for his surrender. Who are the proper authorities in this case, whether it be the executive of state, or, as the rule is international, the executive authority of the United States, the only regular organ of communication with foreign powers, it is not now the occasion to discuss. It is sufficient to observe, that if no such application be made, and duly recognized, within a reasonable time, the prisoner will then be entitled to his discharge upon habeas corpus. 28

In this, he was following the same slippery course as had Judge Bee in the Robbins case.

Chancellor Kent noted that Article 27 of the Jay Treaty had expired 12 years earlier, but interpreted the expiration as serving to broaden the law rather than narrow it: “That article was only declaratory of the law of nations..., the recognition, not the creation of right.” 29 Article 27, he said, had reverted to being “equally obligatory upon the two nations, under the sanction of public law, since the expiration of that treaty.” 30 According to that logic, a nation without a treaty was far better protected than one with a restrictive treaty, since a whole panoply of crimes beyond those that had been included in the treaty (forgery and murder) now fell within the purview of executive discretion:

Considering the great and constant intercourse between this state and the provinces of Canada, and the entire facility of passing from one dominion to the other, it would be impossible for the inhabitants of the respective frontiers to live in security or to maintain a friendly intercourse with each other, if thieves could escape with impunity, merely by crossing the territorial line. The policy of the nation, and the good sense of individuals, would equally condemn such a dangerous doctrine. 31

28 Re Washburn, supra, note 23, at 548-549.
29 Ibid., at 551-552.
30 Ibid., at 552-553.
31 Ibid., 552.
However, Washburn was never actually extradited. Although Chancellor Kent believed that the law was against Daniel Washburn, he discharged him due to insufficiency of the evidence.\(^{32}\)

The LaForests go on to state, “Similarly, in 1827 Joseph Fisher, an alien, was surrendered to the United States by Upper Canada notwithstanding the absence of any treaty or law on the subject.” In \textit{Re Fisher} (1827),\(^{33}\) Reid C.J. followed the \textit{obiter dicta} of Washburn to conclude that the executive had the authority to deliver Fisher to the United States. However, executive policy of Britain at the time, supported by the English Law Lords, precluded return of alleged fugitives to a requesting country. Reid C.J. ruled that even in the absence of a treaty, “The Executive Government may deliver up to a Foreign State, for trial, any fugitive from justice charged with having committed any crime within its jurisdiction.”\(^{34}\) As in \textit{Washburn}, no applicable treaty or law was in place to support returning Fisher to the American authorities for theft, other than a perceived “moral duty to do so imposed by the comity of nations”\(^{35}\) arising from the “social compact which directs that the rights of nations as well as of individual should be respected.”\(^{36}\) Also following \textit{Washburn}, Reid C.J. held that the fact that no demand for surrender had been made by the requesting government was not an issue into which the court had discretion to inquire, since extradition was not a judicial but a “royal prerogative”: “The nature of the demand, and the sufficiency of it, must be best known to the executive, to which it is made, and which alone is competent to determine how far the royal prerogative ought to be exercised.”\(^{37}\) Reid C.J. remanded Fisher to the custody of His

\(^{32}\) LaForest, \textit{supra}, note 16, pp. 2-3.
\(^{33}\) \textit{Re Fisher}, \textit{supra}, note 27.
\(^{34}\) \textit{Ibid.}, at 245.
\(^{35}\) Shearer, \textit{supra}, note 3, p. 25.
\(^{36}\) \textit{Ibid.}
\(^{37}\) \textit{Ibid.}, pp. 261-263.
Majesty, since the Crown alone possessed the executive discretion to process his surrender to the United States.

Although the LaForest assert that Fisher was surrendered to the United States "by Upper Canada," Fisher was in Montreal, part of Lower Canada, when the request for his return was made. It is not likely that the Governor of Lower Canada actually exercised his discretion, since in 1829, Fisher remained in Lower Canada. A major source for LaForest's first edition, the pre-eminent British authority on extradition, Sir Edward Clarke, also assumed that Fisher had been returned; however, he wrote that, prior to the Ashburton-Webster Treaty of 1842,

[T]here had been one or two dicta, not decisions, in the English courts, and so far as these went they recognized the duty of the extradition of fugitive criminals; but their authority was very slight, and it was clear that the right to habeas corpus at common law or by statute would, in the absence of treaties or special acts of parliament, prevent any proceedings for the rendition of such offenders.

Clarke went on to note that in a case originating in the Bahamas, the Attorney-General and Solicitor-General of England both advised the Lieutenant-Governor that he had no right by the law of England to detain anyone in custody for breaking the laws of other nations.

At most, the Fisher decision was an indicator of a willingness of one judge of the Court of King’s Bench of Lower Canada to establish mutual cooperation with the United States in criminal matters. However, in Rex v. Ball (1829), the same court, also sitting in Montreal, held that a person charged with "offences of a political nature, arising out of revolutionary principles, excited in any government" was exempt from extradition:

38 Supra, note 16, p. 3.
39 See Rex v. Ball, 1 Am. Jurist 297, 301 (1829).
41 Ibid., at 109-110.
The authority of the state to which the accused has fled may well be extended to protect rather than deliver him up to his accusers, and this upon a wise and humane policy, because the voice of justice cannot always be heard amidst the rage of revolution, or when the sovereign and subject are at open variance respecting their political rights, and therefore no state will ever be induced to deliver men up to destruction, not even to malicious prosecution.\textsuperscript{42}

It is noteworthy that this decision recognized the validity of protecting a person from extradition for reasons other than the absence of an extradition treaty. The principles voiced in the last phrases of this decision were not properly revisited in Canada until 2001, when the Supreme Court of Canada decided in \textit{U.S.A. v. Burns}\textsuperscript{43} that men should not be “delivered up to destruction” in the form of the death penalty, and in \textit{U.S.A. v. Cobb}, \textit{U.S.A. v. Tsioubris}, and \textit{U.S.A. v. Shulman},\textsuperscript{44} where the Supreme Court of Canada ruled that delivering persons up to what amounted to malicious prosecution was abuse of process. Christopher Pyle remarked with respect to the \textit{Ball} case, “The Canadian court understood, better than most courts since, that the risks of injustice and malicious prosecution are particularly high in cases where political fugitives are sought for extradition.”\textsuperscript{45}

3. The Many Hats of John Beverley Robinson

For the York Militia, the War of 1812 started off with more of a bang than a whimper. In all likelihood, nobody was more surprised by the fall of Detroit than Lt. John Beverley Robinson, who at 21 was among the officers leading their men to behave as if they were “regulars,” lighting hundreds of firebrands to give the illusion of a massed force. Tecumseh’s 300 braves screamed at the top of their lungs as they raced around again and again in a huge

\textsuperscript{42} \textit{Ibid.}, at 301
\textsuperscript{45} Pyle, \textit{supra}, note 6, p. 81.
circle, only one arc of which was within sight of the fort, each time ducking back into the forest and circling around unseen through the trees for yet another mad run, giving the illusion of thousands of Indians closing on the fort. Fearing for the safety of his granddaughters inside the fort, General Hull, in his cups, capitulated without a fight, surrendering some 2,000 regular troops to a force half its size.46

Robinson had been a law clerk for Attorney-General John Macdonell before the war. When Macdonell was shot dead on Queenston Heights on the Niagara escarpment, Lt. Robinson was summarily appointed Acting Attorney-General of Upper Canada in his stead. In the years to follow, he was to call many of the shots in Canadian extradition law, as well – both as a member of the executive and as a member of the judiciary. Like John Jay, he wore several hats at once – including President of the Executive Council of the Legislative Assembly of Upper Canada and Chief Justice of Upper Canada.47

After the war of 1812, it became clear to Robinson, as chief prosecutor in the province, that without help from “insiders” the Americans under General Harrison could not have accomplished the attack that led to the death of Brigadier-General Tecumseh at Thames River. Soon, the alleged traitors were identified, and on 23 May 1814, 19 residents of the London area were charged with treason and prosecuted by Robinson; on 20 July, eight of them were hanged in accordance with Robinson’s recommendation. Interestingly, Robinson recommended imprisonment rather than execution for American nationals, reasoning that they were motivated “‘perhaps from political motives even.’”48 This is understandable, since even

46 Mary Agnes FitzGibbon, A Veteran of 1812: The Life of James FitzGibbon (Toronto: W. Briggs, 1894), p. 11-14, 18.
47 Brode, supra, note 21, pp. 59, 183-185. For a more in-depth analysis of Robinson’s role, see Botting, supra, note 4, pp. 82-84, 95-97.
American citizens resident in Canada could hardly be accused of treason, and therefore would not normally face the death penalty. However, Robinson, at age 23, can at least be credited with planting the seeds in Canada of the notion of more lenient treatment for politically motivated offences where, in war, foreign nationals assist the cause of their rival nation.

Robinson was to have a much more direct influence on the shaping of extradition law in Canada over the next 50 years, holding as many as four major hats at once: member of the Assembly (from 1820), full-fledged Attorney-General, Speaker of the Legislative Counsel and President of the Executive Council. He became one of the “guiding spirits” of the elitist and nepotistic Family Compact that controlled the government of Upper Canada.49 This made Robinson a major target of vitriolic comments by journalists such as William Lyon Mackenzie, with whom Robinson came directly to loggerheads in the 1830s.50

Although Robinson was appointed Chief Justice of Upper Canada in 1829, he continued for two more years to preside over the Executive Council, providing direct legal and political advice to Lieutenant-Governor Sir John Colborne. Only after Lord Goderich expressed reservations about the Chief Justice doing double duty on the Executive Counsel did Robinson resign from that body, but he thereafter was appointed Speaker in the Legislative Counsel, a position he held until 1836.51 During this time, although there was still no extradition treaty in place, he pushed extradition legislation through the Legislative Counsel, including the highly controversial Fugitive Offenders Act (1833). In this, he followed the pattern of New York State, which had passed international extradition legislation of its own.

49 Berton, ibid., p. 435.
50 FitzGibbon, supra, note 46, Appendix VII.
51 Brode, supra, note 21, pp. 59, 183-185.
Some individual states of the United States, New York among them, did not appear to grasp that international extradition was a federal rather than state prerogative. In 1821, Governor DeWitt Clinton of New York proposed a law allowing him to surrender fugitives to Canada, and on 5 April 1822, broad-ranging legislation was passed which gave discretion to the governor to surrender up to a foreign government, upon its requisition, any fugitives charged with any crime. The following year, however, the Supreme Court of Pennsylvania ruled that the effect of s. 27 of the Jay Treaty had “ceased at its expiration.” In 1825, Governor Van Ness of Vermont conveyed to United States Secretary of State Henry Clay a request from “the acting Governor of Canada,” alleging that two British soldiers were in custody in a Vermont jail after robbing two of their officers and fleeing across the border to escape justice. President John Quincy Adams replied that America could not return the British soldiers held in Vermont on the basis that there was no treaty.

In Figsby et al. (1833), the Governor of the Province of Canada, Lord Aylmer, personally refused a request from Governor Marcy of New York to surrender four Canadians who had allegedly murdered a young woman in Champlain, NY, stating that the Attorney-General had ruled “that it was not competent to the Executive, in the absence of any regulation by treaty or legislative enactment on the subject, to dispense with the provision in the Habeas

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52 1822 N.Y. Laws, ch. 148, at 139 (5 April 1822). In 1827, New York State reviewed this broad-ranging extradition law and decided to include all capital offences except treason. As Pyle has pointed out, the exception of treason in this manner “appears to be the first political offense exception expressly written into law anywhere, preceding similar developments in Belgium and France by six years.” Pyle, supra, note 6, p. 64. The New York law was eventually ruled unconstitutional in 1871. See E.G. Clarke, A Treatise upon the Law of Extradition, 4th ed. (London: Stevens & Haynes, 1903), pp. 39, 76. John Bassett Moore, Extradition, Vol. 1 (Washington, D.C.: U.S. Government Printing Office, 1880), section 49, p. 59, n. 2.

53 Commonwealth ex parte Short v. Deacon (1823), 10 Serj., & Rawl., 125.

54 Cited in Holmes v. Jennison, (1840) 14 Peters 540, at 541, 554.

55 Ibid., as described by Taney J. at 554-555.
His letter raised several issues of significance with respect to executive and judicial discretion in Canada. First, he recognized that the issues in law involved in extradition necessitated his consultation, as the executive representative of the Crown, with the imperial Attorney-General, whose ruling he considered binding. Since the Attorney-General's advice was against extradition, Lord Aylmer did not need to defer to a court. Secondly, he recognized that extradition decisions were the domain of the executive, although in the absence of a treaty, even the executive had no jurisdiction. Thirdly, he recognized that Section 11 of the Habeas Corpus Act applied to extradition requests in the absence of a specific extradition treaty provision, "or legislative enactment on the subject." This was all the invitation John Beverley Robinson and the Family Compact needed to begin drafting their own stop-gap remedy for extradition that would enable them to bypass the Habeas Corpus Act. As Speaker of the Assembly of Upper Canada, John Beverley Robinson guided the debate of An Act respecting the apprehension of fugitive offenders from foreign countries and delivering them up to justice, or, simply "The Fugitive Offenders Act (1833)."

56 Letter of Lord Aylmer to General Marcy, 27 May 1833, cited in Holmes v. Jennison, ibid., at 560. Blackstone's Commentaries were cited to similar effect: "A natural and regular consequence of this personal liberty is, that every Englishman may claim a right to abide in his own country so long as he pleases, and not to be driven from it except by the sentence of the law. No power on earth but the authority of the parliament can send any subject of England out of the land against his will, no, not even a criminal. To this purpose the great charter declares that no freeman shall be imprisoned, unless by the judgment of his peers or by the law of the land."

57 "11.... No subject of His Majesty, his heirs or successors, that now is or hereafter shall be an inhabitant or resident of this Province of Quebec, shall, or may be sent prisoner into any province or into any state or place without this province, or into any parts, garrisons, islands, or places beyond the seas, which are, or at any time hereafter shall be within or without the dominions of His Majesty, his heirs or successors; and ... every such imprisonment, or transportation, is hereby enacted and declared to be illegal." Prov. Stat. 24 Geo. III, c.1, s. 11. This indemnification was backed by the threat of a £500 fine for bounty hunters who sought to abduct British subjects to force them to face American justice. See Anne Warner LaForest, supra, note 16, p. 3, and Clarke, supra, note 52, p. 93.

58 3 Wm. IV. c. 6. This Act was incorporated in the Consolidated Statutes of Upper Canada, 1859, c. 96, but was repealed a year later by 23 Vict. (U.C.) c. 41. See "Extradition Practice," 9 C.C.C. 264 at 308-309.
As Chief Justice of Upper Canada, Robinson was in the unique position of being able to interpret and apply the very laws he had helped create. The *Fugitive Offenders Act* empowered the “Governor, in his discretion, by and with the advice of the Executive Council” to deliver up fugitives from justice found in Upper Canada upon evidence of criminality that would warrant commitment for trial there. However, the only fugitives ever prosecuted under the *Fugitive Offenders Act* were runaway slaves – each of them on the advice of Robinson, C.J.U.C. The first case to be tried under the Act was that of Jesse Happy, who late in 1833 “borrowed” his master’s horse to ride the long distance from Kentucky to Canada, from where he wrote to his master thanking him for its use and telling him where and how to find it on the American side of the border. A grand jury in New York indicted him for felony. Lieutenant-Governor Sir Francis Bond Head referred the matter to Robinson, C.J., who told Head, “To proclaim impunity to all slaves who may fly to Upper Canada after murdering or robbing their Masters, or others would be inviting a description of population which, to say the least, it is not desirable to encourage.” The level-headed lieutenant-governor was not convinced by Robinson, and in 1834 referred the matter to Sir John Campbell, then Attorney-General of Great Britain, who advised that if there was evidence of criminality that would warrant apprehension of the fugitive if the alleged offence had been committed in Canada, Happy should be delivered up to justice in the foreign country “without reference to the

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59 Ibid., s. 1.
61 Moore, supra, note 52, p. 626; Anne Warner LaForest (1991), *supra*, note 16, p. 3.
62 Clarke, *supra*, note 52, pp. 80-81.
Question of whether he is, or is not, a Slave.” Thus in Happy’s case, the executive, not the judiciary, exercised discretion in deciding a matter of law: that there was insufficient evidence of horse-theft to send Happy back to Kentucky. The letter to his master was evidence, the Lieutenant-Governor decided, that he had only intended to borrow the horse for the trip, not steal it. This question of the sufficiency of the evidence was a matter of judicial discretion that could and should have been decided in the reference to Robinson.

In the parallel case of Nelson Hackett – the slave from Arkansas who borrowed his master’s horse and beaver coat and a neighbour’s saddle and watch before riding all the way to Canada – Robinson hand again seemed very much in evidence. Shortly after Robinson administered the oath of office to Sir Charles Bagot, the new Governor of a reconstituted Canada, Bagot complied with the American request to surrender Hackett pursuant to the Fugitive Offenders Act, reasoning that Hackett had taken more than he needed to make good his escape. Lord Stanley made it clear to Bagot that the Fugitive Offenders Act, which Robinson had shepherded through the Assembly years before and now had championed in the cases of Happy and Hackett, was unlawful since it was not supported by treaty.

However, by far the most notorious case on which the Robinson C.J. sat – and one of his last – was that of John Anderson, a runaway slave wanted for murder in Missouri for stabbing a white planter, Seneca Diggs, with a knife while trying to escape slavery. Once safely in Upper Canada, John Anderson had confided his dark secret of the stabbing of Diggs

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65 Ibid., at 95.
66 Clarke, supra, note 52, p. 80, citing 60 Hansard 326 (per Lord Campbell), and Forsyth’s cases and Opinions on Constitutional Law, p. 370.
67 Brode (1984), supra, note 21, p. 228. Under the Act of Union of 1840, Upper Canada was now “Canada West” and Lower Canada “Canada East” under the single umbrella of the Province of Canada.
to a fellow escaped slave who years later, after a falling out, reported Anderson’s “confession” to the local magistrate, William Matthews. After an investigation, Anderson was detained in custody on a warrant drawn up by Matthews – a warrant that contained a clerical omission that ultimately was to be determinative of the disposition of the case, not in the Queen’s Bench of Upper Canada, where Robinson C.J. presided, but in the Upper Canada Court of Common Pleas, where Draper C.J.C.P. made every effort to save his senior colleague’s face and reputation.

In August, 1860, a month before he was to hear the Anderson case, the magistrate asked Attorney General John A. Macdonald how he should proceed. Macdonald explained that, whether relying on written affidavits or viva voce testimony, “You should require evidence of criminality sufficient to sustain a charge according to the laws of this province.”

Since extradition was ultimately an exercise of executive discretion, Anderson’s lawyer, Sam Freeman, approached Macdonald to request Anderson’s discharge, arguing that the taking of Diggs’ life “to prevent his being carried back to slavery” was manslaughter, not murder. Under the Ashburton-Webster Treaty, manslaughter was not an extraditable offence.

Macdonald’s responsible reply was to set the tone for many, many extradition cases to come:

“I have come to the conclusion with great regret, but without any doubt existing in my mind that this party has committed the crime of murder; under these circumstances all I can do is to give you every assistance in testing the questions before the Courts or a Judge by Habeas Corpus.”

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70 The warrant alleged “that he, the said John Anderson, did, in Howard county, in the state of Missouri, on the 28th day of September, 1853, willfully, maliciously and feloniously stab and kill one Seneca T.P. Diggs, of Howard County.” *Re John Anderson* (1861), 11 U.C.C.P. 9, at 10.
71 *Brantford Expositor*, 3 August 1860. Cited in Brode (1989), *supra*, note 69, p. 28. It is possible that this is a reference to the Bocarde case, since the comments attributed to Macdonald are similar to his earlier instructions to the provincial secretary with reference to a request from Mathews.
This reaffirmed and clarified the notion, first established in the Ashburton-Webster Treaty, that the executive discretion of the Attorney-General should defer to judicial discretion, and that this process was one of cooperation to “test the questions” already answered by the executive. The “questions” were serious enough for Anderson to appear before a three-judge panel of the Court of Queen’s Bench rather than a single habeas corpus judge.

At Anderson’s extradition hearing, Freeman contended that the runaway slave was justified in stabbing Diggs in defence of his own liberty. Robinson, C.J. carefully set out the principles of extradition law under the Ashburton Treaty of 1842 by which he was governed. The court focused, not on the realities of Anderson’s existential situation (he undoubtedly faced death if returned to Missouri), but on the legal niceties of whether what Anderson had done would amount to criminality in Canada. Agreeing with John A. Macdonald’s assessment of the law, Robinson C.J. decided that, whether or not Anderson was a slave, there was enough evidence to support a conviction for a crime which, had the act been committed in Canada, would have been murder. By a two-to-one decision, Anderson was remanded for surrender to the United States.

The judiciary had thrown the ball back to the executive. The resulting controversy led to a British barrister making an ex parte application for habeas corpus on Anderson’s behalf before the Court of Queen’s Bench in London, England, which purported to retain jurisdiction to grant habeas corpus even though Canada had courts that could grant that remedy. Although Freeman sought and received the permission of Macdonald to take the Anderson matter to Upper Canada’s Court of Error and Appeal, in light of the habeas corpus issuing

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74 See the next section.
75 Ex parte Anderson (1861), 3 El. & El. 487.
76 Brode (1989), supra, note 69, p. 90.
out of London, Freeman instead made an application before the Court of Common Pleas.\textsuperscript{77}

There, Draper C.J.C.P. reaffirmed the judgment of the majority on the merits of the case (it was ludicrous to think that four million slaves could commit assassination with impunity in order to escape their lot, he said), but relying on an obscure 1844 English Queen's Bench decision (to which the beleaguered Robinson himself had drawn his attention after an all-night vigil poring over law books\textsuperscript{78}, Draper found the warrant defective. It alleged that Anderson did “willfully, maliciously and feloniously stab and kill” Diggs rather than “murder” him. “The treaty and our statute,” opined Draper, “do not authorize a surrender, and consequently not a committal for the purpose of surrender, for any homicide not expressed to be murder.”\textsuperscript{79}

Thus Anderson was saved by a technicality – with Robinson’s blessing. The charge itself, not the conduct underlying the charge, was determinative of the question of dual criminality.

Despite the unpopularity of his decision to allow the surrender of Anderson to face almost certain death, Robinson’s interpretation of the law in \textit{Anderson’s Case} – a decision which was not overturned – set the standard for extradition law not only in Canada but throughout the British Commonwealth and the United States. The principles he enunciated, borrowed in part from American jurisprudence including \textit{Holmes v. Jennison},\textsuperscript{80} came to be cited universally by British, American and eventually Canadian jurists. Sir Edward Clarke stated:

In Anderson’s case...the crime charged against him on the facts stated was murder by the law of England, as well as by that of the United States. The question whether the circumstances shewed sufficient provocation to reduce it to manslaughter was one for the jury, and one with which the Canadian Courts had nothing to do. Nor had these

\textsuperscript{77} \textit{Supra}, note 70.

\textsuperscript{78} \textit{Ex parte Besset} (1844), 6 QB 481, 115 E.R. 180. See Brode, \textit{supra}, note 69, p. 90.

\textsuperscript{79} \textit{Supra}, note 70, at 51. Draper himself had been a prominent member in the legislature in his time, who had pushed through the Act of Union in 1941, much to Robinson’s chagrin. See Brode, \textit{supra}, note 21, pp. 228, 250.

\textsuperscript{80} \textit{Supra}, note 54.
Courts any right to enquire into the justice, or policy, of the legislative enactment under which the arrest was attempted to be made. This was a matter for the consideration of the foreign country, and could not, however it was resolved, affect the nature of the crime.81

In Canada, Lyman Duff J., then of the Supreme Court of British Columbia, also endorsed the reasoning of Robinson, C.J., stating that “the substance of the decision of Sir James Beverley Robinson and Mr. Justice Burns is correct in that case, and their decision is an example of the fair and proper application of the provisions in question.”82 Duff J.’s statements of law were in turn adopted by LaForest J. in *Re Schmidt v. the Queen* (1987),83 incorporated at length into Anne LaForest’s *LaForest’s Extradition to and from Canada* (1991), and through this authority were reframed and expanded by LaForest J. in *U.S.A. v. McVey* (1992),84 a decision which was followed in a host of subsequent extradition cases. By this more-or-less direct route, some of the principles of law deriving from *Anderson* came to be codified, along with many other principles of extradition law developed by LaForest J., into the *Extradition Act*.85

With *Anderson*, the notion of trusting thy neighbour had taken on a whole new meaning in extradition law. It meant that upon concluding a treaty, the compacting countries should no longer examine the reality of the situation confronting returned fugitives. The judicial fiction was established that, no matter what socio-political circumstances prevailed in the injured state, the fugitive offender would get a fair trial upon his return. Judicial discretion prevailed, but it is somewhat daunting to realize that John A. Macdonald believed that he

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82 *Re Collins (No. 3)* (1905), 10 C.C.C. 80, 2 W.L.R. 164, 11 B.C.R. 443 (B.C.S.C.), at 101-103.
85 1999, c. 18.
could have exercised his executive discretion without consulting the judiciary, as he plaintively protested to his critics in the press:

"Instead of sending the man to be tried in the States—and I had the power to send him at once to Missouri—I sent the matter to the judges, to have it fully decided whether a case was fully made out against him."86

The Attorney-General and soon-to-be first Prime Minister of Canada was dead wrong in concluding that he could act without consulting the courts, as he must have known from a plain reading of the extradition provision of Article 10 of the Ashburton-Webster Treaty.


The Ashburton-Webster Treaty (known in the United States as the "Webster-Ashburton Treaty") had been concluded in 1842 in response to mounting concerns about the boundaries of Canada, the fate of fugitive slaves, and the perceived gap in the law with respect to extradition. The official title of the Treaty negotiated by United States Secretary of State Daniel Webster and the British Ambassador to the United States, Lord Ashburton was Treaty between Her Majesty and the United States of America, to Settle and Define the Boundaries between the Possessions of Her Britannic Majesty in North America, and the Territories of the United States; for the Final Suppression of the American Slave Trade; and for the Giving Up of Criminals, Fugitives from Justice, in Certain Cases. Article 10 dealt with extradition for the specific charges of murder, assault with intent to commit murder, piracy, arson, robbery, forgery, and uttering forged paper—"upon such evidence of criminality as, according to the laws of the place where the fugitive or the person so charged shall be found, would justify his apprehension and commitment for trial if the crime or offence had there been committed." To

that extent, it followed the wording of Article 27 of the Jay Treaty. However, Article 10 also defined the respective roles of the executive and judicial authorities:

... [A]nd the respective judges and other magistrates of the two governments shall have power, jurisdiction and authority, upon complaint made upon oath, to issue a warrant for the apprehension of the fugitive or person so charged, that he may be brought before such judges or other magistrates respectively, to the end that the evidence of criminality may be heard and considered; and if, on such hearing, the evidence be deemed sufficient to sustain the charge it shall be the duty of the examining judge or magistrate to certify the same to the proper executive authority, that a warrant may issue for the surrender of such fugitive.  

Besides the re-establishment of the rule of double criminality, the most important elements of Article 10 were its recognition of a two-prong system for determining extraditability in which the courts had a specific discretion 1) to issue warrants, and 2) to determine the sufficiency of evidence. Once the sufficiency of the criminal charge was certified, a warrant would issue and in all but the most exceptional cases (like that of John Anderson) there would be no turning back: after all, the executive authorities had brought forward the complaint in the first place. Although theoretically the executive could always change its mind and exercise its prerogative not to extradite even where judges determined that it was legal to do so (as had happened in the cases of Fisher and Happy), after 1842 the executive rarely exercised this prerogative. Once Attorney General Macdonald had declared his opinion that Anderson’s actions constituted murder, the judges effectively had the “last word.” That was why at the end of the day Robinson C.J.Q.B. and Draper C.J.C.P. went out of their way to find any legal excuse whatsoever not to extradite Anderson.

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87 “Treaties with the United States” in G.V. LaForest, *Extradition to and from Canada* 1st ed., *supra*, note 16, at 164. The Ashburton-Webster Treaty remained in force in Canada and the United States until it was superseded by the current Canada-United States Extradition Treaty in 1976. As a template for hundreds of extradition treaties to follow, it is arguably one of the most influential documents in the development of extradition law, not only as between Britain and the United States, but internationally.
Of course, John A. Macdonald could always have done the politically expedient thing and changed his mind about extraditing Anderson by turning down the American request. It was after all ultimately a political decision – and his to make, as he took pains to point out.

The Ashburton-Webster Treaty remained ineffectual until both signatory countries adopted specific enabling legislation to activate it, the United States in 1848\textsuperscript{88} and Canada in 1849.\textsuperscript{89} In its drafting of the Act of August 12, 1848, Congress set forth the procedures to be followed by extradition commissioners or judges and reaffirmed that extradition could only be effected in America pursuant to a treaty. A person wanted for extradition was to be brought before such judge or commissioner, to the end that the evidence of criminality may be heard and considered; and if, on such hearing, the evidence be deemed sufficient by him to sustain the charge under the provisions of the proper treaty or convention, it shall be his duty to certify the same, together with a copy of all the testimony taken before him to the Secretary of State, that a warrant may issue upon the requisition of the proper authorities of such foreign government, for the surrender of such person, according to the stipulations of said treaty or convention....

Thus in extradition matters the United States statute boosted the level of judicial discretion to the point that, as in Canada, the courts effectively had the last word. Although a representative of the executive, the Secretary of State was reduced to the role of a glorified bookkeeper. Once certification of the court was received, extradition was virtually certain.\textsuperscript{90}

\textsuperscript{88} Ch. 167, s. 5, 9 Stat. 302, 303.
\textsuperscript{89} 12 Vict., c. 19, later consolidated in the Consolidated Statutes of Canada, 1859, c. 19.
\textsuperscript{90} Section 2 of the Act allowed copies of depositions to be presented as evidence of criminality, s. 3 authorized the Secretary of State to detain and deliver up the fugitives, s. 4 provided a two-month cap for detention prior to delivery to the requesting nation, s. 5 stated that the Act continued in force only as long as a valid treaty was in place, and s. 6 authorized courts to appoint and authorize extradition commissioners (renamed "magistrates" in 1968).
Simple as it is, Title 18 of the *United States Code* remains the only American statute dealing with international extradition ever to be passed into law by the United States Government, apart from specific, relatively minor amendments to it.\(^{91}\)

In Upper Canada, the Ashburton-Webster Treaty arguably came into effect immediately upon its being ratified, by virtue of the pre-existence of the *Fugitive Offenders Act* of 1833.\(^{92}\) However, Westminster had already expressed grave doubts as to the legality of that statute, and the Act of 1833 was quickly superseded by specific enabling legislation to give effect to the Treaty, an imperial domestic statute which was passed by Westminster later in 1842, becoming law the following year.\(^{93}\) However, the British enabling legislation proved "inconvenient," specifying as it did that no arrest of a fugitive could take place without the Governor of Canada issuing a warrant asserting that the United States had officially authorized the requisition; so in 1849, the Province of Canada passed "An Act for better giving effect within the province to the treaty, &c.," which provided for arrest of a fugitive on the strength of an information laid before a judge or justice of the peace in the Province of Canada.\(^{94}\)

Despite the new Act, the Ashburton Treaty contained "the whole of the law of surrender as between Canada and the United States,"\(^{95}\) as far as Macaulay, C.J. of the Upper Canada Court of Common Pleas was concerned. In a bigamy case arising under the Treaty in 1851, he held that the 1833 *Fugitive Offenders Act* of Upper Canada had been superseded not by the new Act but by the Ashburton-Webster Treaty. Since the Treaty did not specify

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\(^{91}\) Attempts by both the Senate and the House of Representatives to introduce new, more elaborate legislation between 1981 and 1984 were doomed to failure, as has been documented at length by Bassiouni *supra*, note 15, pp. 72-83; see also 3d edition (1996), pp. 36-41.

\(^{92}\) This is the position taken by Anne Warner LaForest, *supra*, note 16, p. 4.

\(^{93}\) 6 & 7 Vict. (Imp.) c. 76.

\(^{94}\) "Extradition Practice," 9 C.C.C. 264 at 284-285. However, the imperial statute continued to have effect in other areas of the British Commonwealth, including British Columbia, New Brunswick, Newfoundland, Nova Scotia, and Prince Edward Island.

\(^{95}\) *R. v. Tubbee* (1851), 1 U.C.P.R. 98.
bigamy as an extradition crime, Tubbee was discharged. Going in the other direction, Canada successfully obtained the surrender of Von Aernam, a fugitive charged with uttering forged documents in Canada in 1854. The extradition commissioner ruled that the evidence was sufficient. Von Aernam applied for habeas corpus, but that was denied, Betts J. of the U.S. Circuit Court holding that he did not have jurisdiction to review the commissioner’s decision on the merits.96 Once Von Aernam was returned to Canada, his counsel pointed out that there were no forged documents in evidence, and the most that could be made out was false pretences. Macaulay, C.J. held: “Even if the prisoner’s offence amounts to false pretences only, I should hesitate to bail him under the circumstances under which he has been taken, surrendered, and received into custody. Being in custody, he is liable to be prosecuted for any offence which the facts may support.”97 The rule of specialty had not fully crystallized by that time, where the exercise of judicial discretion was concerned. The judgment also seemed to reflect the judge’s awe of the fact that Von Aernam’s extradition by a foreign power, signed off by an American president as protocol required at the time, was so momentous an event that the process must be considered to the prejudice of the accused.98 This had been a central issue in the Robbins case, which, fuelled by the Jeffersonian press, had led to President Adams’ difficulties with the Republican opposition at the turn of the century.

During the American Civil War (1861-1865), the United States Government was concerned with pursuing fugitives who sought asylum in Canada, especially those who claimed to be Confederate sympathizers, soldiers, or fundraisers. Three such cases reached

98 In each of the state archives visited in the fall of 2002, the original formal extradition requests made on impressive parchment broadsheets, sealed with wax and bound with red or blue or gold ribbons were invariably signed by the President himself, whether by Coolidge, Harding, Wilson or Roosevelt. 14x17” copies of these requests are in the possession of the author.
prominence: David Collins et al.,99 involving a hijacking of the American steamer
*Chesapeake* off Nova Scotia in early December 1863, in which the engineer was killed; *Re Burley*,100 involving the robbery of the steamer *Philo Parsons* on Lake Erie on 19 September 1864; and the case of the “St. Albans Raiders,” involving an elaborate raid on a Vermont town on 19 October 1864 when 20 men simultaneously held up three banks in St. Albans, Vermont, took several citizens hostage, shot three of them (one fatally), and then escaped north to Canada on stolen horses.101 In each case, the men involved claimed to be Confederate soldiers engaged in acts of warfare.102

The *Burley* case is of particular contemporary interest since the Supreme Court of Canada referred to it in several landmark extradition decisions, including *Re Schmidt* (1987)103 and more recently in *U.S.A. v. Burns* (2001).104 Burley claimed to be a British subject. Sir William Buell Richards, then sitting on the Upper Canada Court of Common Pleas,105 held that “under the treaty and our own statutes, a British subject who is in other respects brought within the law, cannot legally demand that he ought not to be surrendered merely because he is a natural born subject of Her Majesty.”106 In support of the decision to surrender Burley, Hagarty J. held: “The treaty is based on the assumption that each country should be trusted with the trial of offences committed within its jurisdiction.”107 This ruling has been cited with approval ever since, with LaForest J. stating in *Schmidt v. The Queen* (1987), “In principle, as

100 *Re Burley* (1885), 1 U.C.L.J (N.S.) 20.
102 In fact, only one application for extradition made by the United States of Canada during this period was not somehow involved in the War, a case of burglary, an offence not in the Treaty and in any case not supported on the evidence. The accused was discharged. *Re Beebe* (1863), 3 U.C.P.R. 273.
103 *Re Schmidt*, supra, note 83 (S.C.C.), at 209.
105 After Confederation, Richards became the first Chief Justice of Canada.
106 *Burley*, supra, note 100, at 46.
107 Ibid., at 50.
Hagarty J. long ago reminded us, the country seeking surrender under a treaty must be trusted with the trial of offences.\textsuperscript{108} La Forest cited the case in support of his thesis that, in extradition cases, fulfilling international obligations was more important than protecting the individual from prosecution, even in cases where the individual could prove that she had already been tried and acquitted on charges arising from the facts alleged.

One fact conveniently overlooked by LaForest in his decision in Schmidt is that once Burley was surrendered to the United States and brought to trial in Ohio, the judge tried unsuccessfully to direct the jury to find him not guilty on the basis that his motivation was political – in effect trying to do the job that the extradition court should have done in Canada. The jury convicted anyway. Released on low bail pending appeal, Burley disappeared.\textsuperscript{109} It may be argued that justice was thus done by his skipping bail, but it was certainly not seen to be done, and Burley was put into the position once again of fugitive. Surely LaForest J. was in error to cite Burley as a wholesome example of due process.

Richards J.’s statement of the law from Burley regarding British subjects not being immune from extradition was cited with approval in U.S.A. v. Burns (2001) by the Supreme Court of Canada, which extended the principle to Canadians. In Burns, the Court rejected counsel’s argument (and one of the primary reasons given by the British Columbia Court of Appeal for rejecting extradition without assurances that the death penalty would not be sought) that s. 6 of the Charter, which applies to Canadian citizens, should grant Burns and Rafay special protection from the death penalty. “Traditionally,” said the Court, “nationality has afforded no defence to extradition from Canada.”\textsuperscript{110} On the flip side, the court found that

\textsuperscript{108} Schmidt, supra, note 83 (S.C.C.), at 209.
\textsuperscript{109} Re Burley, supra, note 100, at 99 fn.
the death penalty was sufficiently barbarous that the Minister of Justice should exercise the discretion to demand assurances from the requesting country in virtually every instance in which the death penalty arose – irrespective of citizenship. ¹¹¹

The St. Albans Raiders, a force consisting of 20 men “armed to the teeth,” killed one man and injured several others during a daring daylight attack on the financial institutions of St. Albans, Vermont, on 19 October 1864. They fled to Canada on purloined horses with a staggering $208,000 of loot – yet escaped extradition when a Canadian judge found that they staged the raid to raise money for the Confederate war effort, which the court identified as a “political” activity. The court determined that the attack, led by Lt. Bennett H. Young of the Confederate Army, “was a hostile expedition, authorized both expressly and impliedly by the Confederate States, and carried out by a commissioned officer of their army in command of a party of their soldiers.” ¹¹² The case remains the only clear application in Canada by either the judiciary or the executive of the “political exemption” rule (even though it was more accurately an example of a “military exemption” rule). Interestingly, the extradition judge exercised judicial discretion to determine the issue. Under Canada’s Extradition Act (1999) this discretionary power, eventually enshrined in the Canada-United States Extradition Treaty in 1976, is one of the many powers currently assigned to the Minister of Justice.

At the initial hearing in Montreal, the raiders, several of whom were captured by Canadian authorities, were let go on a technicality after they successfully argued that the matter fell under the original Imperial extradition statute of 1842 which required the Governor of Canada to issue a warrant, rather than with the Canadian statute of 1849, which did not have this requirement. Five of the raiders were released on this basis, only to be re-arrested a

¹¹¹ Ibid.
short time later. At their second extradition hearing, Smith J. discharged all the Raiders remaining in custody, saying that “all civilized countries” excused offences arising from “political convulsions”: “As a matter of fact, raids of this description have been constantly permitted and justified by and on behalf of the United States. On what principle then can they be denied to the so-called ‘Confederate States?’” He added:

“Political offenders have always been held to be excluded from any obligation of the country in which they take refuge to deliver them up.... No act committed in the course of, or as incident to, that attack can be made the ground of extradition under the Ashburton treaty.... Political offenders... form the most conspicuous instances of exclusion from the operation of the extradition law. No nation of any recognized position has been found base enough to surrender, under any circumstances, political offenders who have taken refuge within their territories, or if there be instances, they are few in number, and are recorded as precedents to be reprobated rather than followed.”

Perhaps, in this last remark, Smith J. had Burley in mind.

5. The Post-Confederation Era

Following Confederation in 1867, the development of extradition policy in Canada fell more to the legislators than to the courts, which were hard-pressed to keep abreast of the startling explosion of juridical decisions necessitated by the starburst of new nationhood. The year after Confederation, the Canadian Extradition Act was repealed and re-enacted all over again to put the national stamp on the statute. Then in 1877 Canada adopted An Act respecting the extradition of fugitive criminals – which repealed all extant extradition

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113 Ibid., p. 29.
114 Benjamin, supra, note 101.
116 S.C. 1868, c. 94.
117 S.C. 1877, c. 25.
legislation. That Act, amended from time to time, stood Canada in good stead for 122 years, until the passage of the current statute in 1999.\textsuperscript{118}

The Canadian \textit{Extradition Act} of 1877 had the decided advantage over previous Acts applicable to Canada of providing for return of fugitives for any crime mentioned in "an extradition arrangement."\textsuperscript{119} Despite this marked difference from its British counterpart, which included a separate schedule of extradition crimes, it was close enough in its wording to the Imperial Act of 1870 that Canadian judges considered themselves bound by British decisions considering principles arising from that legislation,\textsuperscript{120} which continued to apply to areas of British North America that had yet to join Confederation. It was soon established by the courts that, far from the Treaty being "the whole of the law" where extradition was concerned, the Act could and should be used to interpret the Treaty.\textsuperscript{121} The question was, who had the discretion to make such an interpretation? Does treaty interpretation ultimately reside with executive or judicial discretion? As John A. Macdonald had appeared to recognize in the \textit{Anderson} case, statutory (and treaty) interpretation is ultimately the prerogative not of the executive but of the judiciary.

It will be recalled that as originally drafted, the Ashburton-Webster Treaty applied to a limited list of offences – murder, assault with intent to commit murder, piracy, arson, robbery, forgery, and uttering forged paper. Clearly this list left out a whole range of offences of a violent nature that were germane to the rapid expansion of America into the Wild West, and another range of white collar crimes arising from the expansion of the market economy in the

\textsuperscript{118} Chapter 18 (Bill C-40)(1999).
\textsuperscript{119} \textit{Extradition Act} (R.S.C. 1985, c. E-23, ss 2, 3 and 8. See also Anne Warner LaForest, \textit{supra}, note 16, pp. 6-7.
\textsuperscript{120} See, for example, Duff J.'s comments in \textit{Re Collins (No. 3)}, \textit{supra}, note 71, at 85, where he states, "...The decision of the Queen's Bench Division in \textit{Re Bellencontre}, [1891] 2 Q.B. 122, is conclusive, and is a decision which I am bound to follow."
\textsuperscript{121} \textit{Re Debaun} (1888), 32 L.C. Jur. 381.
east. Furthermore, as determined in the cases of seizure of ships such as the Chesapeake, where extradition was concerned, piracy had been confined by the courts to “piracy by municipal law” rather than to piracy jure gentium, since true piracy was considered to be an international crime that could be tried anywhere. British courts took the view that as long as they had inherent jurisdiction to try fugitives for piracy, it was not permitted to surrender them to another country for trial. This was clearly a distortion of Grotius’ principle of either prosecute with a view to punish, or extradite. Grotius had intended the executive to retain the discretion to make a clear choice between extradition and prosecution, but a choice nonetheless. For the courts to suggest that the judiciary could not allow surrender to another country simply because they had jurisdiction to prosecute was tantamount to fettering their discretion. Clearly the schedule of the Treaty, if not the Treaty itself, needed refinement.

Between Canadian Confederation in 1867 and the end of the century, the courts on both sides of the border struggled to stay on top of wave after wave of legislative change, focusing more on procedural issues arising from application of the new law than on substantive concerns. As a result, the case law on extradition burgeoned and the exercise of discretion by the judiciary went into ascendancy. Decisions made by the courts were not generally disturbed by an executive preoccupied with construction (in the case of post-Confederation Canada) and reconstruction (in the case of post-Civil War America).

In Re Parker (1882), Osier J. remarked on the importance of judicial discretion in asserting the rights of the “criminal”: “So long as there is an extradition law under which a criminal whose extradition is sought has rights to be observed here, he is entitled to have those

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rights administered by the courts."123 Parker, like so many other extradition cases of the age, was certainly bizarre on its facts. An undertaker of the old school, Parker was charged with murder after a strange midnight burial involving cloaked figures with top hats, a black undertaker’s wagon, grave robbing, and a body folded up in a sack. “A few days after the funeral, the body having been ‘resurrected,’ the prisoner formed one of a party of men to remove it from the place where it had been concealed after its abstraction from the grave,” Osler J. solemnly recounted. “He then fled the country.” Parker had been recognized and identified by his undertaker’s garb. But despite the fact that a lethal quantity of arsenic was found in the stomach of the corpse, there was not enough evidence against the undertaker to take to a jury – or to commit his body for extradition: “It appears to me that he is not remotely implicated by the facts proved in the crime of murder,” said Osler in dismissing the case.124

Perhaps with Parker in mind, that same year Ontario Chief Justice Hagarty took the opposite tack with respect to the proper exercise of judicial discretion in Re Phipps (1882), a forgery case:

I have often marvelled at the astuteness that has been displayed in endeavouring to defeat the plain design and scope of this Extradition Treaty, as if we placed the very highest value on our right to the presence of fugitives from the laws of other countries…. According to the view I have always held on this subject, we should always lean in favour of sending him for trial in his own country unless it be plain that under no view of the evidence can a charge of forgery be fairly made.125

The most influential American case law pertaining to judicial and executive discretion under the Ashburton-Webster treaty during this period resulted from the case of the second mate of an American ship charged with the murder on the high seas of an insubordinate crew member. In 1884, William Raucher fled to England, from where he was extradited to the

123 Re Parker (1882), 9 O.P.R. 332.
124 Ibid., pp. 334-335.
125 1 O.R. 586 at 606.
United States for murder. Upon his arrival in America, New York authorities proceeded against him not for the criminal charge of murder but for inflicting cruel and unusual punishment under maritime and admiralty law. As Miller J. pointed out, U.S. Secretary of State Fish had insisted that the receiving government had the right as a matter of executive discretion to proceed against an extradited accused on offence that might stick. Lord Derby, the head of the Foreign Office in England, took the position that an accused could upon his return only be tried for the specific offence for which he had been extradited. In reaching his decision, Miller J. quoted Chief Justice Marshall, who in *Foster v. Neilson*\(^2\) had defined the special role of treaties as part of "the supreme law of the land" under the United States Constitution.\(^3\) The U.S. Supreme Court set a conservative tone by holding that extradition was governed by principles of customary international law. Extradition treaties therefore governed rights only between nations, not between individuals and nations – unless, of course, individual rights were specifically conferred in the treaty. *Raucher* also lent support to the specialty principle: New York courts could not try Raucher for offenses other than those for which he had been extradited from Britain.

6. Expansion of Judicial Discretion at the Turn of the Twentieth Century

The need to amend the Treaty became especially acute upon conclusion of new Extradition Acts in both Britain and Canada. Britain had long been sympathetic with the idea of incorporating the political offence exception into its legislation, and had also incorporated


\(^{127}\) 27 U.S. (2 Pet.) 253 (1829).

\(^{128}\) Ibid., at 314. Cited in *United States v. Rauscher*, supra, note 126, at 418. See also *Ex parte Hibbs*, 26 Fed. Rep., 421, 431, where it was determined that detention of an extradited person on any charges other than the one for which he had been surrendered "would be not only an infraction of the contract between the parties to the treaty, but also a violation of the supreme law of this land in a matter directly involving his personal rights."
the rule of speciality into its Act of 1870. Britain had sought to amend the Ashburton-Webster Treaty to reflect these and other safeguards for the individual. For decades, the United States was curiously unreceptive to amendment – or to any notion that the judiciary should be given discretionary latitude in determining extradition offences or treaty interpretation. However, after years of negotiation, in 1889, the United States and Canada signed a Supplementary Convention for the extradition of criminals\textsuperscript{129} which added a number of extradition crimes and enshrined the rule of specialty into the Treaty. It also specifically excluded political crimes and offences from the extradition process.\textsuperscript{130}

In the first decade of the twentieth century, the role of judicial discretion expanded on both sides of the border even as new extradition crimes continued to be added to the Ashburton-Webster Treaty in supplementary conventions and by amendments to the statutes of the United States\textsuperscript{131} and Canada.\textsuperscript{132} However, these relatively minor refinements to the statutes and the Treaty had nowhere near the impact on the extradition process as did judicial discretion as it emerged in the case law, which reflected a double standard: although the United States routinely requested that Canada return suspected criminals, it was often slow in returning putative fugitives to requesting states.

American courts decided relatively few extradition cases – and those that were decided quickly reached the United States Supreme Court, usually in the guise of an appeal of a

\textsuperscript{129} Signed at Washington 12 July 1889, ratified at London 11 March 1890.

\textsuperscript{130} Ibid., Article II.

\textsuperscript{131} Act of 6 June 1900, ch. 793, 31 Stat. 656, establishing the political offence exemption and listing extradition offences; Act of 28 June 1902, ch., 1301 (Judicial), 32 Stat. 419, 475, outlining process of cost sharing by requesting state.

\textsuperscript{132} S.C. 1909, c. 14. Supplementary Convention of 1900, signed at Washington 13 December 1900, ratified at Washington 22 April 1901. This Convention resulted in a welter of extradition cases being initiated for white collar crimes including the extradition of John Tupper (Manitoba) (Letter, Department of State dated at Washington DC, 24 February 1902); Malcolm De La Fere (Ontario) (authenticated record of Frank White, Governor of North Dakota, dated 7 June 1902); and Albert Saunders (Manitoba) (warrant signed by Theodore Roosevelt 9 June 1902). Supplementary Convention of 1905, signed at London 12 April 1905, ratified at Washington 21 December 1906.
rejected application for habeas corpus. Thus, as had happened in Fisher, extradition cases in
the United States often became precedents that other courts could follow—and were cited not
only in support of extradition issues but in a welter of other concerns from the standard of
evidence required for indictment as a parallel process to extradition, to the constituent
elements required in specific domestic crimes that happened to be listed in a treaty or statute
as extradition crimes.

In addition, few cases were heard in the United States compared to Canada because of
the dynamics of the legislation of each nation. In the United States, habeas corpus
applications arising from extradition cases could be appealed to the national Supreme Court,
but in Canada, habeas corpus applications could be reviewed only up to the provincial Court
of Appeal level.\textsuperscript{133} As a result, while in America the Supreme Court of the United States, in a
few deft strokes, quickly developed an authoritative body of extradition law that could be
applied to succeeding cases across the country, in Canada the law was determined on a
regional basis by province or territory, each jurisdiction developing its own jurisprudence
(usually, however, with deference to the others).

In Grin \textit{v.} Shine (1902),\textsuperscript{134} the United States Supreme Court characterized the
extradition process as a balancing act between treaties and international obligations on the one
hand, and legal and constitutional rights of the accused on the other. Such treaties, said the
Court, are \textit{exceptions} to the general right of political asylum:

\begin{quote}
Foreign powers are not expected to be versed in the niceties of our criminal laws, and
proceedings for a surrender are not such as put in issue the life or liberty of the
\end{quote}

\textsuperscript{133} However, even that mechanism became narrower and narrower in its scope, and eventually was ruled by the
Supreme Court of Canada as beyond the scope of the provincial Courts of Appeal. See \textit{R. v. Storgoff} (1945), 84

\textsuperscript{134} \textit{Grin v. Shine} (1902), 187 U.S. 181, 23 S. Ct. 98, 47 L.Ed. 130, 1902 U.S. LEXIS 807 (U.S. S.C.) affirming
112 F. 790, 1901 U.S. App. LEXIS 4134 \textit{subnom In re Grin.} (Cir. Ct. N.D. Calif.).
accused. They simply demand of him that he shall do what all good citizens are required, and ought to be willing to do, viz., submit themselves to the laws of their country.\textsuperscript{135}

These words would repeatedly haunt Grin’s lawyer, George D. Collins, and others subjected to the extradition process both north and south of the border. In a pivotal decision by Mr. Justice Lyman Duff in the Supreme Court of British Columbia, shortly before he was appointed Chief Justice of Canada, the concept was to become incorporated into the mainstream of Canadian extradition law.

George D. Collins was a high-profile San Francisco lawyer whose initial claim to infamy derived from his controversial articles on citizenship law in the St. Louis-based \textit{American Law Review},\textsuperscript{136} where he had argued that American-born people of Chinese descent were not citizens.\textsuperscript{137} In June, 1905 Collins himself was indicted for bigamy by a grand jury in San Francisco after abandoning his wife, Charlotta, and their children and marrying his mistress. Collins deposed that he had not married Charlotta Eugenie Collins on 15 May 1889, as she claimed – “or at any other time, or at all.”\textsuperscript{138} Nonetheless, Collins fled to Canada, knowing that the charge of bigamy was not in itself a listed extraditable offence. That glitch was overcome on 13 July 1905, when another grand jury indicted Collins for perjury.\textsuperscript{139} The United States then sought his extradition from Canada not for bigamy but for perjury.

\textsuperscript{135} \textit{Ibid.}, at 184-185, per Brown J. The U.S. Supreme Court further ruled that proceedings for a writ of \textit{habeas corpus} cannot be used to establish sufficiency of the evidence as to the criminality of the accused in extradition matters (at 192).
\textsuperscript{136} 18 Amer. L. Rev. 851. See also 29 Amer. L. Rev. 385.
\textsuperscript{137} \textit{In re Wong Kim Ark}, 71 F. 382, 1896 U.S. Dist. LEXIS 47 (1896).
\textsuperscript{138} \textit{Re Collins (No. 1)} (1905), 10 C.C.C. 70.
\textsuperscript{139} \textit{Re Collins (No. 2)} (1905), 10 C.C.C. 73 at 74-75.
In determining that Collins should be committed for surrender,\textsuperscript{140} Duff J. declared with respect to extradition process: “The technicalities of the criminal practice should not be allowed to encumber or smother the administration of the procedure prescribed by these modern statutes for the purpose of carrying out the obligations we have assumed under a vastly salutory international arrangement.”\textsuperscript{141} Referring to binding British precedents\textsuperscript{142} and persuasive American law,\textsuperscript{143} Duff J. stated that “treaties must receive a fair interpretation according to the intention of the contracting parties ... so as to carry out their manifest purpose,” and that “the ordinary technicalities of criminal proceedings are applicable to proceedings in extradition only to a limited extent.”\textsuperscript{144} With respect to dual criminality and sufficiency of evidence, Duff J. admitted that the interpretation of such treaty provisions “has been the subject of a great deal of discussion in Canada and in the U.S. ... In \textit{Wright v. Henkel}, supra, the Supreme Court of the United States treats the question as still open”:

\begin{quote}
The treaty itself, which after all, is the controlling document in the case, speaks not of the acts of the accused, but of the evidence of “criminality,” and its seems to me that the fair and natural way to apply that is this – you are to fasten your attention not upon the adventitious circumstances connected with the conduct of the accused, but upon the
\end{quote}

\textsuperscript{140}\textit{Re Collins (No. 3)}, (1905), \textit{supra}, note 71, at 83. See David Ricardo Williams, \textit{Duff: A Life in the Law} (Vancouver: University of British Columbia Press, 1984), pp. 24-30. See the detailed discussion of this case in Botting, \textit{supra}, note 4. After his escorted return to San Francisco, Collins was kept in secure custody, and he stood trial in November and December, 1905, representing himself and testifying in his own behalf. On 12 December he repeated to a judge and jury under oath basically what he had already said in the courts in Canada: that he had never been married to Charlotta, but rather had married her sister, Agnes. Two days before Christmas, the jury reported that it could not reach a unanimous verdict. Collins could walk. Rather than attempt a retrial on the same charge, the district attorney preferred an entirely new charge of perjury – for the false testimony given before a jury at his first trial. On 29 December, another grand jury indicted Collins for a new count of perjury, “charging him with another and distinct offense than that upon which he had been extradited.” Collins was convicted and received the maximum sentence: a staggering 14 years in jail in San Quentin, every day of which he was required to serve by virtue of his attempted (and almost successful) escape from Alcatraz. \textit{Ex parte Collins} (1906 Cir. Ct.), at 573. \textit{Ex parte Collins} (1906), 151 F. 358, 1906 U.S. Dist. LEXIS 18, at 359 (Dist. Ct. N.D. Calif.). \textit{Ex parte Collins}, 154 980, 1907 U.S. App. LEXIS 4608 (Cir. Ct. N.D. Calif.).

\textsuperscript{141}Ibid.

\textsuperscript{142} \textit{Re Bellencontre, supra}, note 120, at 122, which interpreted the English \textit{Extradition Act} of 1870, essentially parallel to the Canadian \textit{Extradition Act} of 1876 upon which Duff J. relied.


\textsuperscript{144} \textit{Wright v. Henkel}, ibid., per Fuller, U.S.C.J. Cited in \textit{Re Collins (No.3), supra}, note 71, at 84.
essence of his acts, in the bearing upon the charge in question. And if you find that his acts so regarded furnish the component elements of the imputed offence according to the law of this country, then that requirement of the treaty is complied with.  

Duff J. established a two-step test for determining criminality, giving the extradition judge considerable latitude in the exercise of judicial discretion:

One may look at it in two ways. One may take it that one is to apply one’s mind to the conditions existing in the demanding State, or that one is to conceive the accused, and the acts of the accused, transported to this country. In the first case one is to take the definition of the imputed crime in accordance with the law of Canada, and apply that to the acts of the accused in the circumstances in which those acts took place. If in those acts you find that the definition of the crime is satisfied, then you have the statutory and treaty requisites complied with. In the second case, if you are to conceive the accused as pursuing the conduct in question in this country, then along with him you are to transplant his environment; and that environment must, I apprehend, include, so far as relevant, the local institutions of the demanding country, the laws effecting the legal powers and rights, and fixing the legal character of the acts of the persons concerned, always excepting, of course, the law supplying the definition of the crime which is charged.

The example he gave came directly from John Beverley Robinson’s controversial judgement in Anderson, which he defended as being an example of “the fair and proper application” of the treaty provisions:

Anderson was a slave in Missouri, one of the slave States of the American Union. According to the law of that State, citizens of the State were not only entitled, but were bound to assist in the capture of slave runaways. Digges [sic] was a citizen of the State. Anderson was escaping. Digges attempted to capture him, not only in accordance with his legal right, but with his legal duty. Anderson, in resisting capture, killed Digges. Anderson fled to Canada; he was indicted in Missouri, charged with murder, and his extradition was demanded. It was held by a majority of the Court of Queen’s Bench, that in considering the question whether there was evidence of criminality in accordance with the law of Canada, you had to deal with the case on the assumption that Digges, in attempting to capture Anderson, was acting with legal authority.... It seems to me that in substance the decision of Sir James Beverley Robinson and Mr. Justice Burns is correct in that case, and their decision is an example of the fair and proper application of the provisions in question.  

145 Re Collins (No. 3), supra, note 71, at 101.  
146 Ibid., at 103.  
147 Ibid., at 101-103.
Thus Duff J. thoroughly interpreted both the Treaty and the Statute with respect to the issue of criminality, in the process giving an enhanced decision-making role to judges in the exercise of their judicial discretion in terms of procedure, yet also limiting their discretion in terms of substantive application of the law. His judgment established standards in Canadian extradition procedure that LaForest J. in particular was able to draw from in his decision in Schmidt, which came to be the most cited extradition case in Canadian legal history. The principles of extradition law established by Robinson, C.J., endorsed by Clarke, adopted and expanded by Duff J. and resurrected by LaForest J. not only continue to be quoted by jurists to this day, but have been incorporated and codified into the new Extradition Act.

7. Judicial Refinement of the Rule of Specialty

A flurry of extradition cases at the beginning of the 20th Century helped clarify the developing law of extradition and formed the basis for a common law approach to such issues as the relative discretion accorded the judiciary and the executive. In the United States, the tendency was for the courts to uphold the rights of the individual, while in Canada the courts usually reaffirmed the right of the executive to make political choices that would best serve the interests of the fledgling nation in developing rapport with other international players. For example, in 1911, Russia was regarded by Canada and Britain as a sophisticated and civilized nation – and the rule of non-inquiry required acquiescence by the courts to her system of justice: fugitives sent back to face trial, it was assumed, would receive a fair enough trial to justify extradition – otherwise why would the executive have concluded a treaty with Russia in the first place?

\footnote{Supra, note 72.}
Unfortunately, treaties between nations do not anticipate or accommodate radical political changes within signatory nations: although governments change, treaties remain in place. Under these circumstances the courts all too often have taken the legalistic attitude that since a treaty has been concluded with a specific country rather than with the regime in power at the time, any new regime and its new legal system is assumed to remain fair and just. The executive, not the courts, is entrusted with treaty negotiation and regulation. Courts therefore do not have jurisdiction to challenge or second-guess the foreign system of justice as long as a treaty remains in place. Eventually, once reports of atrocities surface, the executive may take steps to question the actions of the new regime, and on this basis has the discretion to refuse extradition; however suspension of an extradition treaty is a last resort, tantamount to suspension of diplomatic relations. In the meantime, the extradition judge does not have the judicial discretion to consider whether the legal or judicial system of the requesting country will accord the individual a fair trial upon his return.\textsuperscript{149}

The advent of World War I changed the dynamic of extradition as participating countries focused initially on the war effort and later on reconstruction of economies strained to the limit by the displacement of millions. Conventional crime such as forgery and fraud must have seemed comparatively trivial following the ravages of war. Nonetheless, during the

\textsuperscript{149} This is not to preclude the courts interfering where there is specific evidence of abuse of process within the judicial system. In \textit{U.S.A. v. Cobb}, [2001] 1 S.C.R. 587, 152 C.C.C. (3d) 270, the Supreme Court of Canada acknowledged the correctness of the extradition judge in refusing to extradite Cobb and his co-accused where the trial judge in Pennsylvania stated that if the accused did not waive extradition from Canada, they would be sentenced more harshly than other co-accused. In \textit{Canada (Minister of Justice) v. Pacificador} (2002) (1 August 2002), Docket C32995 (Ont. C.A.), reversing the order of Dambrot J. (19 October 1999)(sub nom. \textit{Pacificador v. Canada (Minister of Justice)}, sub nom. \textit{Philippines (Republic) v. Pacificador}) (1999) 60 C.R.R. (2d) 126 (Ont. Gen. Div.), the Ontario Court of Appeal declined to send Pacificador to back to his homeland to face trial, finding apparent complicity of the Supreme Court of the Philippines in delaying the trial of Pacificador's co-accused (including his father and his lawyer) for ten years while they remained incarcerated without benefit of trial.
war years, certain principles of extradition law continued to be refined by the judicial discretion of the courts on both sides of the border.

In Kelly v. Griffin (1915), Kelly was a contractor involved in the construction of the new parliament buildings in Winnipeg charged with “unlawfully receiving money and other property of the King which had been embezzled, stolen or fraudulently obtained by means of a conspiracy.” The perjury alleged was that he swore falsely “to the proportion of cement sand and broken stone put into the caissons of the new parliament buildings at Winnipeg, in a judicial proceeding before the Public Accounts Committee of the Legislative Assembly of the province of Manitoba.” On the evidence, said Oliver Wendall Holmes for the Court, “Kelly obtained the money from the Provincial Government by fraudulent representations to which he was a party.... [H]is false statement was the foundation upon which the Government was deceived.” Holmes J. added: “We assume, of course, that the Government in Canada will respect the convention between the United States and Great Britain and will not try the appellant upon other charges than those upon which the extradition is allowed.” The Supreme Court of Canada was equal to the task, and helped refine the law of speciality, determining that upon extradition an individual cannot be prosecuted or punished for any offence other than the ones for which he or she was specifically surrendered unless first being given the opportunity to return to the requested state.

151 Ibid., at 12.
152 Ibid., at 15.
153 Ibid.
154 R. v. Kelly (No. 1) (1916), 27 C.C.C. 94 (Man.K.B.), affd 27 C.C.C. 140 sub nom R. v. Kelly (No. 2), affd 27 C.C.C. 282 sub nom R. v. Kelly (No. 3) (S.C.C.). A similar position was taken by the Supreme Court of the United States in Bingham v. Bradley (1916), 241 U.S. 511, 36 S. Ct. 634, 60 L. Ed. 1136, 1916 U.S. LEXIS 1730, where the court also established the principle that extradition proceedings do not contemplate the hearing of vive voce evidence of witnesses appearing in the flesh. See also Buck v. The King (1917), 29 C.C.C. 45
The Supreme Court of Canada also dealt with the issue of what evidence should be allowed to be led in an extradition hearing by the defence. Fitzpatrick C.J.C. held in *Buck v. The King* (1917)\(^{155}\) that all tendered evidence should be heard, but inadmissible evidence should not be considered in reaching a decision – a classic enhancement of judicial discretion.

Angin J. also enhanced the specificity of the rule of specialty:

> “The offence for which (the accused) was surrendered” means the specific offence with …which he was charged before the Extradition Commissioner and in respect of which that official held that a *prima facie* case had been established and ordered his extradition, and not another offence or crime, though of identical legal character and committed about the same time and under similar circumstances.\(^{156}\)

*Buck* had been extradited to Canada from the United States for publishing a false statement in the *News-Telegram* that he had struck oil in one of his several oil wells. However, he was tried and eventually convicted for acquiescing to the publication of a similar statement in another newspaper, *The Albertan*. The extradition judge had no knowledge of this second publication. *Buck* appealed his conviction on the grounds that it was a different charge than the one for which he had been extradited. Citing an American precedent,\(^{157}\) (“[an extradited person] shall be tried for only the offence with which he is charged in the extradition proceedings and for which he was delivered up”), Anglin J. stated,

> I do not entertain the slightest doubt that this is a correct statement of the law under the present treaty and the Canadian statute, the former of which, in terms restricts the right of trying an extradited person to “the offence for which he was surrendered” while the latter prohibits his prosecution or punishment in Canada, “in contravention of any of the terms of the (extradition) arrangement…for any other offence” than the extradition crime of which he was accused or convicted and in respect of which he was surrendered.\(^{158}\)

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\(^{155}\)Ibid. See also *United States v. Ford and Frary* (1916), 26 C.C.C. 430 (Man. Q.B.).

\(^{156}\) *Buck v. The King*, supra, note 154, at 55.

\(^{157}\) *Re Raucher*, supra, note 126, at 407.

\(^{158}\) *Buck v. The King*, supra, note 154, p. 55.
In that case, Buck proved that the charge he faced was different from the one for which he had been extradited. Other cases were not as successful in meeting this onus.  

8. Judicial Discretion Between the Wars

Courts across the country, from Nova Scotia and New Brunswick to Manitoba and British Columbia had divided opinions on whether proof of criminality in the foreign jurisdiction was required at an extradition hearing. New Brunswick and Manitoba had special provisions by which foreign law did not have to be proved in these circumstances, and the other jurisdictions generally favoured the position now held by the courts – that it is not necessary to prove foreign law in extradition matters since the very existence of the charges or warrant against the fugitive constitutes a presumption that the offence alleged is criminal in the requesting jurisdiction. The wartime cases also established that the validity or substantiality of the evidence adduced is assessed according to domestic law such as the rules of evidence specified in the Canada Evidence Act (including hearsay evidence) sufficient to make out a prima facie case that the accused committed the alleged offence in the requesting country. Certainly the foreign indictment in itself does not constitute evidence to

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160 Re Deering (1915), 24 C.C.C. 133 (N.S.S.C.).
161 Ex parte Thomas (1917), 28 C.C.C. 396 (N.B.S.C.)
162 Re Rosenberg (1918), 29 C.C.C. 309 (Man.C.A.)
164 Anne Warner LaForest, supra, note 16, p. 165, fn. 151.
166 R.S.C. 1985, c. C-5, s. 40. See Ex parte Thomas, supra, note 161; Re Rosenberg, supra, note 162.
168 United States v. Ford and Frary, supra, note 155. The test for determining whether a prima facie case had been met was later refined in terms of the “preliminary inquiry” standard by the Supreme Court of Canada in United States of America v. Sheppard (1976), 30 C.C.C. (2d) 424 (S.C.C.), revg 20 C.C.C. (2d) 575 (Fed. C.A.), affg 19 C.C.C. (2d) 35 (Que.S.C.) – which in turn was widely adopted by Quebec (Berthelotte v. Institut Leclerc
establish a *prima facie* case\(^{169}\) or to establish identity of the accused. Admissible evidence to establish identification could include a photographic record attached to an affidavit which the judge could use to compare to the appearance of the individual brought before him.\(^{170}\) The rule of thumb was to accept the evidence into the record even where the evidence would not be legal in Canada, examine it carefully, and ignore anything that failed to conform to Canadian standards.\(^{171}\)

Where the requested person had already been convicted of a crime in the requesting jurisdiction, and had later escaped lawful custody\(^{172}\) or jumped parole,\(^{173}\) the requirement of proof of double criminality was similar but simpler, in that the conviction was already *fait accomplis* – the extradition always depending, of course, on whether the convicted fugitive had already served the sentence.\(^{174}\) Even where the sentence had been completed, extradition proceedings might serve to alert the requested country to the presence of a convicted criminal

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\(^{169}\) United States v. Jackson (1917), 28 C.C.C. 290 (Ont. Co. Ct.).

\(^{170}\) United States v. Jackson (1917), 28 C.C.C. 290 (Ont. Co. Ct.).

\(^{171}\) State of New York v. Israelowitz, supra, note 163.

\(^{172}\) Ex parte Moser, [1915] 2 K.B. 698.

\(^{173}\) United States of America v. Allison (1918), 42 D.L.R. 585 (N.S. Co. Ct.).

\(^{174}\) Ex parte Moser, supra, note 172. Compare the more recent Canada-U.S. Treaty, Article 9(4), which specifies that the requesting country must state how much of the sentence has been served: Re Reutcke and The Queen (1984), 11 C.C.C. (3d) 386 (B.C.C.A.).
and cause the requested country to eject him as an undesirable alien, assuming he was a citizen – especially if he had not made full disclosure of his criminal past upon entering the country.

After World War I, American courts relaxed some of the more rigid requirements for extradition, the United States Supreme Court holding in *Collins v. Loisel* (1922), for example, that it was no longer necessary to demonstrate that the offence alleged was identical in both the requesting and requested countries – an expansion of the position taken in *Grin v. Shine* and *Wright v. Henkel*. In *Collins v. Loisel* an American (unrelated to George D. Collins) was accused of several counts of fraud in India. Since extradition to India was governed by the same treaty as extradition to Canada, the case came to be cited frequently as a precedent in Canadian cases. In addition to endorsing the notion that “it is enough if the particular act charged is criminal in both jurisdictions,” this case was one of the first to endorse the use of hearsay evidence at extradition hearings. The court relaxed the rules of authentication of foreign documents. Brandeis J. held that the accused person was allowed to present evidence on his own behalf aimed at rebutting probable cause, but not evidence in his own defence. Finally, he defined “such evidence of criminality” which appeared in the Ashburton-Webster Treaty as referring “to sufficiency of evidence in elements essential to a conviction, not to the character of specific instruments of evidence or to rules governing

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177 *Wright v. Henkel*, *supra*, note 143.
178 *Collins v. Loisel*, *supra*, note 175, at 311-312 (*per* Brandeis, J.)
182 In 1922, the Ashburton-Webster Treaty was amended by another Extradition Convention to add the extradition crimes “willful destruction or willful non-support of minor or dependent children,” specifying that these crimes were applicable only in Canada or the U.S. Supplementary Convention of 1922, signed at London 15 May 1922, ratified at London 28 July 1922.
admissibility.” 183 In Collins’ third attempt to apply for habeas corpus, the Supreme Court ruled that the principles of double jeopardy do not apply to multiple extradition applications, where, for example, a de novo hearing has been conducted in a superior court after a magistrate initially refused extradition. 184

Suffice to say that throughout the first three decades of the twentieth century, and especially in the Roaring Twenties, most courts dealing with extradition matters exercised increased judicial discretion from that enjoyed by courts in the nineteenth century, and sometimes exercised judicial discretion even beyond that rationally contemplated by the statutes or the Treaty. However, this was soon to change as, in the days of Prohibition, the United States sought the cooperation of Canada in order to stop the flow of smuggled liquor and later narcotics from Canada to the United States. With Canada’s cooperation, American police forces used undercover officers and agents in a concerted battle against such smuggling, and this formed a backdrop for several cases of rum-running from Nova Scotia, as well as a narcotics sting that had all the makings of high political intrigue.

In Collins v. Vaccaro (1931), a fugitive retreating onto Canadian soil was shot dead, and his alleged partner in crime was subjected to a dramatic cross-border kidnapping. That precipitous action backfired when Canada attempted to extradite one of the undercover agents, Sarro Vaccaro, on charges of murder, kidnapping and larceny. 185 “There is quite a dispute as to where the shooting of Bilodeau and the arrest of Price occurred,” Parker J.A. said of the incident, “but there was substantial evidence that both took place in Canada.” 186

186 Ibid.
Agent Mertz had discharged his gun at Bilodeau in an attempt to apprehend him. Up to that point, Bilodeau had been in lawful custody. As Price approached the United States border, Bilodeau warned him of the narcotic agents’ plant to lure him across it onto American soil – then ran across the border into Canada. He “made it” across the border before he was gunned down, and therefore sustained the fatal gunshot wound in Canada, even though the gun was discharged in the United States, the bullet crossing the border to strike him. Suffice to say that Mertz was not extradited by Canadian authorities. There was no question, however, that Vaccaro had entered Canada in “hot pursuit” of Price, who had specifically declined to cross the border into the United States after being tipped off by Bilodeau. Vaccaro arrested Price in Canada, and forced him to cross the border into the United States in his custody.

Vaccaro was committed by an extradition commissioner in Vermont on the charges of murder and kidnapping, but not on the charge of larceny. When Vaccaro applied for habeas corpus, the district court discharged him, ruling that, while the commissioner was justified in finding probable cause, “there was not sufficient evidence to connect Vaccaro with the killing of Bilodeau by Mertz.” The district court also ruled that Vaccaro was “justified in arresting Price and bringing him across the boundary into the United States.”

On behalf of Canada, the United States marshal appealed.

Speaking for the court, Parker J.A. agreed with the ruling of the district court with respect to the murder charge – there was no evidence that Vaccaro had helped Mertz kill Bilodeau or counselled him to do so, and in any case “Vaccaro and Mertz were co-operating in a perfectly lawful enterprise, the detection and apprehension of men engaged in crime.” But he disagreed with respect to the kidnapping charge, saying that there was sufficient evidence

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187 ibid., at 18-19.
188 ibid., at 19.
to support the contention “that Vaccaro forcibly arrested Price in Canada and forcibly carried him across the boundary into the United States:

Even if he had the right to make the arrest in Canada for crime committed in his presence, he had no right to carry Price forcibly out of Canada and into the United States; and, if he did so, he violated the statute against kidnapping. To arrest a man for crime is one thing; to carry him out of his country and away from the protection of the laws of his domicile is another and very different thing.... An unlawful arrest is merely an offence against the peace and dignity of the state; an unlawful carrying of a citizen beyond its boundaries to be dealt with by the laws of another state is a violation of the sovereignty of the former.\(^{189}\)

Accordingly, the district court had no jurisdiction on habeas corpus to overturn the finding of the committing magistrate that there was sufficient evidence warranting the extradition of Vaccaro for kidnapping. But, said Parker, this did not mean that the American Secretary of State must automatically surrender Vaccaro to the Canadian authorities. The Court of Appeal urged the Secretary of State to use his executive discretion to “review the evidence before the magistrate and decide whether the case presented is one calling for the surrender of the accused to the authorities of the foreign country....

In this case he may, and no doubt will, give consideration to the contention that accused, in attempting to apprehend Price, was operating under instructions of his superior and that he had been sent to work in Canada with the sanction of the Canadian authorities. This, however, is a matter for the executive to pass upon and not for the courts.\(^{190}\)

\(^{189}\) *Ibid.*

\(^{190}\) *Ibid.*, at 20-21. Another story of intrigue arose in *Cook v. United States*, 288 U.S. 102, 53 S. Ct. 305, 77 L. Ed. 641, 1933 U.S. LEXIS 957, where Brandeis J. of the Supreme Court held that the U.S. could not collect on a penalty assessed against Cook for smuggling liquor into the U.S., and that the U.S. Coast Guard had no jurisdiction to seize the Nova Scotia-owned vessel *Mazel Tov* allegedly used in rum-running since the ship “was captured and boarded at a point more than four (4) leagues from the coast” – beyond the territorial limits of the United States. A parallel case in Canada, *Croft v. Dunphy* (1932), 59 C.C.C. 141 (P.C.), rev’g 56 C.C.C. 278, [1931] 4 D.L.R. 284, (S.C.C.), rev’g [1930] 4 D.L.R. 159, 2 M.P.R. 350 (N.S.S.C.) aff’g [1930] 3 D.L.R. 70, involved the Nova Scotia-registered schooner *Dorothy M. Smart* running rum from the French island of St. Pierre to Nova Scotia. Canada customs had boarded the ship and seized the vessel 11 ½ miles from the coast of Nova Scotia. The Supreme Court of Nova Scotia, sitting en banc, upheld the judgment of the trial judge endorsing the actions of the customs officer. The Supreme Court of Canada reversed, but the Privy Counsel allowed the appeal, restoring the judgment of the Nova Scotia Supreme Court.
The advice from the Court of Appeals to the Secretary of State could not have been more pointed: the discretion not to extradite Vaccaro was not a legal decision falling under the prerogative of the judiciary; rather it was a political decision to be exercised by the Secretary of State as a matter of executive discretion.

_Vaccaro_ was a forerunner to _Factor v. Laubenheimer_ (1933),\(^{191}\) where the Supreme Court of the United States allowed a staggering reversal of the principle of double criminality in a case involving a charge of receiving money knowing it to have been fraudulently obtained. In so doing, the Court struck a body blow to judicial discretion in the extradition arena. Although the extradition of John Factor was sought by England, the case had major ramifications for extradition to Canada, for it reversed or distinguished most of the American decisions of the prior 30 years since _Wright v. Henkel_,\(^{192}\) including _Collins v. Loisel_,\(^{193}\) _Kelly v. Griffin_,\(^{194}\) and _Bingham v. Bradley_.\(^{195}\) Holding that extradition treaties should be construed liberally in favour of the rights of extradition claimed under them, the majority of the court ruled that the proviso of the Webster-Ashburton Treaty governing evidence of criminality related only "to procedure and proof, and is not a limitation upon the definition of the offences for which extradition may be demanded."\(^{196}\) Having largely abrogated the discretion of the judiciary to rule on issues of extradition in the standard way – by determining double criminality – the majority proceeded to endorse the importance of the political discretion of the Secretary of State: "The extradition proceeding has not come to an end. The petitioner's


\(^{192}\) _Supra_, note 143.

\(^{193}\) _Supra_, note 175, at 309.

\(^{194}\) _Supra_, note 149, at 6.

\(^{195}\) _Supra_, note 154, at 511.

\(^{196}\) _Factor v. Laubenheimer_, _supra_, note 191, syllabus, and pp. 290-295.
commitment by order of the commissioner was ‘to abide the order of the Secretary of State,’ and continues in force so long as the Secretary may lawfully order his extradition.”

In the wake of the decision of the Supreme Court on 4 December 1933, the U.S. District Court on 17 April 1934 reversed its order discharging Factor. Marshal Laubenheimer immediately served him with a mittimus and a week later, on 24 April, delivered Factor to custody. However, a strange twist entered the Factor case two months later, on 27 June, when Rella Factor successfully applied for her husband’s release from custody on the basis of a cryptic letter from the U.S. Secretary of State to the U.S. Attorney General:

“It would be appreciated if you would instruct the United States Attorney of Chicago, Illinois, to inform Judge Evans that the delay in issuing a warrant to the British Embassy for the surrender of Factor has been due to the desire expressed by the States Attorney at Chicago, Illinois, to have Factor available to give testimony against persons accused of kidnapping him upon the trial of said persons, upon which trial he would, of course, be the principal witness for the prosecution.

“It should probably be called to the Court’s attention in this relation that while some of the persons charged with the kidnapping have been tried and convicted it is not certain that this conviction will not be reversed on appeal, necessitating a new trial, and furthermore that all of the persons so charged have not yet been brought to trial.”

Factor had been held in custody for three days more than the two months established by statute as the period within which an accused ordered extradited could be delivered to the foreign authorities under s. 654 of title 18 of the United States Code. Rather than exercising his executive discretion with respect to the extradition where Factor was concerned, the Secretary of State simply chose not to exercise his discretion, allowing the clock to tick until the extradition proceeding ran out of time.

The Depression years gave rise to Canadian jurisprudence that grappled with the same issues as that of the United States; namely the comparative weight to be given to judicial and

197 Ibid., at 304.
198 Cited in In re Factor’s Extradition, 75 F. 2d 10; 1934 U.S. App. LEXIS 3386 at 11.
executive discretion. Reasoning not unlike that proffered by the United States Supreme Court in *Factor* had already been advanced in Canada in the case of Harry S. Rosen, alias Samuel Memielstein, alias Sam Merrin. In 1931, Rosen was ordered by the Chief Justice of British Columbia, acting as a Judge under the *Extradition Act*, to be extradited to Baltimore, Maryland, on a charge that in 1926 he had obtained 2,160 stockings by false pretences. In reviewing his application for habeas corpus, Macdonald J. came to exactly the opposite conclusion as the Supreme Court of the United States in *Factor*. Alluding to the judgments of Duff J. in *Re Collins (No. 3)* and Brown J. in *Grin v. Shine*, he cited the rule that "treaties should be faithfully observed, and interpreted with a view to fulfill our just obligations to other powers, without sacrificing the legal or constitutional rights of the accused." However, the only cognate extradition crime listed in the treaty was "Obtaining money, valuable security or other property by false pretences." Macdonald J. applied the principle of *ejusdem generis*, which could be defined as "'Where an enumeration of specific things is followed by some more general word or phrase, such general word or phrase is to be held to refer to things of the same kind.'" "Other property" therefore referred to matters similar to money or valuable security, and did not include stockings or any other "goods". Macdonald J. reversed the extradition order of Morrison, C.J., and Rosen was discharged.

Two years later, the Ontario Court of Appeal similarly discharged Harry Low, who had been charged with bribing William D. Dods, a United States customs inspector in Nyando, New York, with $300 to look the other way with respect to importations of merchandise.
Dods testified that he acted under the *Tariff Act* as a customs inspector. A unanimous court held that a customs inspector was not competent to give evidence on a point of foreign law. "The witness relied upon in the case in hand did not attempt to show that his office required any knowledge of law, nor that he had any familiarity with the laws of the United States." Thus, by accepting as within its authority determination of the question of whether the crime charged constituted a crime in the requesting jurisdiction, the court in *Re Low* implicitly exercised judicial discretion.

In *Re Insull* (1933), Kingstone J. recognized limits to his own judicial discretion and refused an application by businessman Martin J. Insull to obtain commission evidence outside the country to prove that authorities in Chicago were prosecuting a businessman in bad faith.

It has been very strongly and vigorously argued before me that it would be a great hardship and injustice to the accused not to be permitted to give evidence in these proceedings to explain matters that are susceptible of explanation and thereby avoid the necessity of having the prisoner extradited and tried. That may be so but I feel that I am bound by the language of the statute....

This statute is the result of a treaty between two friendly powers and I think I should not in any sense attribute to the prosecution bad faith on this application as has been suggested....

A more sympathetic appeal panel, including Mulock, C.J.O., re-examined the charges against Insull minutely, holding that there was no evidence that Insull had converted for his own use or stolen $150,000 of the $500,000 claimed in three Illinois indictments. This was a major concession by an Ontario court that during the 1930's was generally reluctant even to grant applications for bail in extradition cases.

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206 60 C.C.C. 254 (Ont. S.C.).
208 *Re Insull (No. 2)* (1934), 61 336 at 343-344.
209 *Re Gigliotti* (1936), 65 C.C.C. 55; *Re Brenner* (1939), 72 C.C.C. 234.
Thus, Canada and the United States had different attitudes towards judicial discretion and allowed judicial discretion at different stages of the extradition process. In the United States, judicial discretion was the counterpoint to executive discretion, especially in habeas corpus applications made after the initial executive discretion had been exercised, as in Vaccaro. In Canada, "judicial" discretion was really "hearing judge" discretion. The Canadian application of the principle of *ejusdem generis* at the extradition hearing level led to a different balancing of judicial and executive discretion than was concurrently being created by American jurisprudence. Canadian extradition hearing judges were left without direction—and certainly without the precedence of jurisprudence to guide them. It was anyone's guess whether Canadian judges would give greater or lesser deference to executive authority than their American counterparts, who were obliged to follow the questionable precedent of the United States Supreme Court in *Factor*. Would Canadian judges once again import American law, as they had done with *Washburn*, *Holmes*, *Grin v. Shine*, and *Wright v. Henkel*? Or believing that extradition law in Canada was "a law unto itself," would they go their own merry way?

9. The Second World War

As in the First World War, so in the Second: both Canada and America were too preoccupied with the sheer effort of winning the war to be concerned with international extradition in a major way. Most Canadian extradition cases heard after 1939 were concerned with crimes alleged to have occurred before the war. In *Re Danilhik*, for example, Chief Justice Robson of the Manitoba King’s Bench reviewed an application for extradition initiated in 1944 by the United States at the instance of the State of Michigan, which alleged...
that Alex Danilhik, alias Alex Stone, had murdered Andrew Karch in Detroit on 1 November 1925. The central witness, Peter Kozmoff, was himself serving a life sentence for an unspecified crime, possibly the murder of Karch.\textsuperscript{210}

Danilhik's whereabouts in Winnipeg might never had been discovered had he not applied for work in the wartime defence industries. Because of the sensitive nature of the work, he was required to submit to fingerprinting. Following the usual security checks, the war industries employment official sent a report to the RCMP, who checked his name and fingerprints against their records. They discovered a copy of a complaint issued from Detroit in 1927 naming Danilhik as a suspect in the murder of Karch.

Robson C.J.K.B. held that Danilhik must be discharged, since there was no lawful authority to require him to be fingerprinted under the \textit{Identification of Criminals Act}: “The taking of these prints was like the taking of statements without warning, and the result could not be used against the defendant.”\textsuperscript{211} The comparison prints were 17 years old, and there was no proof that they belonged to Danilhik. Robson J. rejected the suggestion that the requirements of proof in an extradition matter were comparatively relaxed and really a matter of judicial discretion: “I have read a great deal in the cases about how loose an extradition commissioner is entitled to be and in my opinion much of it goes too far.” He added: “While our Courts no doubt have every desire to apply this reciprocal treaty in a broad spirit nevertheless judicial officers must recognize that the Act enables a serious inroad upon the personal liberty of a possibly innocent man.”\textsuperscript{212} He was reluctant to accept, without any

\textsuperscript{210} \textit{Re Danilhik} (1944), 82 C.C.C. 264 (Man. K.B.), at 269-270.
\textsuperscript{211} \textit{Ibid.}, at 267.
\textsuperscript{212} \textit{Ibid.}, at 267-268.
corroboration, the evidence of an alleged accomplice who was at that moment serving a life sentence for an unspecified crime.

10. The Post-War Years

With the dawning realization of the true enormity of the events of the Second World War, including untold millions of victims dead, displaced, or injured, extradition for comparatively minor crimes such as fraud and theft must have seemed quite banal to the leaders of most nations. Suffice to say, hardly any extradition proceedings were initiated in Canada and the United States in the late 1940s, and only a handful in the 1950's, as militarism and an almost paranoid respect for authority and law and order remained the order of the day.

The United States initially focused on prosecutions for treason and desertion arising out of the Second World War, and thereafter became obsessed with tracking down spies and communists, the latter activity spearheaded by J. Edgar Hoover of the FBI in tandem with Senator Joseph McCarthy. In that topsy-turvy world, even alleged war criminals were protected by the United States at first, if surrender entailed cooperation with communist states. After the war, "the U.S. government became eager to defend capitalism against

213 See for example Chandler v. United States, 171 F. 2d 921 (1949).
214 See Pyle, supra, note 6, p. 134 ff. A handwritten note from Deputy Attorney General Peyton Ford's assistant to the Immigration and Naturalization Service in connection with the case of Andrija Artukovic, the so-called "Butcher of the Balkans," found in the U.S. after the war, summed up the tenor of the times in the age of McCarthyism: "'Altho[ugh] it appears that deportation proceedings should be instituted, [Artukovic] and/or his family should not be sent to apparently certain death at the hands of the Yugoslavia communists. Unless it can be established that he was responsible for the deaths of any Americans, I think that deportation should be to some non-communist country which will give him asylum. In fact, if his only crime was against communists, I think he should be given asylum in the U.S.'" (p. 134). The convoluted path to Artukovic's eventual extradition in 1986, 25 years after allegations of war crimes were first brought against him, is well documented by Pyle, who devotes two chapters to the case. Suffice to say, the courts and the executive in the United States eventually succumbed to political pressure to deliver him up. Artukovic died in a Yugoslav prison facing charges for 230,000 killings for which he had not been extradited – an expected abrogation of the rule of specialty in a case where a treaty had been concluded by the United States with a completely different regime. Artukovic v. Rison, 628 F. Supp 1370 (C.D. Cal. 1986); 784 F. 2d 1354, 1355 (9th Cir. 1986)
socialism, even when the capitalists were dictators and the socialists maintained modified market economies," wrote Christopher Pyle.

...From the U.S. government's point of view, the integrity of the foreign regime's legal system was irrelevant to the debate. Like most Americans, Justice Department lawyers rarely had the language skills and overseas experience to comprehend other legal systems well. Understanding those systems and the cultures in which they were imbedded was deemed unnecessary.215

The only prominent case originating in Canada was *U.S.A. ex rel Rauch v. Stockinger* (1959),216 where the appellants appealed the denial of habeas corpus using the old saw that larceny in the United States could not be equated with theft and fraud in Canada. The Rauch brothers, Sol and Harold, were alleged to have stolen securities worth $960,000 "by deceit, falsehood or other fraudulent means." It is telling that the court had to go back to the 1920s to find precedents to settle the issue.217

In other areas of extradition law, Canadian courts of the 1950's began to show an uncharacteristic cohesiveness from region to region in the comparatively few cases to come before them. In British Columbia, the Supreme Court ordered the remand of Tina Kaslov, who faced a charge of grand larceny in Buffalo, New York, on the strength of her aiding and

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215 Ibid., p. 142.
217 The U.S. District Court dismissed preliminary arguments relying on technicalities in *Schonbrun v. Dreiband*, 268 F. Supp 332, 1967 U.S. Dist. LEXIS 8246 (1967), which was almost identical on its facts to the *Rauch* case (theft of $960,000).
abetting her mother, Catherine Dennis, in a scam that parted Anna Doerfler from a substantial amount of her money. Dennis claimed to be able to cure Doerfler and her family of “any illness” by “spiritualistic assistance” if she paid $5, burned candles, and returned with “a drinking glass, an egg, and a new lady’s and man’s handkerchief.” When she returned with the items, Doerfler agreed to raise as much money as she could, and returned again with a total of $3,895, which Dennis wrapped in a handkerchief. She told Doerfler to put the handkerchief into a safety deposit box, whereupon it would miraculously double upon her selling off her property. In a sleight of hand, Dennis allegedly exchanged handkerchiefs, so that the handkerchief deposited in the safety deposit box by Mrs. Doerfler in fact contained no money.

There was no evidence that Kaslov took an active part in the scam, but by her very presence, Kaslov was alleged by Doerfler to have “conspired, combined, confederated and agreed to the appropriation of the said monies…by directing, aiding and assisting in said scheme.” Wood J. did not fault Doerfler for her obvious gullibility up to the time “the mumbo-jumbo with regard to the money” (to use his words) took place. However, with respect to Kaslov, “in my opinion a jury might very well come to the conclusion that the applicant was ‘in on’ the whole transaction and therefore she was party to it as an aider and abettor.” Under Canadian law, an aider and abettor is as guilty of the crime as the perpetrator. Kaslov was remanded for surrender.

During the 1960’s, illegal drug use became increasingly popular in both Canada and the United States as the psychedelic revolution led by Timothy Leary “turned on” America. In Ontario, both the County and High Courts extradited Americans back to their homeland for drug trafficking, thereby affirming the validity of the Supplementary Extradition Convention

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218 Re Kaslov (1950), 97 C.C.C. 150 (B.C.S.C.), at 151-152.
219 Ibid., at 154.
of 1925. These cases ruled that trafficking and conspiracy to traffic in drugs such as heroin, opium and cocaine were extraditable offences despite the fact that punishment fell under the Narcotic Control Act\(^{220}\) rather than the Criminal Code.\(^{221}\) Later, protests against institutionalized racism in the United States and the war in Vietnam marred the peace of the American scene. As in any war or other national crisis, the United States put extradition proceedings on hold, seemingly oblivious to the thousands of draft dodgers who drifted north into Canada. Not since the United Empire Loyalists had migrated north to avoid reprisals by fanatic new republicans had Canada experienced such a phenomenon: indeed, in the 1950's, the "brain drain" had been in the other direction. However, the change in lifestyle and standard of living, both for better and for worse, did not have a major impact on extradition law, if only because the process had become so complicated, foreign nations having to hire private lawyers to advance their cases. Prior to the 1970's, Pyle calculated, the United States received "fewer than a dozen extradition requests a year" from around the world.\(^{222}\)

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\(^{221}\) Re Brisbois (1962), 133 C.C.C. 188 (Ont. H.C.); Re Devlin, [1964] 3. C.C.C. 228 (Essex Co. Ct.).

\(^{222}\) Pyle, supra, note 6, p. 143.
CHAPTER THREE
THE POLITICAL CLIMATE UNDERLYING NEGOTIATIONS OF A COMPREHENSIVE EXTRADITION TREATY

1. Federal Limitations on Extradition Judges

Canada and the United States negotiated and signed a new extradition treaty on 3 December 1971, but it did not become ratified for half a decade.\(^1\) Despite the fact that extradition must have been high on the agenda, it had by then reached a low ebb.\(^2\) In fact, the passage of the Canadian *Federal Court Act*\(^3\) in 1970, had more of an impact on Canadian extradition practice than the treaty negotiations, since by operation of ss. 18 and 28 it effectively removed the prerogative writs (except habeas corpus) from the domain of the provincial superior courts to the Trial and Appeal divisions of the Federal Court. In effect, superior court judges sitting as *persona designata* under the *Extradition Act* were not sitting as judges described in s. 96 of the *B.N.A. Act, 1867*, but constituted federal tribunals defined by s.

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\(^1\) The Treaty was not ratified until 22 March 1976 – long after its signing at Washington on 3 December 1971. The signed but unratified treaty was further amended on 28 June and 9 July 1974.


\(^3\) 1970-71 (Can.), c. 1.
2 (g) of the *Federal Court Act*.\(^4\) One consequence of this was that in the absence of a designated judge, provincial appeal court judges had no jurisdiction (for example) to issue a writ of certiorari brought by an accused to quash a committal for surrender to the United States – that was now the exclusive domain of the Federal Court Trial Division.\(^5\) These legislated changes were more constrictions than restrictions, but they could not have come at a worse time, for America was staggering under a series of violent protests against the Vietnam War. So inept was the system of extradition between Canada and the United States that more than one perpetrator of shootings and protest bombings thought they had found permanent refuge in Canada. In exercising their judicial discretion to extradite or not to extradite these “fugitives,” the courts in Canada applied the law unevenly.

Certainly the changes undermined confidence in the courts – and in the confidence of judges to exercise judicial discretion in extradition matters in the ways that they had previously enjoyed. International cooperation between the United States and the rest of the world in the early 1970s was reflected in the termination of the Vietnam War, recognition of the People’s Republic of China culminating in Nixon’s personal visit to Beijing, and efforts to defuse the Cold War by détente with the U.S.S.R. As a sign of good will, the United States Coast Guard on 23 November 1970 returned a Lithuanian seaman seeking asylum to his Soviet ship, to the consternation of many right-leaning Americans.\(^6\)

From the American perspective, the new enemy to replace international communism became international terrorism, especially terrorism in the form of hijacking. In the fall of

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\(^4\) *Re Milbury and the Queen* (1972), 7 C.C.C. (2d) 48 (N.B. S.C. – App. Div.) *per* Limerick J.A.

\(^5\) *Ibid.* This debate continued well into the 1980s, when the Supreme Court of Canada finally decided that superior court judges brought their powers with them to the extradition arena, and were not merely *persona designata*. The question was finally resolved in *Canada (Minister of Indian Affairs and Northern Development) v. Ranville* (1982), 139 D.L.R. (3d) 1. See the discussion of the *Hernandez* case, *infra*.

1970, the four simultaneous hijackings of planes bound from various points in Europe to New York led to rare consensus among the 115 countries which signed the 1970 Hague Convention for the Suppression of Unlawful Seizure of Aircraft. The United States and the U.S.S.R. had united in proposing that any and all hijackers be denied the political offence exception in extradition. Eventually, on 16 December 1970, the signatory countries agreed to an “extradite or prosecute” clause by which each country agreed to return hijackers to the aggrieved country or prosecute them where they had landed “without exception whatsoever.” That Convention entered into force on 14 October 1971, and formed the backdrop for the first extradition treaty to be negotiated directly between Canada and the United States, signed on 3 December 1971.

In 1972, Canadian judges began to quote the first (1961) edition of Gerard LaForest’s Louisiana-published *Extradition to and from Canada* – although later Dickson J. of the Supreme Court of Canada expressed reservations about counsel relying solely on this source. And for the first time, following the lead of Clayton Ruby and Edward Greenspan, lawyers began to invoke the *Canadian Bill of Rights* in extradition proceedings with marginal success. These two lawyers, who were to become two of the best-known criminal law barristers in Canada, cut their legal eye teeth on the juiciest extradition cases of the day – *Re*
Judicial and Executive Discretion in Extradition between Canada and the United States

Armstrong and State of Wisconsin (1972)\textsuperscript{11} and Re Commonwealth of Puerto Rico and Hernandez (1972),\textsuperscript{12} both of which alleged murder arising out of student protests against the war in Vietnam and specifically against the United States Reserve Officers' Training Corps (R.O.T.C.) taking up space on university campuses.

2. Clayton Ruby's Insistence on Proper Exercise of Judicial Discretion

Clayton Ruby in particular was not shy about challenging judges to use their judicial discretion – or about challenging them when they used their judicial discretion badly. His client, Karleton Lewis Armstrong, was charged with one count of murder and four counts of arson in the wake of a bombing spree at the University of Wisconsin at Madison aimed against R.O.T.C. and Army facilities. A university professor was killed in one of the blasts. The extradition court heard that a few minutes before the fatal explosion, someone had telephoned the Madison police, saying:

"O.K. pigs, now listen and listen good. There is a bomb in the Army Math Research Centre, the University, set to go off in five minutes. Clear the building. Get everyone out. Warn the hospital. This is no bullshit, man."\textsuperscript{13}

However, the police had no chance to warn Dr. Robert Fassnacht, who remained oblivious to the danger as he continued to work in his laboratory on the ground floor of Serling Hall, which housed the research centre. The bomb that blew apart the building, killing Fassnacht, was said to have had an explosive force equivalent to 3,400 sticks of dynamite.

Both Armstrong and Hernandez – who was accused of assassinating the Puerto Rican Commandante of Police, Mercado Vega, with a revolver at a noon student rally against the

\textsuperscript{11} Ibid.
\textsuperscript{13} Cited in Re State of Wisconsin and Armstrong (1973), 10 C.C.C. (2d) 271 at 278 (F.C.A.).
R.O.T.C. attended by 3,000 protesters at the University of Puerto Rico – had become dark heroes of the anti-Vietnam protest movement, and the press and the public followed their every move as the two extradition proceedings progressed. When 100 or so young people turned up to observe Armstrong’s extradition hearing on 2 March 1972, Martin Co. Ct. J. decided to act preemptively by closing his courtroom to the public except for members of the press. Bailiffs herded the would-be observers out of the courtroom, indeed out of the courthouse. The young Clayton Ruby objected.

MR. RUBY: Your Honour, before we deal with the question of what procedure to follow at this point may I raise a preliminary matter which I consider to be of importance.

I was informed prior to coming to Court that your Honour ordered the Court cleared of the public. There were approximately one hundred young people who had been ordered out of the Court, and were further ordered out of this hall and the next hall, and further, by order of the Bailiff ordered out of that –

THE COURT: I have issued that order; so far as this order members of the Press and Counsel will be permitted.

MR. RUBY: With your Honour’s permission I wish to speak to that matter.

THE COURT: I made the order and that’s final, that’s all.

The average lawyer would have been humbled by such a blunt rejoinder from the bench. Not so Clayton Ruby:

MR. RUBY: I think it deprives your honour of jurisdiction. I won’t take very long.

THE COURT: It deprives me of jurisdiction?

MR. RUBY: It is a fundamental principle of justice that justice [is seen] to be done and done generally before the public, and it does not simply mean the Press and publishers generally. In my submission the suspicion must inevitably arise that there must be some reason for the public to be excluded. I know of none, and none has been suggested to me, and it appears to suggest that this particular accused, Karleton Armstrong is a man to be feared. His guilt therefore is by this action prejudged, and I submit that is contrary to the fundamental principles of justice.

THE COURT: I am not trying the accused.

MR. RUBY: Your Honour is trying a matter of the extradition of this accused, and deciding if there is a prima facie case against this accused. The Canadian Bill of Rights does not permit such a hearing to proceed in camera or in partial camera.¹⁴

¹⁴ Cited in Armstrong, supra, note 10 (Ont. H.CJ.).
Ruby argued that the judge had "no jurisdiction by reasons of the Bill of Rights to preside in their absence unless your Honour can show some reason why Mr. Armstrong’s hearing should be kept from the public."\footnote{Ibid. at 333.}

In response, Austin Cooper Q.C. argued for the State of Wisconsin that s. 442 of the Criminal Code gave the judge the right to exclude members of the public from the courtroom "in the interest of morals, the maintenance of order or the proper administration of justice." If the judge felt intimidated, Cooper suggested, “you may have the right under Section 442 to exclude them.” Mr. Ruby was quick in his rebuttal:

If your Honour chooses to rely on Section 442 which permits you to clear the Court of the public where it is in the interest of public morals and maintenance of order to do so, surely there has to be some notice. Your Honour was not present in Court; there has to be some evidence of threat other than the one hundred persons behaving properly; they have a right to appear in Court, and my submission is that Mr. Armstrong has a right to have the public attend and observe the hearing as he is put upon his trial in this extradition matter.

THE COURT: You heard the order I made. That is the order. All right.

At which point, Armstrong himself jumped into the fray:

THE FUGITIVE (Mr. Armstrong): Your Honour I find it very difficult to honour this Court as it is; and if you so choose to exclude my friends who are among the public I find it very difficult to honour this Court and I won’t honour this Court.

THE COURT: Thank you Mr. Armstrong, that’s fine.\footnote{Ibid. at 334-335.}

On Mr. Cooper’s suggestion, the court adjourned.

In reviewing Judge Martin’s decision to exclude the public from an extradition hearing, O’Driscoll J. of the Ontario High Court of Justice said he was disturbed that the transcript did not disclose what order was made (it having been made outside the courtroom where there was no court reporter), or why: “It may well be that the learned County Court Judge had the best reasons in the world for making whatever order he did make, but in my
responsible opinion any such order and the reason for such order should appear on the record."\textsuperscript{17} He refused to equate "public" with "the press" and refused to draw any inference that Armstrong was trying to "pack" the courtroom with his friends. Although he ruled that the County Court judge had not been seised of the case, and therefore the application was premature, he stated, "In my view, if His Honour Judge Martin intends to continue hearing this extradition matter he should state on the record why he made whatever order he did make outside the Courtroom."\textsuperscript{18}

Needless to say, when in the following month Armstrong was committed for extradition, it was by a completely different judge.\textsuperscript{19} That ruling was taken to the Federal Court of Appeal, Edward L. Greenspan appearing on Armstrong's behalf in a preliminary motion to question the court's jurisdiction. The Court decided that it had jurisdiction since the County Court judge when acting in an extradition matter was really acting not as a judge but in the capacity of a federal tribunal.\textsuperscript{20}

Ruby and Greenspan joined forces in the final appeal to argue more substantive issues with respect to extradition, including other rights of their client under the \textit{Canadian Bill of Rights}, to which the \textit{Extradition Act} was subject since it was a federal law adopted by Parliament. They argued, unsuccessfully, that affidavit evidence adduced under the \textit{Extradition Act} was contrary to the \textit{Canadian Bill of Rights} since the fugitive had been afforded no opportunity to cross-examine the deponents.\textsuperscript{21} They argued that there was

\begin{itemize}
\item \textsuperscript{17} \textit{Ibid.} at 336.
\item \textsuperscript{18} \textit{Ibid.} at 339.
\item \textsuperscript{20} \textit{Re State of Wisconsin and Armstrong} (1972), 8 C.C.C. (2d) 452, at 458 (Ont. Co. Ct.)
\item \textsuperscript{21} By then, the Ontario High Court of Justice had refused to apply the \textit{Canadian Bill of Rights} to extradition hearings with respect to "the right to be presumed innocent until proven guilty and the right to bail." See \textit{Re Barnes and State of Tennessee} (1972), 34 C.C.C. (2d) 122 at 123-124.
\end{itemize}
insufficient evidence to support a charge of first degree (as opposed to second or third degree) murder in Wisconsin — to which Thurlow J.A. responded that as long as murder was an extraditable offence made criminal by the laws of both countries, the various degrees of murder was a matter for the trial court to consider. Clayton Ruby then argued that evidence should have been allowed to establish “the applicant’s state of mind with respect to his political views and attitudes as to how to bring about changes in the United States of America” — thus establishing a political motive for the offence and triggering the “crimes of a political character” exemption.\(^{22}\) Sweet J.A. summarized Ruby’s arguments:

> Applicant’s counsel submits there exists in the United States of America a significant public opinion against the policy of the Government of the United States in connection with the war in Vietnam and an expressed desire on the part of many there that that Government bring that war to an end. As I understand it, it is also the position of counsel for the applicant that the applicant was part of that movement and that, as a result, all of the charges against him are associated with that movement and have, thereby, a political character. Also, as I understand Mr. Ruby’s position on behalf of the applicant, expressed during his argument, it is that if there is a significant movement to bring about a change in governmental policy and if, with the intention of furthering the aims of that movement, an individual commits a crime, the offence is one of a political character within the meaning of s. 21 even though all others in the movement attempt to achieve their aims only by peaceful, legal means.\(^{23}\)

Ruby and Greenspan wanted to lead evidence from a friend of Armstrong to the effect that long before the bombing Armstrong had expressed strong political views against United States involvement in Vietnam. This would tend to prove that the political exception argument was not “a claim of recent contrivance,” as had been suggested by Mr. Cooper. But Thurlow J.A. ruled that there was no such issue, since at his extradition hearing “the applicant did not give evidence of his motivation or state of mind or purpose at the times of the

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He reviewed the law on the "crime of a political character" exemption, concluding that while the extradition judge must receive any evidence from the accused indicating that the offence was of a political character, he did not have authority to rule on the question. Thurlow J. relied on English cases such as Re Castioni, where Hawkins J. had said,

I entertain no doubt that the magistrate has no right and no jurisdiction to find finally, as against the prisoner whether or not he had committed, or whether that crime is one of a political character. ... "The police magistrate shall" not adjudge that the offence is of a political character, but he "shall receive any evidence which may be tendered to shew that the crime of which the prisoner is accused or alleged to have been convicted is an offence of a political character or is not an extradition crime." 

Even though this statement of the law had been specifically criticized and overturned in subsequent cases in England, Thurlow J. held that the Canadian Extradition Act was sufficiently different in its wording from the British Act that it was not "open to this Court on this application to enter upon and decide the question of the political character of the offences... as the English Courts have consistently done in extradition matters." But he added that the crimes in any case did not have the earmarks of a crime of a political character: the bombing was not directly against the government of the United States – it was directed against the University of Wisconsin, the property of the State of Wisconsin. Nor was Dr. Fassnacht a government operative, but a university professor going about his business in the presumed safety of his own laboratory.

In each case the purpose... was to force the University authorities to dispense with army presence on the campus. If this can be regarded as rebellious it appears to me to be rebellious against University authority rather than against the Authority of the Government of the United States.... Finally, it must be noted that in each case the alleged offence occurred in the night time when all else was peaceful rather than in the

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24 Ibid., at 281.
25 [1891] 1 Q.B. 149.
26 Ibid., at 161.
course of a political tumult or revolution and that in no case was the offence followed by a political tumult or revolution.\textsuperscript{29}

The reasoning of Thurlow J.A. seems flawed. Do we adjudicate the political nature of an act by its method or motivation, or by its results?\textsuperscript{30} However, in his concurring judgment, Sweet J.A. remarked, wryly: "I do not think the evidence establishes that bombing and arson were generally accepted activities in the anti-Vietnam war movement in the area...."

Pursuant to s. 15 the Judge is to receive any evidence tendered to show that the crime of which the fugitive is accused is an offence of a political character. This does not say that he is to receive this evidence for the purpose of determining whether or not the crime is of a political character. Rather it would seem to me that the reason is so that any such evidence offered will appear in the certified copy of the evidence which the Judge is to send to the Minister of Justice pursuant to s. 10(2). It is not difficult to see the reason for that requirement. Certainly this would be one convenient way in which the Minister would have relevant information before him in connection with matters relating to political character so that he may exercise his discretion pursuant to s. 22.\textsuperscript{31}

In short, the role of the extradition judge was not to exercise his own discretion where a crime of a political character might be involved, but to make it easy for the Minister of Justice to exercise his discretion.


Clayton Ruby shepherded the \textit{Hernandez} case through the courts with considerable more success. County Court Judge Honeywell accepted that Commandante of Police Mercado "was killed deliberately and intentionally by some person shooting at him from the monument" at a noon rally at the University of Puerto Rico, but was not satisfied with the identification of Hernandez by Lieutenant Atilama, second in command under Mercado.

\textsuperscript{29} \textit{Ibid.}, at 292.
\textsuperscript{30} "By the same argument," remarked Pittsburgh lawyer Rebecca Wolf, "had the Boston Tea Party failed to raise the ire and general consciousness of the colonial populace, it would not have constituted a political act." Correspondence (Pittsburgh: 17 February 2003).
\textsuperscript{31} \textit{Re State of Wisconsin and Armstrong, supra}, note 22, at 303-306.
Atilama claimed to have run towards the monument after the shooting, whereupon the gunman glanced his way, then fled. On the basis of that glimpse, according to the evidence, Atilama was able to pick out Hernandez’ university identity card from two dozen submitted in response to a request by the police. Hernandez’ photo was included in response to a tip.

The majority of the students photographed …would not answer to the description of the assailant given by Atilama, namely, white, black hair and sideburns, or wore glasses. Of the remainder, there is a sufficiently wide variation of facial characteristics to make it doubtful that there was any real objective opportunity to test [Hernandez’] features against those of other students of similar appearance.  

Hernandez was a well-known student leader, actively involved in the anti-Vietnam war movement; however, no other evidence established that Hernandez was on campus that day. The judge concluded:

In my opinion, a witness who has not previously seen the killer and sees him only full-face for a brief glance at a distance of approximately 60 ft., and in shadows at that, cannot, in the absence of any unique characteristic, have that certainty of recognition which would justify his opinion in selecting the assailant’s photograph some days later. I find there is not sufficient factual basis to support the opinion of Atilama that the accused is the guilty person and, on that, I have no doubt. No fair and honest view of this evidence could, in my opinion, lead to a conclusion of probably guilty…  

In fact, the assassination took place at high noon, when there would have been no shadows. On the corollary issue of whether the shooting was an offence of a political character, Judge Honeywell, again relying on English cases such as Castioni and Schtraks v. Government of Israel, concluded that it was not.

Puerto Rico applied to the Federal Court of Appeal to set aside the decision, but Ruby argued persuasively that that court had no jurisdiction to disturb the decision to refuse to issue

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32 Re Commonwealth of Puerto Rico and Hernandez (1972), 8 C.C.C. (2d) 433 at 438.
33 Ibid., at 439.
34 Re Castioni [1891] 1 Q.B. 149.
a committal order against Hernandez. Ruby relied on *U.S.A. v. Link and Green*, which had determined that such a decision was not a “judgment.” This decision abrogating jurisdiction was appealed by Puerto Rico to the Supreme Court of Canada, where Pigeon J. for the bare majority of a divided court distinguished between the role of the Supreme Court of Canada and the Federal Court of Appeal. A county court judge sitting on an extradition case, Pigeon J. held, derives his power not from his appointment as a judge, but from a special Act of Parliament – the *Extradition Act*. Since he is acting as a federal tribunal, the Federal Court of Appeal has every right to sit in review of that decision.

Eventually this decision was specifically overturned by another panel of the Supreme Court of Canada, but in the meantime, the Supreme Court sent the matter back to the Federal Court of Appeal – which promptly dismissed the application of the United States on behalf of Puerto Rico. Despite a pointed hint from the Supreme Court of Canada that the Federal Court of Appeal should do its duty in the Hernandez case, Thurlow J.A., in affirming the findings of fact of Honeywell J., held: “I find it inconceivable that a person should be put on trial on such flimsy evidence.” Thus despite repeated attempts of the United States to pressure the courts to comply with their request for extradition, judicial discretion appeared to prevail.

At least, in the short run. But the executive had a trump card up its sleeve in the form of an immigration warrant. Since Hernandez had entered the country illegally in the first place, he was summarily deported in 1973 as if there had been no extradition application – no appeal, no habeas corpus application, no judicial review, no judicial input whatsoever.

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38 Canada (Min. of Indian Affairs and Northern Development) *v.* Ranville (1982), 139 D.L.R. (3d) 1.
40 Compare the case of Robert Judge, *infra*, Chapter 4, note 152.
4. Double Criminality Revisited

By the time Armstrong and Hernandez were adjudicated, Edward Greenspan had already successfully represented Leslie C. Cohen, a native of Timmins, Ontario, who had rented a car from Hertz Corporation in Virginia on 20 October 1972, agreeing to return it to the rental agency at Detroit, Michigan ten days later. Not only did Cohen fail to return the car as promised, but in February he was found to be in possession of it in Ontario – with stolen licence plates and a new vehicle insurance policy covering the car in his name. It would have been impossible to argue that a crime had not been committed on both sides of the border, and so argument hinged on where exactly the crime had taken place.

Under Virginia law, Greenspan pointed out, when a rented car is not returned, the renter is deemed to have formed the intent to defraud at the time and place where he rented the car. But there was no indication that Cohen had formed any such intention at the time of rental. In fact, on the due date he was in Michigan, and so, as Haines J. acknowledged, “it is difficult to say when the applicant formed the intent to keep the car.”

Under cross-examination, the key expert witness for the requesting state, in the course of expounding on the law of Virginia, admitted that in Virginia extraneous details could and likely would be led at a jury trial to prove “larcenous intent,” including the fact “that he did not pay his hotel bill about the same time as signing this bailment contract.

Q. Well, I am afraid that isn’t in evidence.
A. Well, it would be in Virginia. In Virginia it would be admissible evidence. I am trying to explain how you could get this to a jury. I could also show that a removal and according to Virginia law, or the law that Virginia has adopted, the removal of the car from the area to which it was to have been delivered, in this case across the United States and Canadian boundary into Canada, there would [ – ] there then

41 Re Commonwealth of Virginia and Cohen (No. 2) (1973), 14 C.C.C. (2d) 174 (Ont. H.C.J.) at 183.
necessarily follows an inference, which would go to the jury as to the larcenist’s intent at the time of his making the bail agreement...in Arlington, Virginia.\textsuperscript{42}

The extradition judge would accept none of this sophistry: “There is no evidence at all that a larcenous intent was formed by the applicant in the Commonwealth of Virginia.”\textsuperscript{43}

Greenspan then made the same argument regarding the applicability of the \textit{Canadian Bill of Rights} that he had made in \textit{Armstrong} before the Federal Court of Appeal. Although Haines J. expressed sympathy with the argument, he rejected it on the grounds that it would create turmoil in extradition proceedings:

Mr. Greenspan argued that a decision of the Federal Court of Appeal is not binding upon the Supreme Court of Ontario and that in the absence of written or recorded reasons, the Supreme Court of Canada cannot be taken to have ruled upon the matter. While I agree with his submission that a judgment of the Federal Court of Appeal is not binding upon this Court, the judgment is binding upon extradition Judges. If I were to rule that the Canadian Bill of Rights requires cross-examination upon affidavit evidence in extradition hearings, the result would be that extradition Judges would be put in an intolerable position....

If this matter had come before me without the Federal Court of Appeal’s decision, I would not necessarily have agreed with their approach. In an era of jet travel and telephone, there is less need for the use of affidavit evidence than there was in the 19\textsuperscript{th} century, when extradition treaties were first signed.\textsuperscript{44}

Nonetheless, Cohen was discharged on the grounds that intent to commit larceny in Virginia – a primary element of the offence – could not be proved. Haines J. pointed out that Cohen had already spent four months in Canadian jails, and in any case Hertz Corporation had the right to commence civil actions against him for rent due.\textsuperscript{45}

\textsuperscript{46} 507 F. 2d 925, 1974 U.S. App. LEXIS 5692 (U.S. Court of Appeals, 2d Cir.).
\textsuperscript{47} However, they dropped that argument on appeal – \textit{ibid}, at 928.
\textsuperscript{48} \textit{Ibid.}
5. Interpreting the Outgoing Treaty

Perhaps because a new treaty was imminent and drew attention to the underlying issues of extradition, American and Canadian courts paradoxically enough scrambled to clarify the old treaty and its supplements while they were still in effect. In *Bloomfield v. Ferrandina* (1974), for example, appellants David Bloomfield and Bennett Ettinger had been acquitted on charges of conspiracy to import, export and traffic in hashish, only to have the decision reversed on appeal. The New Brunswick Court of Appeal entered a conviction *in absentia*, the two accused having returned to New York. They argued that they were not "convicted" within the meaning of the Webster-Ashburton Treaty because they had had their acquittals overturned and convictions substituted on appeal in their absence. In affirming the judgment that they were extraditable back to Canada, Circuit Judge Oakes characterized their argument as "ingenious" but "not what the treaty-makers had in mind." Bloomfield and Ettinger had further argued in their extradition hearing that since hashish was now defined as a "controlled substance" rather than a "narcotic drug," the 1925 Convention did not apply. The clinching argument used by the United States Court of Appeal was ironic only because it came to be so familiar in Canada in the reverse situation twenty years later:

Our "sense of decency" is not shocked either by this Canadian conviction or by the tough, apparently mandatory sentence of seven years; the importation of drugs across foreign border lines is a serious offense, whatever arguments can be made for "decriminalization" in this country.

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46 507 F. 2d 925, 1974 U.S. App. LEXIS 5692 (U.S. Court of Appeals, 2d Cir.).
47 However, they dropped that argument on appeal – *ibid*, at 928.
Meanwhile, in *Cotroni v. Attorney-General of Canada* (1974), the Supreme Court of Canada settled a similar issue – whether the crime of *conspiring* to import a narcotic is a crime against the laws for the suppression of the traffic in narcotics as specified in the 1925 Supplementary Convention to the Ashburton-Webster Treaty. Although the Federal Court of Appeal had granted leave to appeal that question, the Supreme Court was quick to answer it in the affirmative. Earlier, in the same case, the Federal Court of Appeal had ruled that it had no “implied or inherent power” to set bail under s. 2(f) of the *Canadian Bill of Rights*.

The Federal Court of Appeal continued to interpret the Ashburton-Webster Treaty (as amended by various supplementary conventions) in new ways, in one case refusing to apply the *ejusdem generis* rule to interpret once again the phrase “money, valuable security or other property” – this time ruling that “other property” applied to stolen goods. The extradition judge had applied the *ejusdem generis* rule according to the precedent set by *Re Cohen*, finding that the court there dealt with the “identical” offence. “Accordingly, it follows that the offence in this case is not an extraditable offence because a quantity of steel cannot be construed *ejusdem generis* with money or valuable security.” In reversing the decision of the extradition judge, Ryan J.A. bluntly declared that both *Re Cohen* and *Re Rosen* had been wrongly decided. He rejected the rather convincing argument that the framers of the 1951 Supplementary Convention on Extradition (which revised the Ashburton-Webster Treaty) had

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50 *Ibid.* at 516. The same question was addressed in *Re Bing Hin Low*, [1976] 2 W.W.R. 560 (B.C.S.C.), where the United States sought to extradite four accused who, with 16 others, were charged in the United States with conspiracy to import narcotics.
51 *Re Cotroni and U.S.A.* (1973), 15 C.C.C. (2d) 76. This case was later distinguished in *Re State of Arizona and Thompson and Schliwa* (1976), 30 C.C.C. (2d) 148 (Ont. Co.Ct.), where bail was refused despite the fact that the extradition judge acknowledged that he had jurisdiction to grant it.
53 (1904), 8 C.C.C. 251, 8 O.L.R. 143.
deliberately rearranged the wording of the phrase to read, "Obtaining property, money or valuable securities by false pretences." This, he said, would obviously include property. Rather, Ryan J.A. accepted an editorial note appended to the report of the Cohen case that was critical of the application of the *ejusdem generis* rule. That "more natural reading" was in accord with LaForest's observation that "In construing extradition treaties and statutes, it is a well established rule that courts should give them a fair and liberal interpretation with a view to fulfilling Canada's international obligations."55

Even after the new Treaty came into force with exchange of instruments of ratification on 22 March 1976, the Ashburton-Webster Treaty continued to be applied by both the United States and Canada to cases arising before that date. Thus, on 3 May 1977, the United States Court of Appeals Sixth Circuit applied the older treaty in *O'Brien v. Rozman*,56 where it affirmed the judgment of the district court that Wayne William O'Brien should be sent back to Canada for his trial for a murder committed in North Vancouver, British Columbia on 17 March 1975.57 Similarly, on 18 July 1977 the U.S. District Court in Atlanta, Georgia, applied the 1842 Treaty in *Freedman v. United States*,58 denying Ely Freedman habeas corpus in an extradition case brought by Canada, which on behalf of Ontario wanted to return him to face trial for five criminal charges in connection with a secret commission paid in 1971 for the sale of securities in "Buffalo Gas & Oil Company." The secret commission was first discovered by the Commercial Crimes Branch of the RCMP in 1973, but extradition of Freedman was not initiated until 1976.59 The Court found that commercial bribery contemplated by the Canadian

Criminal Code was not criminal in Georgia, as it was required to be if it were to be criminal "according to the laws of the place where the person so charged shall be found" as specified by the Ashburton-Webster Treaty;\(^{60}\) by this standard, Freedman could only be extradited to face charges of fraud.

In the Federal Court of Appeal in Canada in 1978, the question arose whether a plea of guilty made in 1973 prior to sentencing would amount to a "conviction" for the purposes of extradition. Heald J.A. ruled for the majority that the Extradition Act must be read and construed "so as to be in harmony with the provisions of the applicable Extradition Treaty which, in this case, is the Supplementary Convention of 1889."\(^{61}\) He noted that Article 7 distinguished between a "record of conviction" and "the sentence of the Court," treating them as separate matters. Applying that finding to the Extradition Act, the Court found that McMahon had been convicted of the crime the moment he pled guilty.\(^{62}\)

In *Ashkenazi v. Director of Cowansville Penitentiary* (1979),\(^{63}\) counsel for Ashkenazi argued in an application for habeas corpus that the material presented to the extradition commissioner did not comply with the requirements of the new Treaty since it had not been certified by a consular officer. In rejecting the application, the Quebec Supreme Court ruled that the Treaty had come into effect after the commission of the crimes alleged, and "according to art. 18(2) of the treaty, such crimes were subject to the provisions of the former treaty, which contained no such requirement."

Even as late as 1983, courts in Canada routinely referred to the Ashburton-Webster Treaty where crimes had been committed prior to the 1976 ratification, the new treaty having

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\(^{60}\) *Ibid.*, at 1262.

\(^{61}\) *Re U.S.A. and McMahon* (1978), 40 C.C.C. (2d) 250 (F.C.A.)


no retroactive effect by virtue of Article 18(2). Thus, in *Meier v. Minister of Justice*, Cattanach J. reviewed the comparative roles of an extradition judge and the Minister of Justice outlined in the *Extradition Act*, construing it in conformity with the 1842 Treaty:

In my view, there is no incompatibility with the provisions of the Ashburton-Webster Treaty of 1842. Article X sets forth the agreement between the two contracting States and is the forerunner of s. 21 of the present Act providing for not surrendering fugitives for political offences. There was introduced into the Treaty in 1889 the treaty provisions of S. II and III. The purport thereof is likewise included in ss. 21 and 22 of the Extradition Act. Article II provides that if any question should arise as to whether an offence is of a political character “the decision of the authorities of the government in whose jurisdiction the fugitive shall be at the time shall be final.” The words “the authorities of the government” clearly mean the Executive authorities and certainly not the judiciary.

He did not refer to the new Treaty beyond his oblique initial reference to it with respect to the United States relying on it to bring the extradition request forward in the first place.

In 1978, the Rhode Island petitioner for habeas corpus in *Sabatier v. Dambrowski* argued creatively that “there is no valid extradition treaty between the United States and Canada”—or at least no treaty “which would apply to the offenses here alleged,” namely, a 1975 robbery in which Sabatier was alleged to have “caused bodily harm with intent to endanger life.” The Court agreed that the schedule of extraditable offenses set out in the Treaty of 1971 were not germane, and agreed further that “causing bodily harm with intent” was not a recognized extradition offence. However, the Court found that Article 10 of the Webster-Ashburton Treaty specifically established robbery as an extraditable offence. The court stated that, “considering the substantial political and geographical identity of Canada as a Dominion both before and after the Statute of Westminster,” the 1842 Treaty and

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supplementing conventions constituted the “prior agreements” on extradition alluded to in Article 18 of the new Treaty.

6. Leonard Peltier and the AIM Revolt

Undoubtedly the greatest failure of both judicial and executive discretion in Canadian extradition history surrounds the decisions of both the extradition judge and the Minister of Justice in the case of Leonard Peltier, an American Indian Movement (AIM) leader accused of the murder of two FBI special agents at Wounded Knee, South Dakota. Quite simply, they were duped by overzealous members of the FBI, who led suborned evidence that since has been debunked, repudiated, disclaimed and recanted many times over – to no practical effect. Twenty-seven years after his initial arrest by the RCMP at Smallboy’s Camp west of Rocky Mountain House, Leonard Peltier remains in a North Dakota jail. Yet there was and is no direct evidence to support his conviction.

Naturally enough, persons in Canada facing murder charges in the United States are concerned lest they face execution if they are delivered up to a retentionist state. At the time the new Treaty came into force on 22 March 1976, Leonard Peltier was in RCMP custody. However, the alleged crime had occurred the previous fall – before the Treaty came into force.

Peltier had a sound reputation as an AIM leader with political savvy. The tribal elders of Pine Ridge Reservation near Oglala in South Dakota had invited him to stay at the reservation to help protect the traditional elders and their families from raids by an FBI-organized GOON squad – “GOON” standing for “Guardians of the Oglala Nation.” On 26 June 1975 (so the official story goes) two FBI agents, Ray Williams and Jack Coler, drove onto the reservation in hot pursuit of a red truck driven by a man suspected of having stolen a pair of cowboy boots. Documents discovered long after the trial through an application under
the Freedom of Information Act revealed that an assortment of FBI agents, Bureau of Indian Affairs (BIA) agents, and GOONS, all armed, had been waiting in the woods for 20 minutes before the first shots were fired, initially from the police side of the line.\textsuperscript{68} In the course of the ensuing firefight, the two FBI agents and one Sioux man were shot dead. Peltier described the morning, which had started out by his dozing in his tent, from where he was able to hear the women cooking pancakes and smell the scent of fresh coffee:

 But suddenly this beautiful and peaceful morning was cut short by the staccato sound of gunfire. It seemed far off, and at first I dismissed it as someone practicing in the woods. Then I started hearing the screams. My heart nearly leaped out of my chest. Our spiritual camp had abruptly become a war zone....

 I took temporary cover by a stand of trees nearby and tried to figure out what in hell was going on. Two cars, those shiny ones that always meant trouble for Indians, were parked askew from each other in a field out toward the road, maybe a hundred and fifty yards away. That's where the first shots I'd heard had been coming from, but now there was the sound of gunshots coming from all over, behind me, ahead of me, seemingly from every direction. Were we surrounded and about to be slaughtered? I fired off a few shots above their heads, not trying to hit anything or anyone, just to show that we had some kind of defense so they didn't just roll in and slaughter us. A few other brothers were doing the same with the few rifles we had.\textsuperscript{69}

As an AIM leader, Peltier was known to the FBI, who had already charged him with attempted murder in Milwaukee, Wisconsin in 1972. They were later to charge him with additional trumped-up counts of attempted murder near Ontario, Oregon on 14 November, 1975 and burglary near Nyssa, Oregon on the following day — even though he had long been a refugee at Smallboy’s Camp in Alberta, Canada, by then.\textsuperscript{70}

 At the extradition hearing, counsel for the United States proceeded on the Wisconsin charge, producing an official-looking bundle of documents bearing the signature of Henry Kissinger on the front page. The then Secretary of State certified that "the document hereunto


\textsuperscript{70} \textit{Re U.S.A. and Peltier} (1976), 32 C.C.C. (2d) 121 (B.C.S.C.), at 121.
annexed is under the Seal of the State of Wisconsin.” Other Wisconsin officials certified that signatures and attached documents were in “proper form.” But nowhere in the authenticated record did any official certify that the documents were true copies of the originals. Peltier’s counsel, D.J. Rosenbloom, argued that this deficiency was fatal to the admissibility of the authenticated record from Wisconsin. Schultz J. agreed. Although G.V. LaForest had said in *Extradition to and from Canada* that “extradition laws passed to give effect to international agreements should be liberally construed”\(^{71}\) in favor of the requesting nation, the better position on statutory interpretation, Schultz held, was a line of cases beginning with *Re Lewis* (1874),\(^{72}\) where Gwynne J. had stated that where affidavit evidence is tendered, “It is the right of the accused, which impartial justice and the letter and spirit of the law award to him, that the minutest forms and technicalities with which the Legislature hath surrounded the production of this species of ex parte testimony, shall be strictly complied with.”\(^{73}\) Applying this principle to *Peltier*, Schultz J. refused to receive or admit into evidence the defective authenticated record from Wisconsin.\(^{74}\)

The authenticated record from South Dakota appeared to be in better technical form. However, it presented an affidavit from Myrtle Poor Bear, who claimed not only to be a girlfriend of Leonard Peltier, but also to have witnessed the shooting of the FBI officers. Peltier denied even knowing the woman, but the affidavit was unassailable, since under the provisions of the *Extradition Act* Ms. Poor Bear was not presented for cross-examination: her evidence could only be challenged at trial once Peltier was returned to South Dakota.

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\(^{72}\) 6 P.R. 236.

\(^{73}\) *Ibid.* at 237. This principle was repeated in *Re Harsha (No. 1)* (1906), 10 C.C.C. 433 at 441, 11 O.L.R. 494 at 501 (Ont. C.A.), per Osler, J.A.; *Re Moore* (1910), 16 C.C.C. 264 at 273, 20 Man. L.R. 41, per Metcalfe, J.; and *Miller v. The Queen* (1963), 42 W.W.R. 141 at 146, 41 C.R. 238, 6 Crim. L.Q. 247 at 147-148 (Alta.), per Riley J.

\(^{74}\) Peltier was finally acquitted of this charge in 1978. See Peltier, *Prison Writings*, *supra*, note 68, p. 225.
Rosenbloom applied to Schultz J. for relief under the *Canadian Bill of Rights*, arguing (correctly, as it turned out) that as a high-profile leader in the American Indian Movement, Peltier would be exposed to cruel and unusual treatment or punishment while incarcerated before and during his trial. Furthermore, his status in the community as an "Indian leader" charged with the murder of FBI agents would all but guarantee that he would not receive a fair trial in South Dakota. Finally, under the law of South Dakota, he would be subject to the death penalty, which was the epitome of "cruel and unusual punishment."

Rosenbloom was in effect asking the court to anticipate the treatment that Peltier might expect to receive in a foreign state. Schultz J. refused to extend the powers of the *Canadian Bill of Rights* beyond the territory of Canada, falling back on the "rule of non-inquiry" – the assumption that courts and judges in foreign states with which Canada has a treaty would necessarily act fairly. This was precisely the position that had been taken by the hard-nosed Sir John Beverley Robinson in his notorious decision in *Anderson*: "We may be told that there is no assurance that the prisoner...will be tried fairly and without prejudice in a foreign country; but no court ... can refuse to give effect to an act of parliament by acting on such an assumption." Schultz J. held that the avoidance of the death penalty and the other issues raised fell to the discretion of the Minister, not to the discretion of the Court. He committed Peltier for extradition, and the matter went forward to the Minister of Justice.

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75 *An Act for the Recognition of Human Rights and Fundamental Freedoms*, 1960 (Can.), c. 44. As amended by 1970-71-72, c. 38, s. 29.
The Minister considered whether the offences were of a political character, and determined that they were not. He opined that Peltier's constitutional rights, including the right to due process under s. 1(a) of the Canadian Bill of Rights, would not be infringed if Peltier were to be returned to the United States. In exercising his discretion to surrender Peltier to the American authorities, the Minister relied on the affidavit evidence of Myrtle Poor Bear, as had Schultz J. in the Supreme Court of British Columbia. Significantly, at Peltier's trial in Fargo, North Dakota, Myrtle Poor Bear was dropped from the witness list. On 18 April 1977, a jury found Peltier guilty of two counts of first degree murder. His conviction was based on circumstantial evidence, including analysis of firearms and ammunition found in the burned-out hulk of a car that ultimately could not be connected to him at all. Even the firearms evidence was tainted, since federal prosecutors suppressed exculpatory evidence that the ammunition did not match his gun. Nonetheless, Peltier was sentenced to two life terms, to be served consecutively. He appealed, and over the next 24 years continued to appeal, hoping for a new trial on the grounds that the FBI and expert witnesses had either tampered with, juggled, or withheld forensic evidence, specifically ballistics evidence with respect to firing pin markings on cartridge casings.

A hearing in 1988 determined that there was no question that the firing pin on a badly burned gun alleged to be Peltier's – but found in the wreck of a station wagon in Wichita, Kansas on 10 September 1975 – did not match the marks on spent cartridges found in the vicinity of the shooting. This had been the subject of a teletype supplied to the FBI with

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78 Compare U.S.A. v. Pitawanakwat, supra, note 67, discussed in Chapter 5 below.
which Peltier’s counsel was not supplied prior to trial. In any case, there was no evidence linking that gun to Peltier. Peltier further alleged that the FBI had deliberately intimidated witnesses, including Myrtle Poor Bear, in order to obtain affidavit evidence sufficient to return him to the United States. This was of no consequence to the court, since Ms. Poor Bear was not called as a witness, even though a subsequent hearing found that Peltier had been extradited on the basis of false affidavits sworn by her after receiving threats from the FBI.

On 10 November 2000, Myrtle Poor Bear testified under oath for the first time before former Quebec Court of Appeal judge Fred Kaufman, confessing what Peltier had been saying all along: that her incriminating statement had been coerced by FBI agents anxious to close the file on their deceased colleagues.

In her first public statement on the case, Ms. Poor Bear testified that she agreed to implicate Mr. Peltier in the 1975 shooting deaths of two Federal Bureau of Investigation agents in North Dakota only after she had endured months of unrelenting harassment and threats from other FBI agents.

“They told me they were going to take my child away from me. They told me they were going to get me for conspiracy, and I would face 15 years in prison if I didn’t co-operate. They said they had witnesses who place me at the scene.”

The 48-year-old woman said her claim that she was Mr. Peltier’s girlfriend and that she saw him shoot the agents was utterly false. She testified she has never met Mr. Peltier, and that she was actually 80 kilometers away at the time of the shooting.

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80 This was a finding of fact in a special hearing on 22 May, 1985. *U.S.A. v. Peltier, 609 F. Supp. 1143, 1985 U.S. Dist. LEXIS 19618* (District Court of North Dakota), at 1152-1153.
Her whereabouts at the time of the shooting was corroborated by her sister, Elaine Poor Bear-Martinez, who also testified at the Toronto hearing.

Ms. Poor Bear testified that the FBI told her that if she signed a false affidavit incriminating Peltier in the murders of the FBI agents, they would not threaten her with taking away her children any more. However word soon leaked out that she was an FBI informant. She testified that the agents then told her that without their protection, she “would be killed as a traitor by the American Indian Movement.” She claimed the FBI showed her photographs of decomposing body parts of Anna Mae Aquash, an Indian activist from Nova Scotia who had been executed and dumped into a ravine on the reserve. Aquash had been arrested by the FBI along with other activists on 5 September 1975, and although she was not present for the confrontation at Wounded Knee was there not long afterwards, trying to comfort the terrified residents who had been under siege. On 5 March, 1976, her body was found, frozen stiff, in a ravine at Pine Ridge. A Bureau of Indian Affairs coroner reported that she had died of exposure, and she was quickly buried. However, her family from the MicMac Reservation in Nova Scotia had the body exhumed and ordered an autopsy of their own. The new coroner discovered that Aquash had been shot in the back of the head at close range – hardly a detail that a BIA coroner could overlook. One of Aquash’s former acquaintances in AIM, John Graham, a native of the Yukon and father of eight, is currently facing extradition from Canada to the United States, where 27 years after the fact he was charged with her murder.

Before her death, Aquash claimed that she had been threatened with death by an FBI agent unless she gave false testimony against Peltier and other AIM members. She had refused to do so.84 In Toronto in November, 2000, Ms. Poor Bear testified that the agents

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84 Peltier, Prison Writings, supra, note 68, p. 227 (Appendix I).
actually hung Aquash’s autopsy pictures on the wall in front of her: “They said that’s how I was going to end up if I didn’t co-operate with them. They said they could kill me and get away with it. I was very scared.”

Judge Kaufman was impressed with Ms. Poor Bear’s testimony. “I say without hesitation that each of the witnesses appeared honest and credible,” he wrote in a letter to then President Bill Clinton. He urged the President to consider granting Peltier executive clemency. He concluded that Peltier had been extradited from Canada “under false pretenses” and that his extradition and jailing were “highly questionable”: “I am satisfied that if this had been known when the extradition hearings took place, the request to extradite Peltier would likely have been refused.”

One member of the Leonard Peltier Defence Committee, Professor Dianne Martin of Osgoode Hall Law School at York University in Toronto, stated, “A strong case has now become overwhelming. There is a clear pattern of [U.S.] government misconduct.” Even constitutional law expert Professor Peter Hogg wrote a letter to the White House saying that it appeared very likely that a miscarriage of justice had been done in the Peltier case. “I add my voice to those who urge that executive clemency be granted,” he said. Nonetheless, Canadian Justice Minister Anne McLellan wrote to United States Attorney-General Janet Reno that she saw “nothing untoward in the case.” Undoubtedly, the Minister’s statement of opinion served to scuttle any chance Peltier may have had for executive clemency. Executive “discretion” had won the day.

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86 Ibid.
87 Kirk Makin, “Murder, guilt, and 25 years of fear,” supra, note 82.
88 Ibid. “I’ve seen a lot of things happen in the Peltier case over the years, but that stunned me,’ Prof. Martin said.”
CHAPTER FOUR

EXECUTIVE AND JUDICIAL DISCRETION IN THE CANADA-U.S. TREATY

1. Judicial Interpretation of Extraditable Offences

The Extradition Treaty between Canada and the United States of America\(^1\) was designed to “make more effective the cooperation of the two countries in the repression of crime by making provision for the reciprocal extradition of offenders.”\(^2\) However, political turmoil in America surrounding “getting out of Vietnam,” and later the Watergate scandal, led to a delay in ratifying the Treaty in the United States. Furthermore, American negotiators were not satisfied that all the bases were covered with respect to hijacking, terrorism and drug smuggling. One proposed amendment in the pre-ratification period limited the list of exceptions to the political offences exemption, and another redefined illegal drugs in conformity with various multilateral Conventions. Acting Secretary of State Joseph John Sisco accepted the changes on behalf of the United States on 9 July 1974. However, the current Extradition Treaty between Canada and the United States was not ratified until 22 March 1976.\(^3\)

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\(^1\) Extradition between Canada and the Unites States of America, Canada Gazette, Part I, 3 April 1976, p. 1521.
\(^2\) Ibid., Preamble.
\(^3\) The new Treaty replaced all previous agreements in force between Canada and the United States. However, Article 18(2) specifies that extradition crimes committed before the Treaty came into force (on 22 March 1976) “shall be subject to extradition pursuant to the provisions of such agreements.” An attempt was made to correct this curious provision in Article VIII of the Protocol of 1988: “Notwithstanding paragraph (2) of Article 18 of the Extradition Treaty, this Protocol shall apply in all cases where the request for extradition is made after its entry into force regardless of whether the offense was committed before or after that date.” Strange as it may seem,
The prerogative for negotiating treaties lies with the executive. In Canada, "the Minister [of Justice] is responsible for the implementation of extradition agreements,"\(^4\) including monitoring treaty compliance and receiving, administering and monitoring the progress of requests made under the Treaty. "The decision maker on this issue is the Minister, not the extradition hearing judge."\(^5\) The Supreme Court of Canada has consistently rejected any role an extradition judge may take upon himself in the nature of monitoring compliance with treaties. "Parliament chose to give authority to the Minister of Justice. It is the Minister who must consider the good faith and honour of this country in its relations with other states."\(^6\) In both \textit{U.S.A. v. McVey} (1992)\(^7\) and \textit{U.S.A. v. Lepine} (1993),\(^8\) "the court held that attempts by the courts to monitor treaty compliance were a usurpation of a function of the executive."\(^9\) In the wake of these pronouncements, treaty interpretation came to fall entirely within the discretionary realm of the Minister of Justice rather than the judiciary.

Nonetheless, judges had other tools to work with to achieve the same ends. To the extent that the Act tracks the Treaty, and the \textit{Canadian Charter of Rights and Freedoms} establishes some of the same values advanced in the Treaty, compliance with Treaty provisions can be achieved judicially through the back door – even though the new \textit{Extradition Act} specifically assigns the Minister the responsibility of applying certain safeguards specified within the Treaty. Only when the Minister fails to exercise discretion, or exercises it

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\(^4\) \textit{Extradition Act}, s. 7.
\(^6\) \textit{Idziak v. Canada (Minister of Justice)} (1992), 77 C.C.C. (3d) 65 (S.C.C.), reconsideration refused (1992), 9 Admin. L.R. (2d) 1 n (S.C.C.), at 86, per Cory J.
inappropriately, does the judiciary at the appellate level have discretion to overturn the
Minister’s decisions, in the interests of justice.\textsuperscript{10}

Articles 1 and 2 of the Canada-United States Treaty are joined at the hip. Article 1, as amended, specifies that each contracting party agrees to extradite “persons found in its territory who have been charged with, or convicted of, any of the offenses covered by Article 2 of this Treaty committed within the territory of the other.” In the first Canadian case arising entirely after the new Treaty came into force, \textit{Meier v. U.S.A.}, (1979),\textsuperscript{11} the Federal Court of Appeal was required to interpret Article 2:

(1) persons shall be delivered up according to the provisions of this Treaty for any of the offenses listed in the Schedule annexed to this Treaty, which is an integral part of this Treaty, provided these offenses are punishable by the laws of both Contracting Parties by a term of imprisonment exceeding one year.

(2) Extradition shall also be granted for attempts to commit, or conspiracy to commit or being a party to any of the offenses listed in the annexed Schedule.

(3) Extradition shall also be granted for any offense against a federal law of the United States in which one of the offenses listed in the annexed Schedule, or made extraditable by paragraph (2) of this Article, is a substantial element, even if transporting, transportation, the use of the mails or interstate facilities are also elements of the specific offense.

\textit{Meier} involved the forgery of documents purportedly signed by the famous recluse Howard R. Hughes and filed by John H. Meier in a suit brought against him by Hughes Tool Company (later Summa Corporation). Meier had allegedly filed the forged documents in a bid to postpone court proceedings. It was alleged that he “did corruptly endeavour to influence, obstruct and impede the due administration of justice” with the forged documents, “knowing

\textsuperscript{10}Initiating the process of extradition through diplomatic channels is the obvious domain of executive rather than judicial discretion under Article 9. The specifics of this process are governed by the \textit{Treaty between the Government of Canada and the Government of the United States of America on Mutual Legal Assistance in Criminal Matters} (the “Mutual Assistance Treaty”), and in Canada by the \textit{Mutual Legal Assistance in Criminal Matters Act}, R.S.C. 1985. c. 30 (4th Supp.). In Canada, this falls to the Minister of Justice, who must be satisfied that several elements are in order before exercising discretion by issuing an “Authority to Proceed” under s. 15 of the current Act. See Chapters 5 and 6 \textit{infra}.

\textsuperscript{11}[1979] 2 F.C. 461,
that they had been fabricated and were not what they purported to be.” A second count of the same charge alleged that he publicized a fabricated memorandum from a company official.

Counsel for Meier argued that under Article 2 of the new Treaty, an extradition judge could only grant extradition where the offence was against a federal law of the United States specifically including the elements of transporting, use of the mails, or using interstate facilities. The Court disagreed.

It is to be noted that in the Treaty the word “offense” is used to describe both (1) the deviant conduct in which the fugitive is alleged to have engaged, i.e. the specific infraction of the law, and (2) the generic description of the elements constituting the essentials of some recognizable crime, e.g. murder, bribery, forgery, perjury, or arson. In general, as we understand it, the definition of “crimes” and the provision of punishment therefor in the United States is a field of legislation reserved to the individual States of the Union and the legislative authority of the Congress of the United States does not ordinarily extend to them; however federal laws may be enacted there creating offences and providing punishment therefor....

Meier’s counsel argued that extradition of his client under Article 4(3) would not be proper since Meier had not used the mails or interstate facilities, nor did the federal charges against him entail transportation. The Court virtually had to recast Article 2 in order to make sense of the provision:

If a person sought to be extradited has been charged with an infraction of a law of the United States and a substantial element of the conduct constituting the infraction charged would of itself constitute one of the offenses listed in the annexed schedule, extradition shall be granted, notwithstanding that transporting, transportation, the use of the mails, or interstate facilities are also elements of the specific infraction charged.

In other words, for Article 2(3) to apply, the alleged offence must be a federal offence, one element of which was also an offence listed in the schedule. The Court noted, “The applicability of the Treaty is brought down on the fugitive by his deviant acts and remains

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12 Ibid., para. 10.
13 Ibid., para. 14.
related to the consequence of those acts. Where, as here, the fugitive employed conduct which constituted a listed offence — forgery — to accomplish the infraction of the federal law, he had brought himself within the ambit of section (3).”

The failure of the United States to make out an alleged offence as also constituting an offence in Canada became even more of an issue in *U.S.A. v. Denbigh* (1990), where the Supreme Court of British Columbia refused to extradite a man accused of drug smuggling and racketeering in connection with the seizure of a shipload of 13,000 pounds of marijuana off the coast of Vancouver Island, partly because the American charges of “racketeering” have no parallel in Canada. Although the Treaty had been amended by exchange of diplomatic notes in 1974 to criminalize the production, manufacture, trafficking and importation of drugs in

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14 *Ibid.*, para. 15. Article 2(2)(i) of the Treaty appears to give greater powers to the United States than to Canada where use of the mails is concerned. This clause specifies, “An offense is extraditable notwithstanding ... that conduct such as interstate transportation or use of the mails or of other facilities affecting interstate or foreign commerce, required for the purpose of establishing jurisdiction, forms part of the offense in the United States.” Protocol of 1988, Article I - 2(2). There is no converse provision for “use of the mails or of other facilities” affecting foreign commerce as part of an offence in Canada. In the United States, the use of the mails has become a “hook” that the federal executive authorities have traditionally used to bring an offence within federal jurisdiction in the absence of a statutory provision that would otherwise have that effect. The “mails” provision allows the Government of the United States to act on an offence even where the state may choose not to. Use of interstate “wires” such as telephone and Internet systems has a similar result. These provisions have the effect of expanding United States federal jurisdiction. In case law interpreting the interstate commerce clause, the federal courts have ruled that use of this type of process is constitutionally permissible. Canada does not need to provide for similar powers under the Treaty since the Government of Canada does not have such a constitutional hurdle to overcome. In Canada, criminal law and procedure, including the drafting of the Criminal Code, falls under federal rather than provincial jurisdiction by virtue of s. 91(27) of the *Constitution Act, 1867*. Several specific federal statutes such as the *Firearms Act*, the *Fisheries Act*, the *Narcotic Control Act*, and the *Proceeds of Crime (Money Laundering) Act* fall to the federal government to both enact and enforce. Section 92(14) of the *Constitution Act, 1867* governs the administration of justice in the provinces, including provincial policing, prosecution, and courts of criminal jurisdiction. However, “there is (unexercised) concurrent federal power as well on the basis that federal legislative power over the criminal law (or any other subject matter) carries with it the matching power of enforcement.” Peter W. Hogg, *Constitutional Law of Canada* (Toronto: Carswell, 1998), p. 436.

15 (1990-05-25) BCSC CC881333 (Vancouver Registry), per MacDonell J.

both countries, “what is not contained in the Schedule to the Treaty are the offences of racketeering or money laundering, interstate and foreign travel or transportation in aid of racketeering enterprise charges.”\(^{17}\) There being no similar laws in Canada, said the court, the racketeering charges “fail to meet the duality test.” Furthermore, money laundering “was not a crime in Canada at the time of the charges, so that cannot be relied on either.”\(^{18}\)

Although there was evidence that Denbigh was a member of the criminal enterprise involved in the drug smuggling, there was no direct evidence to link Denbigh to seizure of the ship in British Columbia or to show that he actually had anything to do with the shipment: “The circumstances of the association may be suspicious, but that falls woefully short of proof of involvement.”\(^{19}\) One by one, the four counts against him fell – including a count of importing hashish. The application to extradite him was dismissed, despite the fact that there were “overt acts connected with money laundering proven, both with respect to Denbigh and, of course, others involved in the Enterprise, and a properly instructed jury could reach the conclusion that there had been overt acts proven to complete a conspiracy.”\(^{20}\) The missing element in Canadian law was racketeering.

Such concerns were to a great degree obviated the following year with the 1991 ratification of the amendments to the Treaty in the Protocol of 11 January 1988, by which any offence garnering a punishment greater than one year became extraditable. This amendment, reinforced by s. 3(1) of the current Canadian *Extradition Act*, which focuses on the underlying

\(^{17}\) Ibid., p. 6
\(^{18}\) Ibid.
\(^{19}\) Ibid., p. 8.
\(^{20}\) Ibid., p. 9.
conduct rather than the alleged crime, effectively removes most conceivable barriers to determining double criminality.21

Article 1 of the Treaty also alludes to situations of extraterritorial jurisdiction specified in Article 3, under which extraterritorial offences are considered extraditable if the State would have legal jurisdiction over such an offence were it committed in similar circumstances at home.22 “If the laws in the requested State do not so provide, the executive authority in the requested State may, in its discretion, grant extradition.”23 Note that the discretion alluded to is specifically executive, not judicial, discretion.

Prior to the passage of the current Extradition Act, the extradition judge had the right, if not the duty, to examine both the alleged conduct of the accused and the foreign law – at least the foreign indictment – to determine that the principle of “double criminality” was met.24 While it becomes increasingly rare for judges to find that conduct in one jurisdiction is not necessarily criminal in the other, they do occasionally exercise their judicial discretion to

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21 Canada v. Barrientos, [1997] 1 S.C.R. 531 (S.C.C.), reversing [1996] 3 W.W.R. 631 (Alta.C.A.). However, the process is not to be used by the requesting state for any other purpose, such as forcing the settlement of civil suits or debt collection in the guise of criminal proceedings: Nebraska (State) v. Morris (1970), 2 C.C.C. (2d) 282 (Man. Q.B.). Similarly, the Canadian Extradition Act does not append a schedule of “extradition crimes,” relying instead on the blanket coverage provided by “imprisonment for a maximum term of two years or more, or by a more severe punishment, subject to a relevant extradition agreement.” Re Lazier (1899), 3 C.C.C. 167, affd 3 C.C.C. 167 at 177 (Ont. C.A.). Accordingly, it is no longer necessary for the offences in the two countries (or any country with which Canada has an extradition treaty) even to be conceptually similar, Extradition Act (1999), s. 3(1); U.S.A. v. Manno (1996), 112 C.C.C. (3d) 544 (Que. C.A.); Cotroni v. Canada (A.-G.) (1974), 18 C.C.C. (2d) 513 (S.C.C.) [Fed.], let alone bear the same name. Section 3(2) of the Extradition Act provides: “For greater certainty, it is not relevant whether the conduct referred to in subsection (1) is named, defined or characterized by the extradition partner in the same way as it is in Canada.”

22 Article 3(1) expands the definition of “territory of a Contracting Party” to include that nation’s air space and territorial waters, vessels and aircraft registered in the nation, or aircraft in flight leased without a crew to a business or resident of the nation. An aircraft is considered in flight from the moment when power is applied for take-off until the moment the landing run ends.

23 Protocol of 1988, Article III.

thwart extradition. In *U.S.A. v. Smith* (1997),^{25} Allan J. refused to commit Robert Lewis Smith for extradition for alleged abduction of his daughters to Canada, despite his obvious violation of an American court order that he not leave Pennsylvania, on the grounds that the Pennsylvania charge – "concealment of the whereabouts of a child" – did not meet the requirement of double criminality.^{26} Similarly, in *Stewart v. Canada (Minister of Justice)* (1998), the British Columbia Court of Appeal looked at the nature of extortion in the United States compared to Canada and found them to be so dissimilar (the American charge lacks the element of overt threat) that Stewart could not be extradited to California to face that charge.^{27}

2. Judicial Limitation of "Double Jeopardy"

   a) *Gallanis v. Pallanck* (1977)

   Article 4(1)(i) of the Treaty specifies that extradition shall not be granted where the person has already been tried for the offence and either discharged or punished for it. The first American case to deal with the new Treaty in any depth decided to accord this protection to a person sought for extradition even though at the time of his offence the Treaty had not been ratified. In *Gallanis v. Pallanck* (1977)^{28} the District Court of Connecticut had rejected Gallanis' application for *habeas corpus* and thereby affirmed the order of the extraditing magistrate to allow Gallanis' extradition to Canada to face charges of securities fraud amounting to $1.6 million. The 1973 charges predated the Treaty – indeed, the alleged fraud

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^{25} (11 December 1997), B.C.S.C. CC970527 (Vancouver Registry), per Allan J.
^{27} *Stewart v. Canada (Minister of Justice)* (1998) (*sub nom. U.S.A. v. Stewart*), 131 C.C.C. 423 (B.C.C.A.), at 434-436; *U.S.A. v. Stewart* (1997), 120 C.C.C. (3d) 78 (B.C.C.A.), at 81, 86. By virtue of s. 15(3)(c) of the *Extradition Act*, judges in Canada now have no authority to make this determination, that duty being delegated by statute to the Minister of Justice, who considers the question of dual criminality before issuing an Authority to Proceed.
dated back to 1971-72. However, in reversing the District Court decision, the United States Court of Appeals for the Second Circuit applied Article 4(1)(i), the protection against double jeopardy.

Gallanis had pled guilty to several counts of securities fraud in the United States, receiving six months’ imprisonment plus five years’ probation. The Assistant United States Attorney in charge of prosecutions against Gallanis attested that the guilty pleas tendered in the United States were intended to cover “every fraudulent involvement that Galanis had that came within the jurisdiction of the U.S. Department of Justice.” Since the Canadian crime involving Champion Securities Corp. Ltd. had been perpetrated on the Canadian company from American soil, the Federal Department of Justice could claim jurisdiction. Thus it could be argued that Galanis had already been punished for the Champion fraud, even though it was not specifically mentioned in any of the indictments to which he pled guilty. No parallel provision to Article 4(1)(i) existed in the Ashburton-Webster Treaty or its supplementary agreements. The Appeals Court held that it was unreasonable to conclude that the drafters of the 1971 Treaty would have wished to defer the obligation of the United States to honour its provisions, including its defences, to apply only to charges arising after the Treaty came into force. Thus the Treaty was construed liberally not in favour of “international obligations” but in favour of individual rights.

Clearly policy considerations were paramount in the minds of the three circuit justices as they compared the two treaties:

Prior to the present treaty, extradition between the United States and Canada was governed by Article X of the Webster-Ashburton Treaty of 1842 between the United States and Great Britain..., a rudimentary one-paragraph provision which listed only

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seven extraditable offenses, as modified by six supplementary agreements between this country and Great Britain and Canada. The objective of the present treaty, signed on December 3, 1971, was to replace this unsatisfactory situation with a new treaty containing a greatly expanded list of extraditable crimes. As President Ford stated in submitting the treaty to the Senate, the purpose was to effect a "modernization of the extradition relations between the United States and Canada."

Article 18(3) of the new Treaty specified that the Treaty would enter into force upon the exchange of ratifications, which did not occur until 22 March 1976. Furthermore, Article 18(2) provided:

This Treaty shall terminate and replace any extradition agreements and provisions on extradition in any other agreement in force between the United States and Canada; except that the crimes listed in such agreements and committed prior to entry into force of this Treaty shall be subject to extradition pursuant to the provisions of such agreements.

The lower courts had agreed with the government position that the final clause of Article 18(2) prevented Galanis from benefiting from the double jeopardy defense. Newman J., the extradition magistrate, had interpreted Article 4 with reference to a letter from Robert S. Ingersoll, Acting Secretary of State, submitting the revised treaty to President Ford in which he specified that the treaty was not "retroactive in effect." The extradition judge also cited the affidavit of a member of the Office of the Legal Advisor of the Department of State who declared unequivocally that "all of the provisions on extradition in other agreements in force prior to the 1971 treaty, and not the provisions of the 1971 treaty, apply to crimes listed in such other agreements which were committed prior to March 22, 1976." But the Court of Appeals did not agree with the magistrate.

Although such a reading would be permissible and perhaps would adhere more closely to the letter of the "except" clause than that urged by Galanis, it is not the only

31 "Message from the President of the United States," ibid., at VI.
32 Cited at Gallanis v. Pallanck, supra, note 28 at 239.
reasonable reading. The purpose of the draftsmen seems to have been two-fold – to make clear that no one who was extraditable under previous treaties should be able to gain immunity because these were “terminate[d]” by the 1971 treaty, and that perpetrators of the many crimes not previously extraditable should not become so by virtue of the new treaty. Presumably the draftsmen were aware of the long-established rule that “extradition treaties, unless they contain a clause to the contrary, cover offenses committed prior to their conclusion.”…

Since the objective of the Treaty was to modernize extradition between Canada and the United States, said the Court, there was no reason to assume that the draftsmen wished to deprive the defendant of the defense of double jeopardy – or any of the other defences listed in Article 4. After all, protection against double jeopardy was a defense “common to most extradition treaties”:

In view of the deep considerations of policy that must have moved the draftsmen to include the double jeopardy provision in this treaty, it would seem reasonable to conclude that they did not wish to defer the obligation of this country to respect it, but rather wished this and other improvements implemented by the 1971 treaty to become operative as soon as the treaty became effective…. We therefore hold that the double jeopardy clause of the 1971 treaty applies in all proceedings begun after the exchange of ratifications even though the crime occurred before.

Even by this logic, Gallanis would not properly fall under the protection afforded by Article 4, since Canada had initially requested extradition on 10 December 1974. However the Court pointed out in a footnote that extradition proceedings were not actually commenced in the United States until 1 September 1976.
b) *Schmidt v. The Queen* (1987)

One of the earliest extradition cases to deal with the issue of double jeopardy was *Schmidt v. The Queen* (1987),\(^ {37}\) the first of a trilogy of cases to reach the Supreme Court of Canada that dealt directly with the interface between the Canada-United States Extradition Treaty and the 1982 *Canadian Charter of Rights and Freedoms*.\(^ {38}\) The judgment in *Schmidt* was released on 14 May 1987, along with those of *U.S.A. v. Allard and Charette*\(^ {39}\) and *Argentina (Republic of) v. Mellino*.\(^ {40}\) In both *Allard* and *Mellino*, LaForest J. referred to *Schmidt* on the substantive issues, making this the pre-eminent case on extradition up to that time. In fact the case remains central to Canadian extradition law, setting a standard that the Supreme Court of Canada followed in the spate of extradition cases that came down in 2001 – *U.S.A. v. Burns*, *U.S.A. v. Cobb*, *U.S.A. v. Shulman*, *U.S.A. v. Tsioubris*, and *U.S.A. v. Kwok*.\(^ {41}\)

Helen Susan Schmidt, a Canadian, was alleged to have abducted her two-year-old granddaughter from Cleveland to New York, where for the next two years she raised the child as her own. She was indicted by two separate grand juries in Ohio with “child stealing” under Ohio state law and “kidnapping” under United States federal law.


The United States is notorious for switching jurisdictions when an initial charge fails to “stick.” United States constitutional case law holds that where different jurisdictions (such as two or more states, or the federal government and a state government) bring separate charges, double jeopardy does not occur. Furthermore, evidence wrongfully obtained in one jurisdiction is not excluded from use in another American jurisdiction. Hence in *U.S.A. v. Langlois* (1989),

the fugitive had been charged with the possession of cocaine and smuggling of cocaine under the law of Maryland. These charges were later dismissed because of unreasonable search, and on the following day the fugitive was charged with the federal offence of possession of cocaine with intent to distribute. In the United States, there are three further possibilities. First, the fugitive may be requested for a second federal offence. Secondly, the fugitive may be requested for a second state offence. Finally, there is the possibility that the fugitive may have been tried or acquitted in one state but his extradition is sought by another state with concurrent jurisdiction. 43

Before the initiation of extradition proceedings, Helen Schmidt had already been tried and acquitted of the federal kidnapping charge after testifying that she had been led to believe that her son was the natural father of the girl, whose mother was a prostitute. 44 A week after her acquittal, on 6 August 1982, Ms. Schmidt returned home to Canada. However, the State of Ohio still sought her extradition for child stealing, a separate offence from kidnapping.

Before the extradition judge in Kirkland Lake, and later in the Ontario Court of Appeal, Schmidt unsuccessfully pled a version of *autrefois acquit* on the grounds that in Canada she

42 50 C.C.C. (3d) 445 (Ont. C.A.).
43 Anne Warner LaForest, *LaForest’s Extradition to and from Canada, Third Edition* (Aurora, Ont.: Canada Law Book, 1991), p. 110, fn. 132. In *U.S.A. v. Andrews*, (1991), 65 C.C.C.(3d) 345 (Man.C.A.), Andrews was committed for surrender to face burglary charges in the United States even though he had been acquitted in Canada on different charges arising from the same facts – possession of stolen property illegally obtained in the same alleged burglary. An exception to the practice of leaving the consideration of *res judicata* to the Minister is the situation in which an individual has been prosecuted in Canada for the same alleged crime. By contrast, in *R. v. Knapp* (1987), 3 W.C.B. (2d) 369 (B.C. Co. Ct.), the British Columbia County Court determined that Knapp’s prior conviction in Canada for conspiracy to traffic in cocaine precluded his surrender on American charges of conspiracy to transport cocaine arising out of the same set of facts. Under the new Act, s. 47(d) provides the Minister, not the courts, with discretion to refuse surrender if “the conduct in respect of which the request for extradition is made is the subject of criminal proceedings in Canada against the person.”
would be protected from such seeming double jeopardy by sections 7 and 11(h) of the Charter, sections of the Criminal Code dealing with res judicata and autrefois acquit, and Article 4(1)(i) of the Canada-United States Treaty.

In his judgment, LaForest J. noted that res judicata and double jeopardy were defences that could be raised by Schmidt at her trial in the United States:

The judicial process in a foreign country must not be subjected to finicky evaluations against the rules governing the legal process in this country. A judicial system is not, for example, fundamentally unjust – indeed it may in its practical workings be as just as ours – because it functions on the basis of an investigatory system without a presumption of innocence or, generally, because its procedural or evidentiary safeguards have none of the rigors of our system.

LaForest’s point was that the entire treaty system that has developed in the past century operates under the assumption that justice will ultimately prevail once a person is returned to the requesting state. LaForest J. added: “It should not be forgotten either that the good faith of this country in honouring its international obligations is involved.... An attempt by courts to consider defences more appropriately dealt with at trial could seriously affect the efficient working of a salutary system devised by states for the mutual surrender of suspected wrongdoers.”

LaForest J. said that the Charter did not apply to criminal proceedings outside Canada’s borders. Six of the panel of seven Supreme Court judges agreed that “there cannot be any doubt that the Charter does not govern the actions of a foreign country.... In particular the Charter cannot be given extraterritorial effect to govern how criminal proceedings in a foreign country are to be conducted....

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45 Now sections 12 and 607.
46 Schmidt, supra, note 24, at 214 (C.C.C.).
47 This principle was first set down in Re Burley (1865), 1 C.L.R. 34 (Chamb.), at 50.
...In some circumstances the manner in which the foreign state will deal with the fugitive on surrender, whether that course of conduct is justifiable or not under the law of that country, may be such that it would violate the principles of fundamental justice to surrender an accused under those circumstances.

...The Canadian Charter of Rights and Freedoms should not, save in special circumstances, be given extraterritorial effect by refusing to conduct a hearing or surrender a person on the grounds that the prospective trial would be a violation thereof.49

Wilson J. parted company with the rest of the panel on this point, saying that the question of extraterritorial effect did not arise: the Court was dealing with an issue with respect to a “judicial proceeding in Canada.”50

If the court refused to commit the appellant to prison for extradition in the discretion of the Executive because to do so would violate the appellant’s Charter rights, the Charter is not being given extraterritorial effect. The effect is right here in Canada, in the Canadian proceedings, although it will, of course, have repercussions abroad. But there is nothing wrong in this. We would not permit a Canadian citizen to be extradited for torture in a foreign land on the basis that to refuse to permit it would be to give the Charter extraterritorial effect.51

Lamer J. adjudged that “as the proceedings in Canada are in the nature of a preliminary inquiry, those rights of ss. 7 to 14, including s. 11, guaranteed accused at that stage of the criminal proceedings in Canada are also guaranteed to those being subjected to extradition proceedings.”52 However, the contrary Charter interpretation of LaForest J. held the day:

The Government of Canada, to which the Charter applies, is not trying the fugitive. An extradition hearing, we saw, is not a trial. It is simply a hearing to determine whether there is sufficient evidence of an alleged extradition crime to warrant the government under its treaty obligations to surrender a fugitive to a foreign country for trial by the authorities there for an offence committed within its jurisdiction. To repeat, s. 11(h)53 was not intended to be given extraterritorial application so as to govern criminal processes in another country. It was intended to govern trials conducted by the governments of this country mentioned in s. 32. Here no trial is being conducted by the Government of Canada. If a trial is to be held, it will be

49 Ibid., at 197, 211, 214.
50 Ibid., at 200.
51 Ibid., at 199.
52 Ibid., at 198.
53 “11. Any person charged with an offence has the right... (h) if finally acquitted of the offence, not to be tried for it again and, if finally found guilty and punished for the offence, not to be tried or punished for it again.”
conducted by a foreign government in a foreign country for an offence under its laws....

This approach is supported by the whole structure of s. 11. Not only is a fugitive at an extradition hearing not being charged with an offence, certainly not by the Government of Canada, several of the rights of "a person charged with an offence" can simply have no application to extradition. These include the right to be presumed innocent....

LaForest J. conceded there may be some situations where the broader provisions of ss. 6, 7 and 15 of the Charter may apply; but not here. Furthermore,

judicial intervention should await the exercise of executive discretion, for the decision to surrender is that of the executive authorities, not the courts, and it should not be lightly assumed that they will overlook their duty to obey constitutional norms by surrendering an individual to a foreign country under circumstances where doing so would be fundamentally unjust.

The extradition judge had to begin with the notion that the administration of justice in the foreign nation "sufficiently corresponds to our concepts of justice to warrant entering into the treaty in the first place.

Blind judicial deference to executive judgment cannot, of course be expected. The courts have the duty to uphold the Constitution. None the less, this is an area where the Executive is likely to be far better informed than the courts, and where the courts must be extremely circumspect so as to avoid interfering unduly in decisions that involve the good faith and honour of this country in its relations with other states. In a word, judicial intervention must be limited to cases of real substance.

And then, the classic line that has been quoted again and again in extradition cases ever since:

"The present system of extradition works because courts give the treaties a fair and liberal interpretation with a view to fulfilling Canada's obligations."

The concept of giving a treaty a "fair and liberal interpretation" favouring the requesting country and honouring Canada's obligations by extraditing the individual is

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54 Schmidt, supra, note 24, at 211-212.
55 Ibid., at 214.
56 Ibid., at 215.
57 Ibid.
obviously at odds with the principle of giving the Charter “a large and liberal interpretation.” Peter W. Hogg pointed out a similar conundrum in his classic text *Constitutional Law of Canada*: “In the context of federalism, the large and liberal interpretation is the course of judicial restraint; it tends to uphold challenged legislation, reinforcing a presumption of constitutionality.” However, in the context of the Charter, a large and liberal interpretation has precisely the opposite effect:

The Charter of Rights does not confer power on the Parliament or Legislatures. On the contrary, it denies power to the Parliament and Legislatures. A generous interpretation of the Charter cannot be justified as increasing the powers of the legislative bodies; it will have the effect of reducing their powers. It is the course of judicial activism, since it will lead to more invalidations of laws than a narrow interpretation of the Charter. The justification for a generous interpretation of the Charter is that it will give full effect to the civil liberties that are guaranteed by the Charter. That was the approach of the Supreme Court of Canada in *A.-G. Que. v. Blaikie* (1979). With respect to the Charter, the Court has agreed that it calls for “a generous interpretation, avoiding what has been called ‘the austerity of tabulated legalism’, suitable to give the individuals the full measure of the fundamental rights and freedoms referred to.”

Theoretically, the standard rules of double jeopardy, including *autrefois convict* and *autrefois acquit* apply to extradition proceedings, but the narrow standard set in *Re Schmidt and The Queen* (1987) set the requirements for such a protection impossibly high.

Unfortunately *Schmidt* severely limited the effect of Charter rights in extradition cases, denying extraterritorial effect even where potential injustice was predictable. Later, Anne Warner LaForest was to state, “The principles applicable to double jeopardy being matters that are argued at trial, they do not arise at an extradition hearing. Moreover, a proper

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58 *[Schmidt*, supra, note 24, (S.C.R.) at 514-515; *Allard*, supra, note 39.]
63 *Schmidt*, supra, note 24 (S.C.C.).
determination of arguments such as *autrefois acquit* and *autrefois convict* require
consideration of matters of both fact and law, which would result in overburdening the
extradition process." 

The Supreme Court of Canada allowed Schmidt's extradition, construing the law
"liberally" in favor of international treaty obligations, rather than applying the Charter broadly
as a constitutional document. LaForest J. ruled for the majority that the Charter did not have
extraterritorial application. Hence an extradition judge cannot look behind the foreign charges
to determine if the accused has already been convicted or acquitted of a similar or identical
offence in a different jurisdiction. Anne Warner LaForest stated, almost by way of apology,
that "it might be argued that the decision is too broad in its application.... It is possible that
courts faced with a different fact situation than that in *Schmidt* will read down the decision." 
Even broadly interpreted, "the decision in *Schmidt* will allow only a very narrow defence for
fugitives arguing that they were previously tried for an offence," she admitted. Peter W.
Hogg roundly criticized LaForest J.'s judgment in *Schmidt* for implying that "cruel and
unusual punishment" was not necessarily "shocking or unacceptable": "This counterintuitive
proposition simply underlines the enormous discretion that the Supreme Court of Canada has
assumed for itself under the rubric of fundamental justice." 

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65 Ibid., at 113.
67 Hogg, *supra*, note 60, p. 894. Some nations have treaty provisions that specifically protect fugitives from the
kind of double jeopardy to which Helen Schmidt was exposed – Argentina, for example. See *Mellino, supra*,
note 40, at 557-558.
c) Double Jeopardy and Executive Discretion

Claiming that double jeopardy considerations, however “meritorious,” were a matter for executive rather than judicial discretion, Dambrot J. in *U.S.A. v. Drysdale* (2000) declined to exercise his judicial discretion to give Charter relief for persons who claimed to have been convicted in Canada on the same facts as those for which their extradition was sought. With the passage of the *Extradition Act* in 1999, Dambrot J. held, such decisions became the domain of the Minister of Justice:

I note that where a person sought advances a meritorious claim of double jeopardy, the Minister has ample jurisdiction to vindicate it.... In addition, article 4 of the *Treaty on Extradition Between Canada and the United States of America* provides that extradition shall not be granted when the person whose surrender is sought has been tried and discharged or punished in the territory of the requested state for the offence for which his extradition is requested. I do not presume the outcome of the application of any of these provisions.... It seems apparent that this application is premature.

However, he did give relief to all but one of the four accused, discharging the other three on grounds of insufficient evidence.

In *U.S.A. v. K (J.H.)* (2002), the Ontario Court of Appeal refused to apply Article 4(1)(i) in a situation where a Canadian father was accused of sexual battery of his daughter while on holiday in Florida, despite the fact that the mandatory minimum sentence that must be imposed upon conviction was life imprisonment without possibility of parole for 25 years. Upon her return to Ontario, the mother advised the police of the Florida sexual assault, and the child disclosed that she had been subjected to sexual touching by her father over several months. The father pleaded guilty to sexual assault. At his sentencing, a factual summary read into the record by Crown counsel alluded to the Florida incident, in which Mrs. K.

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69 Ibid., p. 174, para. 24.
walked in on her naked husband as their seven-year-old daughter performed fellatio on him.\textsuperscript{71} The accused received a sentence in Ontario of 30 months imprisonment in addition to three and a half months in pre-sentence custody. He served his sentence commencing in 1991. No formal request was made for his extradition to the United States until 1997.

The appellant requested the Minister to decline to order his surrender under Article 4(1)(i) on the basis that his conduct in Florida had already been taken into account in the course of his being sentenced in Ontario. In ordering K's surrender, the Minister opined that Article 4(1)(i) did not apply "as Canada did not have the jurisdiction to prosecute the appellant for his Florida conduct." Although the Florida conduct had been mentioned in the course of sentencing, "the sentencing judge never specifically referred to the Florida conduct in his reasons for judgment, nor did he mention that he was taking it into consideration in imposing sentence."\textsuperscript{72} Nonetheless, there is no doubt that the Florida incident led directly to K's Ontario confession. Had the court applied a standard parallel to that applied in \textit{Gallanis}\textsuperscript{73} and therefore the behavior was recipitated rejecting K's application for judicial review of the Minister's decision, McMurtry C.J.O. stated for the court, "Although I am of the view that the imposition of a life sentence without parole for twenty-five years is extremely severe in the circumstances of this case, I am unable to conclude that the sentence would 'shock the conscience' or be 'simply unacceptable' given the horrific nature of the assault on the appellant's seven year old daughter in Florida."\textsuperscript{74} It is well to recall Peter W. Hogg's assessment of a parallel situation:

\begin{flushright}
\textsuperscript{71} \textit{Ibid.}, para. 16.
\textsuperscript{72} \textit{Ibid.}, para. 14.
\textsuperscript{73} \textit{Supra}, note 29.
\textsuperscript{74} \textit{Ibid.}, para. 42.
\end{flushright}
The Court has upheld extradition orders where fugitives faced drug charges in the United States carrying mandatory penalties of 15 to 20 years imprisonment, despite the fact that the Court has held that a seven-year minimum sentence for similar offences in Canada’s Criminal Code is cruel and unusual. This means that long mandatory minimum sentences for drug offences are cruel and unusual, but not shocking or unacceptable.\footnote{Hogg, supra, note 60 p. 894.}

4. Offences of a Political Character

a) Limiting Political Offences

One sticking point to concluding negotiations of the Canada-United States Treaty between its drafting in 1971 and its ratification in 1976 were the two “political exemption” clauses, subparagraphs 4(1)(iii) and 4(2)(i). The actual exemption was not in itself a problem:

\begin{verbatim}
ARTICLE 4

(1) extradition shall not be granted in any of the following circumstances:  

(iii) When the offense in respect of which extradition is requested is of a political character, or the person whose extradition is requested proves that the extradition request has been made for the purpose of trying or punishing him for an offense of the above-mentioned character....
\end{verbatim}

However, the exceptions to the exemption contained in subparagraph (2)(i) did not initially cover conspiracy or being a party to a crime:

\begin{verbatim}
(2) The provisions of subparagraph (iii) of paragraph (1) of this Article shall not be applicable to the following:

(i) A kidnapping, murder or other assault against the life or physical integrity of a person to whom a Contracting Party has the duty according to international law to give special protection, or any attempt to commit such an offence with respect to any such person.
\end{verbatim}

On 28 June 1974, Canada’s Ambassador to the United States, M. Cadieux, wrote to U.S. Secretary of State Kissinger with a proposal to amend Article 4(2)(i) by inserting after “or any
attempt” the words “or conspiracy to commit, or being a party to the commission of”. This narrowed the political offence exemption considerably, and was eventually incorporated as a second clause:

(ii) When offense 23 of the annexed Schedule, or an attempt to commit, or a conspiracy to commit, or being a party to the commission of that offense, has been committed on board an aircraft engaged in commercial services carrying passengers.

Article 4(1)(iii) not only bars extradition where the offence is of “a political character,” it also invites the person whose extradition is requested to “prove” that there is a hidden agenda underlying the request – specifically, that “the extradition request has been made for the purpose of trying or punishing him for an offense of the above-mentioned character.” Assessment of the kind of “proof” anticipated by this provision is a judicial rather than political exercise, and therefore is the domain of the courts. While there is an obvious subjective element to determining if an offence is of a political character, the reference to “proof” imports a more objective standard. However, in Canada, the Treaty suggests that when in doubt, the authorities of the requested government, not the courts, have the final say as to whether the political offence exemption can be invoked.

Article 4(2) of the Treaty as amended deals with exceptions to the political offence exemption, a “claw-back” list which was much expanded in the Protocol of 1988, no doubt owing to concern for dealing with international crimes against humanity. Exceptions to the exemption under the Treaty include:

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(i) An offense for which each Contracting Party has the obligation pursuant to a multilateral international agreement to extradite the person sought or to submit the case to its competent authorities for the purpose of prosecution;
(ii) Murder, manslaughter or other culpable homicide, malicious wounding or inflicting grievous bodily harm;
(iii) An offense involving kidnapping, abduction, or any form of unlawful detention, including taking a hostage;
(iv) An offense involving the placing or use of explosives, incendiaries or destructive devices or substances capable of endangering life or of causing grievous bodily harm or substantial property damage; and
(v) An attempt or conspiracy to commit, or counselling the commission of, any of the foregoing offenses, or aiding or abetting a person who commits or attempts to commit such offenses.  

Krivel, Beveridge and Hayward note in *A Practical Guide to Canadian Extradition*:

The Act and the international agreements contain many exemptions specifying what may not be considered to be a political offence or offence of a political character, with the result that there is little or no room left for an offence to fall outside extradition on this basis. Virtually all crimes of violence have been excluded from being considered political offences. As well, the proliferation of international tribunals and creation of international criminal courts has weakened the justification for exempting politically motivated crimes.

Christopher H. Pyle made a similar observation about American law in *Extradition, Politics and Human Rights*.  

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79 Protocol of 1988, Article IV. Compare s. 46(2) of the current Extradition Act:

For the purpose of subparagraph (1)(c), conduct that constitutes an offence mentioned in a multilateral extradition agreement for which Canada, as a party, is obliged to extradite the person or submit the matter to its appropriate authority for prosecution does not constitute a political offence or an offence of a political character. The following conduct also does not constitute a political offence or an offence of a political character:

(a) murder or manslaughter;
(b) inflicting serious bodily harm;
(c) sexual assault;
(d) kidnapping, abduction, hostage-taking or extortion;
(e) using explosives, incendiaries, devices or substances in circumstances in which human life is likely to be endangered or serious bodily harm or substantial property damage is likely to be caused; and
(f) an attempt or conspiracy to engage in, counseling, aiding or abetting another person to engage in, or being an accessory after the fact in relation to, the conduct referred to in any of paragraphs (a) to (e).

80 Krivel et al., supra, note 9, p. 357.
During the 1900s, both Canadian and American courts seemed to have reached an unspoken agreement not to recognize applications that suggested that the political offence exemption could arise in either jurisdiction.\(^{82}\)

Given the close political and legal similarities between Canada and the United States, it seems antithetical to ever deny extradition to Canada based on the political offense exception. Unlike some other countries, Canada can hardly be characterized as an unjust or oppressive nation where defendants may be subjected to unfair trials and punishments because of their political opinions.\(^{83}\)

As a result of the exceptions to the exemption contained in the amended Treaty, charges of a political character that contain the elements of an ordinary crime – politically motivated murder or abduction, for example – are now extraditable. More traditional political offences such as sedition or even treason are now considered unextraditable only if the conduct does not contain as one of its elements domestic criminal acts such as murder or abduction.

Protesting or belonging to a banned political party or other group is not in itself an extraditable offence, although such conduct may be prosecutable under recent anti-terrorism laws, including s. 7 and section 83.01-83.18 of the *Criminal Code*.

Under the preliminary inquiry provision of the *Criminal Code*, sworn *viva voce* evidence is required of any witness tendered to show the truth of the existence of the charge or the fact of the conviction.\(^{84}\) Under s. 15 of the old Act, the same standard applied to any witness tendered by the fugitive to show that the alleged offence was not an extradition crime or that it is of a political character, or that the motivation for the prosecution or punishment

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\(^{84}\) *Criminal Code*, s. 540(1)(a).
was political. In practice, extradition judges prior to the 1992 amendments emasculated this section of the Act by holding, more or less consistently, that the section empowers a judge only to hear the evidence with a view to creating a record for future use by the Minister of Justice. Thus, in *Meier v. Canada (Minister of Justice)* (1984),\(^8\) the Federal Court Trial Division held that the question of whether the alleged offence was of a political character was within the “exclusive purview” of the Minister of Justice. In 1987, the Ontario District Court followed the same reasoning in *U.S.A. v. Liebowitz*.\(^6\) However, *Meier* and *Liebowitz* followed *Wisconsin (State) v. Armstrong* (1973),\(^7\) a Federal Court of Appeal decision (and therefore arguably more persuasive, although dated) which stood for the proposition that *either* the Minister *or* a “superior court judge” with jurisdiction to determine habeas corpus could determine whether the alleged offence or foreign proceeding is of a political character.\(^8\)


The treatment of Canadian First Nations activists and American attitudes towards the political offence exception were canvassed in *United States v. Pitawanakwat* (2000), which concerned a warrior of the Ts’peten Defenders who jumped parole and fled to the United States, having being convicted in Canada of firearms offences. The case preceded by a year the terrorist attacks on New York and Washington, but gives a clear insight into the value of retaining judicial discretion in extradition matters, especially where treaty interpretation is concerned. Under Article VI of the United States Constitution, treaties remain the “Supreme

\(^8\) In any event, that issue is arguably moot with the passage of the *Extradition Act* which explicitly provides that consideration of the “political offence” exception falls within the expanded executive discretion of the Minister.
Law of the Land” and are therefore subject to judicial interpretation. In Canada, on the other hand, the Extradition Act assigns to the Minister the duty of interpreting the Treaty.

In Pitawanakwat, Stewart J. of the United States District Court for the District of Oregon reasserted the political offence exemption and neutralized the effect of the exceptions enumerated in the Canada-United States Extradition Treaty. Saying that “the Extradition Treaty contains the political offense exception, and defendant is entitled to seek its protection,” Stewart J. refused to extradite James Pitawanakwat back to Canada to finish his sentence.89 Pitawanakwat, a First Nations Canadian, had moved to Oregon while serving the last few days of parole at the end of a three-year sentence received for shooting at an RCMP helicopter in the 1995 “Lake Gustafsen Incident.” The court concluded that Pitawanakwat’s crimes were indeed “of a political character,” and therefore denied the United States government’s request for extradition, made on behalf of Canada.90

The Ts’peten Defenders occupied private property encompassing a parcel of land traditionally considered sacred ground near Gustafsen Lake in the interior of British Columbia. The parcel of land was the subject of a petition to Queen Elizabeth II made by lawyer Bruce Clark (since disbarred) to restore the jurisdiction of the native people over their hunting grounds, which they claimed to have been illegally taken from them by the actions of band councils supported by Canadian courts. Queen Anne’s Order of 9 July 1704 had established a Standing Committee to deal with boundary disputes between the native people and the Crown. King George III’s Royal Proclamation of 1763 granted jurisdiction to the Crown courts over persons committing crimes upon public lands who fled to hunting grounds to evade the law. The Constitution Act (1982) confirmed existing aboriginal and treaty rights,

89 Pitawanakwat, supra, note 83, at 15-16.
90 Ibid., at 2, 29-30.
including those of the 1704 and 1763 Orders. Clark argued that subsequent developments, particularly in the 19th Century, had "illegally usurped jurisdiction over unsurrendered hunting grounds." He asked Queen Elizabeth to re-establish the Standing Committee initially contemplated by the Order of Queen Anne. While awaiting Her Majesty's response, the Ts'peten Defenders hunkered down on the disputed land, built a fence around it, and in July, 1995, held another Sundance.91

Following the Sundance, between 30 and 40 people, including women and children, refused to vacate the land, despite the fact that the farmer who held title to the land, Lyle James, had given notice of trespass. An RCMP investigation showed that illegal firearms and explosives were being moved into the camp, and several men were seen in camouflage gear carrying rifles. One spokesman for the occupying group stated that any attempted invasion of the sacred land by the police would be seen as an "act of war."92

Although the local Cariboo Tribal Council and the Canoe Creek Indian Band attempted to distance themselves from the renegades, support for the group mounted. The Shuswap Indians brought them food and tobacco, and the Kahnawake Mohawks from Quebec expressed support, as well as the Union of British Columbia Indian Chiefs. Towards the end of August, Jones Ignace reiterated that should the police come onto the land, "it's clearly war. We're all going to do federal time, 20 years. We're not going to go peaceful. Body bags or do a hell of a long stretch.... Nobody is going to tell you to put your weapons down."93

Stewart J. made several findings of fact:

The situation escalated as the RCMP increased their presence by constructing a base camp (named "Camp Zulu") replete with armoured personnel carriers,
helicopters, a field hospital, a communications center, a landing field, military assault weapons, and a heavily armed militarized police force of 400 officers in camouflage gear. The Canadian army also was involved under the secret code name “Operation Wallaby”....

On August 24, 1995, defendant, among others, fired on a police helicopter flying near the camp. Though within range, the helicopter was not struck.  

In the meantime, back in England, Queen Elizabeth kept her counsel. Undeterred but not undisturbed, on 26 August Clark reported to the Queen that the Governor General had refused to stop the “genocide.” The following day, members of the encampment fired at the police and highway workers who were trying to remove a barricade of trees. Another exchange of gunfire occurred on 7 September, and on 11 September, some of the members of the encampment exchanged gunfire with police as they drove in a truck across the police perimeter. The police had concealed an explosive device on the road (described by Pitawanakwat as a land mine), which the truck triggered. Pitawanakwat and the driver both escaped injury and arrest, but left behind the AK-47 and another rifle.  

“Lake Gustafsen was only one of many incidents involving native people during the summer of 1995,” Judge Stewart noted in her opinion. “That same summer saw other protests, road barricades, and occupations of parks and private property across Canada.” She cited the cases of 100 rebel Chippewas (Ojibways) occupying a military camp in Ontario, 40 “rebel members” of the Kettle and Stony Point Bands occupying Ipperwash Provincial Park in Ontario (where one protester was killed by police bullets), and 40 Nuxalkl Nation chiefs, elders and supporters blockading access to their unceded tribal lands near Bella Coola, British Columbia.  

94 Ibid., at 6.  
95 Ibid., at 7.  
96 Ibid., at 7-8.
At Pitiwanakwat's sentencing, the trial judge referred to Canada’s "long history of civil protest in support of causes believed to be just....

"There is no question that all accused genuinely believe in the justice of their cause, though some no longer advocate the unlawful use of weapons to further that cause. All felt great frustration at the failure to achieve any success for their cause in the courts or through other lawful channels. Nor did they enjoy the support of local elected bands who, along with the Assembly of First Nations, are dismissed by them as government collaborators.

"What separates the Gustafsen lake stand-off from other forms of civil protest and even unlawful civil disobedience was the use of weapons, violence and threats of violence to prevent their removal from the land should their demands not be met."97

In the United States, the extradition court rather than the executive has discretionary jurisdiction to determine whether the political offence exception should apply.98 The initial burden of proof to establish the essential elements of the exception is on the defendant, but once those are established the burden of proof shifts to the requesting government to prove that the crime is not of a political character.99 "Because the treaties contain no definition of political offense, the interpretation of the political offense exception has been relegated to the courts."100 This is precisely the opposite of current Canadian practice, which under the new Act relegates the interpretation of the political offense exception to the Minister of Justice.101

Stewart J. found that the activity in Pitawanakwat fell within the framework of "acts of domestic violence in connection with the struggle for political self-determination" that were

97 Ibid., at 8.
98 Quinn v. Robinson, 783 F. 2d 776, 786 (9th Cir), cert denied 479 U.S. 882 (1986).
100 U.S.A. v. Pitawanakwat, supra, note 83, at 11.
101 In Eain v. Vilkes (1981), 641 F. 2d 504 (7th Cir.), cert denied, 454 U.S. 894 (1981), the Seventh Circuit affirmed the extradition to Israel of a PLO member accused of exploding a bomb that killed and injured Israeli civilians. That court had defined an "uprising" as "as struggle between organized, non-dispersed military forces," and excluded violent acts against civilians as legitimate political objectives. However, in Quinn (1986), supra, note 98, at 806, the Ninth Circuit rejected this analysis, holding that "acts of domestic violence in connection with the struggle for political self-determination" were within the scope of an "incidence test."
within the scope of an “incidence test” outlined in Quinn v. Robinson (1986). 102 “He ... proudly admits that he was a member of the insurgent group which defended the encampment to achieve a political end, namely sovereignty of native people over sacred tribal land.” 103 It was more difficult to demonstrate that the crime was “incidental to, in the course of, or in furtherance of an uprising or violent political disturbance,” since Quinn limited the political offense exception to protecting those “rising up, in their own land, against the government of that land” 104 — in other words, people “engaged in internal or domestic struggles over the form or composition of their own government, including, of course, struggles to displace an occupying power.” 105 Stewart J. stated of the campers at Gustafsen Lake: “It is clear that they occupied tribal lands to achieve the political goal of achieving native sovereignty over those lands....

The Lake Gustafsen incident involved indigenous people rising up in their own land against the government of that land.... James acquired title to the land through the Canadian government, but his land included tribal land over which native people believed they had a valid claim. Thus, the protest by the Ts’peten Defenders was directed largely against the Canadian government which had granted title to James, not against James. In addition, the violence was aimed not at James, but at the Canadian government and its military forces....

The seriousness of the challenge to Canadian jurisdiction over unceded tribal lands is evidenced by the fact that large military forces were deemed necessary to suppress the challenge. 106

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102 “It is the fact that insurgents are seeking to change their governments that makes the political offense exception applicable, not their reasons for wishing to do so or the nature of the acts by which they hope to accomplish the task.” Quinn, supra, note 98, at 804-805. Quinn, an Irish-American member of the Provisional Irish Republican Army, allegedly sent letter bombs to London and was accused of murdering a British police officer who was trying to apprehend him for that offence. The Court applied “a rather liberal standard”: Neither proof of the potential or actual effectiveness of the actions in achieving the group’s political ends, nor proof of the motive of the accused, or the requesting nation, is required. Nor is the organization or hierarchy of the uprising group or the accused’s membership in any such group determinative...all that the courts should do is determine whether the conduct is related to or connected with the insurgent activity. Ibid., at 810.


104 Quinn v. Robinson, supra, note 98, at 813 (emphasis in original).

105 Ibid., at 807.

Stewart J. distinguished *Pitawanakwat* from *Peltier*, stating that in that case, “the murders of the FBI agents clearly were not committed as part of a direct confrontation against the government for political reasons.”

5. **Treatment of Minors**

Article 5 suggests the withdrawing of extradition proceedings against minors in cases where extradition would disrupt their “social readjustment and rehabilitation” – a not unlikely outcome for young people, given the seeming complexity of the extradition process:

**ARTICLE 5**

If a request for extradition is made under this Treaty for a person who at the time of such request, or at the time of the commission of the offense for which extradition is sought, is under the age of eighteen years and is considered by the requested State to be one of its residents, the requested State, upon a determination that extradition would disrupt the social readjustment and rehabilitation of that person, may recommend to the requesting State that the request for extradition be withdrawn, specifying the reason therefor.

The Treaty refers to a person who “is under the age of eighteen years and is considered by the requested State to be one of its residents.” The Treaty only furnishes the requested state with the power to “recommend to the requesting State that the request for extradition be

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107 *Ibid.*, at 27. She also distinguished cases pertaining to PLO fire-bombers in Israel and the Occupied Territories such as *Eain v. Vilkes*, *supra*, note 101, at 515; and *Ahmed v Wigen*, 726 F. Supp. 389, 402, affd. 910 F. 2d 1063 (2nd Cir 1990), saying that *Pitawanakwat* was by no means a terrorist action.

108 See *R. v. Potvin* (1989), 47 C.C.C.(3d), [1989] 1 S.C.R. 525 at 547; *Charles v. Insurance Corporation of British Columbia* (1989), 34 B.C.L.R. (2d) 331 at 337 (C.A.). The wording of the parallel provision in s. 47 (c) of the Canadian *Extradition Act* is also permissive, empowering and conferring an area of discretion on the Minister. The Minister’s discretion ends when it is determined (in the case of extradition to the United States) that the territory or state over which the United States has jurisdiction does have appropriate parallel laws governing the prosecution of young offenders. However, the Treaty provision will prevail where there is a conflict, by virtue of s. 45(1): “The reasons for the refusal of surrender contained in a relevant extradition agreement…, or the absence of reasons for refusal in such an agreement, prevail over sections 46 and 47.” The Act does not take into account the humanitarian tone of Article 5, since it does not refer to social readjustment or rehabilitation. However, the Minister has further discretionary power to deny surrender under s. 44(a) where “the surrender would be unjust or oppressive having regard to all the relevant circumstances.”

109 Italics added. The Act refers to *any* young person under 18.
withdrawn, specifying the reasons therefor.” The requested state does not have to acquiesce, but can insist on the return of the accused. Extradition from Canada of children under age 12 would in any case not be allowed by Canadian courts (and, one would hope, the Minister), since in Canada their actions would not be considered “criminal.”

In Canada, the rights of young persons who are accused of criminal offences are governed by the declaration of principle contained in s. 3, the policy section of the *Youth Criminal Justice Act*, which replaced the *Young Offenders Act* effective 1 April 2003. The stated principles express some of the same sentiments with respect to the special treatment and requirements of young offenders as is implied in the provisions of the Extradition Treaty, including rehabilitation, reintegration, reparation, reinforcement of respect for societal values, involvement of social and community agencies, and enhanced procedural protection including assertion of Charter rights. The preamble to the *Youth Criminal Justice Act* alludes not only to the *Canadian Charter of Rights and Freedoms* and the *Canadian Bill of Rights*, but also to the United Nations Convention on the Rights of the Child, and s. 3(1)(d)(i) specifies that “young persons have special guarantees of their rights and freedoms.” The preamble also anticipates a role for the criminal justice system in supporting “effective rehabilitation and reintegration,” and reducing “over-reliance on incarceration for non-violent young persons.”

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110 In that case, besides applying s. 44 where necessary, the Minister would have to ascertain whether the statutory provisions for the treatment of young offenders approximated that of Canadian law, including alternatives to incarceration.

111 Section 77 of the Act specifies that in respect of a prosecution or sentencing of a young offender returned to Canada by extradition, the Attorney General of the province responsible for the prosecution of the case will be the competent authority to proceed; in the case of enforcement of a sentence the Solicitor General of Canada is the competent authority for sentences to be served in a federal penitentiary and the provincial minister responsible for corrections is the competent authority for lesser sentences. The right of specialty provision in s. 80 of the Act refers specifically to “a disposition made or executed under the *Youth Criminal Justice Act*.”

112 S.C. 2002, c. 1 (came into force 1 April 2003), as am. 2002, c. 7, s. 274; 2002, c. 13, s 91.
Occasionally, courts of appeal have been very hard-nosed when it comes to young offenders who face sometimes horrific jeopardy abroad. In *Sanders v. Canada (Minister of Justice)* (1998), the British Columbia Court of Appeal upheld the Minister's discretion to surrender Sanders (who, at 17, had jumped bail in 1992) to face a minimum mandatory sentence of five years in prison for selling LSD and marijuana valued at less than $400. Sanders, whose father was Canadian, had become a Canadian citizen, had got married, had not been in trouble with the law, and had been steadily employed in Canada. "The request under Article 5 is a matter of ministerial discretion which she was not prepared to exercise in favour of the applicant," Southin J.A. stated in summarizing the Minister's decision. Although Southin J. stated, "I am not at all sure that Canadians, as a whole, think that trafficking in marijuana in contradistinction to trafficking, for instance, in heroin, is a serious offence," she nonetheless held that the Minister was "right that a prison sentence harsher than that which would be imposed here would not shock the conscience of Canadians." She concluded:

As a matter of administrative law (there being no constitutional issue), the decision of the Minister not to invoke Article 5 is one which is most certainly owed curial deference. It is for the Minister to decide when, and in what circumstances, it is appropriate to ask this "favour" of the requesting state.... The Minister did not improperly fetter her discretion.

Interestingly, in *U.S.A. v. Burns* (2001), the Supreme Court of Canada took the relative youth of Burns and Rafay into account in weighing whether the Minister should seek assurances that the death penalty would not be sought by the State of Washington. The Court noted that although Burns and Rafay were both 18 at the time of the alleged murder of Rafay's parents and sister, and therefore legally adults for the purposes of criminal proceedings in

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113 *Sanders v. Canada (Minister of Justice)* (20 February 1998), B.C.C.A. CA021654, para. 17-18.

Canada, "The relative youth of the respondents at the time of the offence does constitute a mitigating circumstance in this case, although it must be said, a factor of limited weight."\textsuperscript{115}

6. The "No Death Penalty" Assurance
   
a) An Invitation to Exercise Executive Discretion

   Article 6 of the Canada-United States Treaty pertains to cases where fugitives face the death penalty if returned to a retentionist jurisdiction:

   \begin{quote}
   \textbf{ARTICLE 6}
   \end{quote}

   When the offense for which extradition is requested is punishable by death under the laws of the requesting State and the laws of the requested State do not permit such punishment for that offense, extradition may be refused unless the requesting State provides such assurances as the requested State considers sufficient that the death penalty shall not be imposed, or, if imposed, shall not be executed.

   Although the wording of the Treaty clearly allows for the exercise of discretion on the part of the executive, the common sense purpose of Article 6 is unambiguous: since persons charged with first degree murder would not face the death penalty in the requested abolitionist state, that state should not surrender such fugitives to a retentionist extradition partner without first obtaining assurances that in the course of prosecution, the death penalty would not be sought,\textsuperscript{116} or if it was sought, would not be implemented.

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\textsuperscript{115} U.S.A. v. Burns, supra, note 41, para. 93.
\textsuperscript{116} The supportive provisions in the Canadian Act are twofold. First, s. 40(3) states that "The Minister may seek any assurances that the Minister considers appropriate from the extradition partner...," and this is supported by subsection (4): "If the Minister subjects surrender of a person to assurances or conditions, the order of surrender shall not be executed until the Minister is satisfied that the assurances are given or the conditions agreed to by the extradition partner." The second provision, s. 44(2), is more specific:

   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.

   Again, the provision in the Act, as in the Treaty, is permissive. However, in the case of s. 44(2), the reasons or absence thereof contained in the Treaty do not necessarily prevail, and certainly not by exercise of statute, as s. 45 only applies to ss. 46 and 47. Two different levels of ministerial discretion are therefore mandated by the Act.
Technically, the assurance could work both ways. Although Canada has not executed anyone since 1962, the death penalty was not finally abolished for all crimes in Canada until 1998. Some parts of the United States can boast much earlier dates of abolition. Although a dozen American states do not permit executions, 38 reinstated the death penalty after the United States lifted its moratorium on the death penalty in 1988 following a United States Supreme Court ruling that executions were constitutional.

In September, 2000, American Attorney General Janet Reno stated that she was “sorely troubled” by data showing that 43 percent of the 183 cases in which the death penalty had been sought came from nine of the 94 judicial districts, and that white defendants were almost twice as likely as black defendants to be given a plea agreement in which the prosecution agreed not to seek the death penalty. Thus the vast majority of inmates on death row in the United States were black, and most were in the South - begging questions about racial and geographical disparity.

b) Kindler and Ng

Successive Ministers of Justice were reluctant to apply the protection implied in Article 6 of the Treaty to fugitives charged with capital offences such as murder. One explanation is that two rather gruesome cases – Kindler and Ng – tainted the perception
of the appellate courts, which for years did not interfere with the Ministers' refusal to exercise executive discretion in this area. As Arbour J. explained in *U.S.A. v. Burns* (2001), those cases were exceptional beyond the pale:

Kindler was an American citizen who had escaped to Canada after being convicted in Pennsylvania for the brutal murder of an 18-year-old who was scheduled to testify against him in a burglary case. The jury which convicted Kindler had recommended that he face the death penalty. Prior to being sentenced he escaped to Canada.... The death penalty was no longer simply a possibility. It had already been recommended by the jury. Nevertheless, we held that the Minister was entitled to extradite without assurances.

In the companion appeal, the respondent Ng was a British subject born in Hong Kong and subsequently a resident in the United States. He had been arrested in Calgary after shooting at two department store security guards who tried to apprehend him for shoplifting. Once his identity was established, he was extradited to the State of California to face numerous charges of murder. He has since been convicted and sentenced to death for murdering 11 people – six men, three women and two baby boys – during what one newspaper described as a “spree of sexual torture and murder in rural California.” In that case, as well, the Minister was held to have the power, though not the duty, to extradite without assurances.122

The *Kindler* and *Ng* cases were sufficiently horrible on their facts that the Supreme Court of Canada found it relatively easy to determine that punishment for such crimes was a matter for the receiving jurisdictions to decide, and that it would not shock the conscience of Canadians to send such persons back to jurisdictions where they would almost certainly face, if not experience, the death penalty.123 The Supreme Court held that the Minister had not erred in refusing to seek assurances that they would not be executed, declaring that on these facts it did not “sufficiently shock the conscience of Canadians” and is not “simply unacceptable” to send such a person back to the United States to face the death penalty.

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123 *Ibid.; Re Ng*, supra, note 121.
Following that precedent, in *R. v. Campbell*\(^{124}\) the Ontario Court of Appeal found no error in the Minister refusing to seek Article 6 assurances where there were no special circumstances to warrant such exercise of ministerial discretion.

c) *Gervasoni*

In *Gervasoni v. Canada (Minister of Justice)*,\(^{125}\) the Minister declined to obtain formal assurances under the Treaty, claiming that they were unnecessary since it had been determined through informal diplomatic channels that the United States would not be seeking the death penalty. Gerald Gervasoni had been charged in the State of Florida with first degree murder in the strangulation death of his girlfriend. Subsequent to the alleged murder, he “bought” a false Canadian identity on the black market and lived for 12 years on Saltspring Island, British Columbia, where he became a house painter and popular member of the Junior Chamber of Commerce well known for his participation in amateur sports, including baseball and hockey. He was finally identified, many years after the murder, by an alarmed girlfriend watching a program profiling him as a suspect in the Florida murder on *America's Most Wanted*.

On the strength of vague “communications” with the United States, the Minister ordered Gervasoni to be surrendered. The British Columbia Court of Appeal held that since the seeking and obtaining of assurances was a “political” decision, the Minister was entitled to rely “as he sees fit” upon the informal representations provided by an unidentified person (presumably in the office of the U.S. Secretary of State) that Florida would not seek the death penalty.\(^{126}\) The Court failed to appreciate that, when a life is in the balance, strict formality is

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\(^{125}\) *Gervasoni v. Canada (Minister of Justice)* (1996), 119 W.A.C. 141 (B.C.C.A.), leave to appeal to S.C.C. refused 137 W.A.C. 240n, 204 N.R. 398n.

\(^{126}\) *Ibid.*, at 147.
appropriate. Rather, it indicated that a diplomatic intervention at some level could be expected if the United States sought to impose the death penalty in the face of such informal assurances:

The accuracy of advice and information conveyed, and of representations made, like compliance with undertakings given in international diplomatic communications, is a matter of national honour, any breach of which carries serious international repercussions.

The advice or representation given by the United States that a final decision had been made that Florida will not seek or impose the death penalty in this case is integral to the Minister’s decision to issue the warrant of surrender without further consideration of the question of death penalty assurances. If the United States were to attempt to act contrary to its diplomatic representation, Canada would be in a position to challenge this decision through diplomatic and legal channels.127

The Court did not specify which “legal channels,” and nor does the Treaty or the Act. Thus the British Columbia Court of Appeal held that the Minister of Justice “could rely on communications from the American prosecutors that the death penalty would not be sought on the first degree murder charge which the fugitive was facing. The court rejected the fugitive’s contention that the Minister was required to seek formal assurances under Article 6 of the Treaty.”128 No distinction was made between formal assurances made by the United States or Florida and prosecutors’ “communications,” nor did the Court specify what form assurances should take before they can be considered binding on the receiving jurisdiction. Gervasoni left both Crown and defence lawyers shooting in the dark.

On the other hand, in R. v. Bounnam (1996)129 and Chong v. Canada (Minister of Justice) (1996),130 the Ontario Court of Appeal directed the Minister to obtain written assurances from the Tennessee government in order to perfect the “necessary assurance under

127 Ibid., at 147-148.
128 Krivel, et al., supra, note 9, p. 321.
Article 6 of the Treaty.” And in *U.S.A. v. Burns*, the B.C. Court of Appeal set aside the decision of the Minister of Justice to surrender Burns without Article 6 assurances, specifically directing the Minister to seek those assurances as a condition of surrender. The outcome of that appeal was finally affirmed by the Supreme Court of Canada in 2001.

d) *U.S.A. v. Burns*

*In U.S.A. v. Burns*, Glen Sebastian Burns and Atif Ahmad Rafay, both Canadian citizens, were 18 years old at the time they visited Rafay’s parents in Bellevue, Washington in July, 1994. On 12 July, Rafay’s parents and sister were found bludgeoned to death. Although the Bellevue police suspected the two teenagers, they did not have enough evidence to arrest or charge them, and so enlisted the assistance of the RCMP in British Columbia. In the course of the resultant undercover operation, Burns admitted that he had killed Rafay’s parents and sister with a baseball bat. Rafay confirmed the admissions. The State of Washington charged Burns and Rafay with “aggravated first degree murder,” which normally garners a minimum penalty of life imprisonment without possibility of parole. But paragraph (2) of s. 10.95.030 of the *Revised Code of Washington* states: “If, pursuant to a special sentencing proceeding..., the trier of fact finds that there are not sufficient mitigating circumstances to merit leniency, the sentence shall be death.” Allan Rock, then Minister of Justice, was asked in submissions to seek assurances under Article 6 of the Treaty that Burns and Rafay would not face the death penalty if returned to Washington. He declined to do so.

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132 Cited *ibid.*, at 530-531.
In reviewing the written decisions of the Minister, Donald J.A., with whom McEachern C.J. agreed, took exception to the Minister’s assertions that Article 6 assurances are a “special exercise of discretion…not to be sought routinely”:

I can find nothing in the language of Article 6 of the Treaty which limits its operation only to “special” cases, or that a person subject to extradition must “justify” its application. The Minister seems to be struggling with an illusory problem, that extradition cases involving the death penalty are so numerous that there are “routine” cases and “special” cases. This is the first case of its kind: citizens of Canada surrendered to the United States to face the death penalty. Such cases will be few in number. Each deserves to be considered on its own merits without being fettered by rules designed to deal with an imagined case load.\(^\text{133}\)

The Minister of Justice-cum-Attorney General, Anne McLellan, responded to this directive of the Court that she request Article 6 assurances by seeking leave to appeal to the Supreme Court of Canada. She stated in a news release from the Department of Justice:

“The decision by the Court that the Minister of Justice must seek assurances that the death penalty will not be imposed in every case involving Canadian citizens being surrendered to a state where a death sentence is a possibility, may serve as a serious limitation on ministerial discretion. The national significance of this decision has led me to conclude that clarification from Canada’s highest court is required.”\(^\text{134}\)

In refusing to send back alleged murderers to face the death penalty in *U.S.A. v. Burns* (2001),\(^\text{135}\) the Supreme Court of Canada, 30 years after the abolition of the death penalty in Canada, at last took a position consistent with Canadian law and with world opinion as expressed through the United Nations. Agreeing with the result of the Court of Appeal, the Supreme Court in a unanimous decision rejected its reasons, and substituted its own.\(^\text{136}\)

After the extradition hearing in *Burns*, then-Minister of Justice Allan Rock had declined to seek Article 6 assurances “because of his policy that assurances should only be

\(^\text{133}\) Ibid, at 539.
\(^\text{135}\) *U.S.A. v. Burns*, supra, note 41.
\(^\text{136}\) Ibid, at para. 8.
sought in exceptional circumstances, which he decided did not exist in this case" – despite the fact that he “proceeded on the assumption that the death penalty would be sought by the prosecutors in the State of Washington.” The Supreme Court of Canada recognized that its own customary deference to the Minister’s extradition decisions was “rooted in the recognition of Canada’s strong interest in international law enforcement activities.”

However, as counsel for Burns argued, “The executive negotiated Article 6 of the extradition treaty, the United States agreed to it, and both parties must therefore have regarded its exercise as consistent with the fulfillment of their mutual assistance obligations.” Accordingly, the Supreme Court reviewed the historical context of the extradition treaty negotiations:

The extradition treaty in question here was concluded by Canada and the United States in 1971 at a time when Canada still retained the death penalty, although no executions had been carried out since 1962. A de facto moratorium occurred commencing June 1967. This was reinforced five years later when the Supreme Court of the United States declared the death penalty regime of the State of Georgia to be unconstitutional. By 1976, the year in which the extradition treaty was ratified and came into force, there had been a realignment of positions. Canada had abolished the death penalty for all but a few military crimes. In the same year the United States Supreme Court declared that the death penalty could be constitutional if appropriate procedural safeguards were put in place. In recognition, perhaps, of the fluid state of affairs the parties agreed that the extradition treaty should include Article 6 in respect of seeking assurances.

The Court did not stop at consideration of Canada’s bilateral extradition arrangements with the United States, but went on to consider the broader context of international relations, “including Canada’s multilateral efforts to bring about change in extradition arrangements where fugitives may face the death penalty itself.” It noted that the European Convention

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137 Ibid. at para. 15, 18-19; also (C.A.), supra, note 166 at 541.
141 Ibid.
142 Ibid., para. 81.
on Extradition\textsuperscript{143} had a virtually identical provision as Article 6, as did the Model Treaty on Extradition passed by the General Assembly of the United Nations in 1990, and resolutions of the United Nations Commission on Human Rights passed in 1999 and 2000.\textsuperscript{144} The Court also alluded to the submission of Amnesty International that “Canada currently is the only country in the world, to its knowledge, that has abolished the death penalty at home but continues to extradite without assurances to face the death penalty abroad.” It added:

It is noteworthy that the United Nations Security Council excluded the death penalty from the punishments available to the International Criminal Tribunals for the former Yugoslavia...and for Rwanda..., despite the heinous nature of the crimes against the accused individuals. This exclusion was affirmed in the Rome Statute of the International Criminal Court, signed on December 18, 1998 and ratified on July 7, 2000 by Canada.\textsuperscript{145}

Article 6 of the Treaty was therefore in tune with contemporary international efforts to abolish the death penalty. Furthermore, the Court concluded that to order the extradition of Burns and Rafay without first obtaining Article 6 assurances would violate the principles of fundamental justice as guaranteed by s. 7 of the Canadian Charter of Rights and Freedoms.

The Minister has not pointed to any public purpose that would be served by extradition without assurances that is not substantially served by extradition with assurances, carrying as it does in this case the prospect on conviction of life imprisonment without release or parole....

It is true that if assurances are requested, the respondents will not face the same punishment regime that is generally applicable to crimes committed in Washington State, but the reality is that Washington requires the assistance of Canada to bring the respondents to justice. Assurances are not sought out of regard for the respondents, but

\textsuperscript{143} Signed 13 December 1957 (E.T.S. No. 24).
\textsuperscript{145} \textit{U.S.A. v. Burns, supra}, note 41, para. 88.
out of regard for the principles that have historically guided this country’s criminal justice system and are presently reflected in its international stance on capital punishment.\textsuperscript{146}

Arguing that even if s. 7 of the Charter was applicable, extradition of Burns and Rafay without assurances could be justified under s. 1 of the Charter since the position was reasonable and demonstrably justified in a free and democratic society, the Minister cited two “important policies that are integral to Canada’s mutual assistance objectives” – 1) maintenance of comity through international cooperation with the United States, and 2) avoiding the prospect of an influx of persons attempting to avoid the death penalty in retentionist states. The Court shot down both arguments.

With respect to the argument on comity, there is no doubt that it is important for Canada to maintain good relations with other states. However, the Minister has not shown that the means chosen to further that objective in this case – the refusal to ask for assurances that the death penalty will not be exacted – is necessary to further that objective. There is no suggestion in the evidence that asking for assurances would undermine Canada’s international obligations or good relations with neighboring states. The extradition treaty between Canada and the United States explicitly provides for a request for assurances and Canada would be in full compliance with its international obligations by making it.\textsuperscript{147}

The Court noted that the “safe haven” argument had been accepted in \textit{Kindler} by both LaForest J. and McLachlin J, but opined that “there is no evidence whatsoever that extradition to face life in prison without release or parole provides a lesser deterrent to those seeking a ‘safe haven’ than the death penalty.” If Canada is chosen as a haven for fugitives from the United States from time to time, “it likely has more to do with geographic proximity than the Minister’s policy on treaty assurances.” The Court concluded that “The Minister is

\textsuperscript{146} \textit{Ibid.}, at para. 125-126.
\textsuperscript{147} \textit{Ibid.}, at para. 136.
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constitutionally bound to ask for and obtain an assurance that the death penalty will not be imposed as a condition of extradition”¹⁴⁸—and not just for Canadians: for everyone.

Given current international pressure against the death penalty, combined with Canada’s desire to be an exemplar of humanitarian policy, only in the most exceptional cases, the nature of which the Supreme Court would not even speculate, would it not be appropriate for the Minister to seek such assurances, no matter what the nationality of the requested person. Thus the Supreme Court of Canada was able at last to bring a common sense reading to Article 6 of the Treaty. In death penalty cases at least, the Minister will henceforth have to exercise discretion to apply the Charter and Article 6 of the Treaty in a meaningful way instead of resting on a policy, borne of Kindler and Ng, of blithely ignoring a perfectly sound discretionary Treaty provision similar to those that other civilized nations take pains to honour.¹⁴⁹ As the court noted, the United States consistently gave such assurances to other countries upon request; why wouldn’t it give them to Canada? The fact is that for many years, out of some misguided sense that to make the request was an unreasonable imposition on its main extradition partner, the Minister and the staff of the Department of Justice had a policy of not bothering to ask.

¹⁴⁸ Ibid., at 143. The delay in the release of the Burns decision led in turn to the delay of the surrender of several other cases in which the accused faced the death penalty, including U.S.A. v. Cook (2003), 2003 B.C.C.A. 458, where the accused argued that the two-year delay, agreed to by him specifically in the hope of avoiding Nevada’s death penalty, was an infringement of his constitutional rights! See para. 24-31.

¹⁴⁹ The Minister has as a matter of course followed Burns in seeking Article 6 assurances, which led some accused to continue their applications for judicial review. See, for example, Yousef v. U.S.A. (1 August 2003), ONCA C30530; C32376 (Ont. C.A.), para. 3, where Gillese J.A. noted, “The appellant brought a separate judicial review application against the decision of the Minister of Justice to surrender him to the United States. However, he has abandoned that proceeding because the Minister obtained an assurance from the United States that the State of Illinois will neither seek nor impose the death penalty against Yousef should he be surrendered.”
7. The Case of Robert Judge

Article 7 of the Treaty gives discretion to the executive of the requested state either to surrender or postpone surrender where the fugitive is being prosecuted or has been sentenced for an unrelated offence until after the proceedings or any sentence arising from them have concluded. While this makes eminent sense, in the case of long sentences there is a danger that the country in which the individual is incarcerated could lose sight of the entire procedure, or of the significance of “extradition” for the accused, whether the process is legal or otherwise. For example, in 1987, Roger Judge, then 44, escaped custody in Philadelphia and fled to Canada after being convicted of the shotgun slaying of his 15-year-old former girlfriend and her new boyfriend, 18. Judge faced the death penalty for the two murders. Once in Canada, he committed a string of armed robberies in British Columbia, for which he was convicted and received a ten-year sentence. He served his time in a Quebec penitentiary. When his sentence expired, Canadian immigration authorities attempted to deport him. He applied for a stay of the deportation order to the Superior Court of Quebec – a court which does not have jurisdiction to deal with federal immigration matters. Before he could appeal this “disguised extradition” to the appropriate court, he was shunted across the border into the waiting arms of Pennsylvania authorities and taken to Philadelphia, where he was initially scheduled to be executed on 2 December 2002. The U.S. District Court of Eastern Pennsylvania issued a stay of execution two months before he was due to die.

Although Judge was not formally extradited from Canada to the United States, the United Nations Human Rights Committee ruled in August, 2003 that “Canada shirked its
international responsibilities” when it deported him to a country where he faced the death penalty.¹⁵⁰ According to the Associated Press,

The UN Human Rights Committee said Canadian authorities were wrong to extradite Roger Judge in 1998 after he had served a separate 10-year term in Quebec for crimes committed in Canada.

Under the International Covenant on Civil and Political Rights, “for countries that have abolished the death penalty, there is an obligation not to expose a person to the real risk of its application,” the committee said in a ruling published Thursday. Canada abolished the death penalty in 1972.

"By deporting (Mr. Judge) to the United States where he was under sentence of death, Canada established the crucial link in the causal chain that would make possible (his) execution," the committee said.

It said Canada failed to demand guarantees from U.S. authorities that Mr. Judge – a U.S. citizen – would not be executed and also broke the rules by sending him to the United States before he had time to lodge a final appeal against his expulsion.¹⁵¹

Although Judge was not formally extradited, his case points out the wisdom of formalizing extradition procedure and protocol to accord with Articles 6 and 7 of the Treaty. The U.N. ruling stipulated that countries that have abolished the death penalty were obliged to protect life, stating: "‘They may not remove, either by deportation or extradition, individuals from their jurisdiction if it may be reasonably anticipated they will be sentenced to death.”¹⁵²

That had been the gist of Judge’s initial application to the Superior Court of Quebec.

A parallel situation existed in the Hernandez case, where in 1973 Hernandez, charged with the murder of a senior police officer in Puerto Rico during a noon protest rally against the R.O.T.C. was deported from Canada for entering the country illegally despite the fact that he had earlier won a convoluted extradition battle in the courts and had been discharged on the basis of suspect identification evidence from the San Juan police.¹⁵³

¹⁵² "Deporting convicted killer wrong: UN," supra, note. 150.
¹⁵³ See supra, Chapter 3, note 40.
8. Remedies, Recourses, and the Charter

Article 8 of the Treaty establishes that the law of the requested state applies to extradition proceedings. But it goes further:

ARTICLE 8

The determination that extradition should or should not be granted shall be made in accordance with the law of the requested State and the person whose extradition is sought shall have the right to use all remedies and recourses provided by such law.

A narrow reading of "the law of the requested State" would limit it strictly to the extradition legislation. However, Article 8 has been used in procedural arguments which have applied it to Canadian law in a more general sense. For example, in U.S.A. v. Jnobaptiste (1993), owing to an intervening statutory holiday, the documentation was not received from the United States by Canadian officials until the 61st day after the fugitive's arrest, a day after the 60-day limitation period specified in Article 11(3) of the Treaty. Article 8 was used as justification to apply s. 26 of the Canadian Interpretation Act allowing for an automatic extension of the deadline to the next business day after the holiday.

Once Article 8 had been applied to Canadian law beyond the extradition statute, a common sense reading would have it apply to or trigger remedies and recourses in the criminal law, as well as the Canadian Charter of Rights and Freedoms and parallel provisions in the United States, including the Bill of Rights and other constitutional protections. Prior to 1992, applicants for Charter relief had to rely on an application for habeas corpus in the Federal Court Trial Division, which had jurisdiction to review the extradition judge's

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154 Article 7, as amended in 1988, gives discretion to the executive of the requested state either to surrender or postpone surrender where the fugitive is being prosecuted or has been sentenced for an unrelated offence until after the proceedings or any sentence arising from them have concluded.

155 U.S.A. v. Jnobaptiste (1993), 19 W.C.B. (2d) 525 (Ont. Ct. Gen. Div.). In U.S.A. v. Davis (1999), 132 C.C.C. (3d) 442 (B.C. S.C.), per Oppal J., the Minister was forgiven for missing a deadline by a day due to "inadvertence." See also U.S.A. v. Davis (3 February 1999) B.C.S.C. CC950165 (Vancouver Registry), per Oppel J., where the Minister missed the limitation date by one day "as a result of mere inadverrence" (para. 21).
decision. However, other remedies could be pursued in the provincial courts of appeal, and these courts were not averse to considering Charter issues despite the peculiarities of the requirement to pursue habeas corpus in the Federal Court. In the Ontario Court of Appeal, for example, *Re U.S.A. v. Smith* was heard by the same panel of judges as *Re Schmidt*, in fact both judgments were released on the same day (27 January 1984) and were reported contemporaneously. *Smith* stands for the proposition that in extradition hearings, there is no Charter right to cross-examination of witnesses on affidavits sworn outside Canada, and there is no guarantee to a fair hearing as provided for under s. 11(d) of the Charter, since extradition hearings, unlike trials, do not “determine the guilt or innocence of a fugitive.” Nor does the similar guarantee in s. 2(e) of the *Canadian Bill of Rights* apply to extradition hearings.

Long before his appointment to the Supreme Court, Gerard V. LaForest had been a staunch advocate of extradition under virtually any circumstances, as reflected in his two editions of *Extradition to and from Canada*, which he had initially written while employed by the Department of Justice. It was not surprising, then, that he would take the lead in writing judgments in initial extradition cases when they reached the Supreme Court of Canada. His judgments set the tone for extradition in Canada for a decade and a half.

In the *Allard* appeal, the United States requested the surrender of two alleged hijackers who had commandeered an American plane in New York and had flown it to Havana, Cuba. It was ruled by LaForest J. that the five-year delay in advancing the prosecution was the fault of American, not Canadian, authorities. Since the Charter extended only to the actions of

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158 *Schmidt, supra*, note 24.
159 *Smith, supra* note 157, at 547-553.
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Canadian officials, LaForest J. ruled, it could not be used by Allard. This decision seems suspect, since the delay could be construed as a form of abuse of process that had a direct effect on the timing of extradition proceedings held within Canada.

In Mellino, LaForest J. attempted to limit the role and discretion of the extradition judge to the absolute minimum: "The role of the extradition judge is a modest one; absent express statutory or treaty authorization, the sole purpose of an extradition hearing is to ensure that the evidence establishes a prima facie case that the extradition crime has been committed." Since there was no legislated authority for the extradition judge to apply the Charter, such remedies had to be sought in the judicial review of the habeas corpus procedure in the Federal Court Trial Division. The habeas corpus judge, not the extradition hearing judge, had the right to apply s. 24 of the Charter and grant its remedies, including applications under sections 7 and 11 of the Charter. Even LaForest admitted that "the decision to surrender a fugitive for trial in a foreign country would in particular circumstances violate the principles of fundamental justice" – although only under "obvious and urgent" circumstances.

Persons caught up in the extradition process do not have a "full measure of the fundamental rights and freedoms" precisely because jurists, led by LaForest J., have bought into the notion that Canada should put its international obligations ahead of the rights and freedoms of the individual, even where such individuals are Canadian citizens. For nearly two decades following Schmidt, extradition and appeal courts alike held with nearly absolute consistency that Section 7 of the Charter, which guarantees life, liberty and security of the

160 This position was all but reversed in 2001 by Arbour J. in U.S.A. v. Cobb, supra, note 41, para. 1-4.
161 Argentina (Republic) v. Mellino, supra, note 40 at S.C.R. 558; C.C.C. 349.
162 Federal Court Act, R.S.C. 1970, c. 10 (2d Supp.), s. 17(4)(b).
163 Ibid.
164 Schmidt, supra, note 24.
person, cannot be applied to curb Canada’s international obligations in the face of a treaty. Even as a court of “competent jurisdiction,” the extradition judge is competent only to hear arguments and substantive evidence regarding alleged Charter violations, including habeas corpus applications. In practice, for more than a decade extradition courts confined arguments under s. 7 to the person’s situation and treatment in Canada, including any irregular behavior on the part of Canadian officials, and such matters as judicial interim release.

Nonetheless, some judges have at least given notice of the importance of the Charter in extradition matters, as did Oppel J. in United States v. Davis (1999), when he neatly linked the Charter to Article 8 of the Treaty. Citing Dynar (“One of the most important functions of the extradition hearing is the production of the liberty of the individual”) and McVey (“This function, if modest in scope, is critical to the liberty of the individual”), Oppel J. rejected the argument of counsel for the United States that the extradition court ought to interpret the Treaty “without resorting to ‘the ordinary technical rules of Canadian criminal law’ and ‘certain protections guaranteed by the Canadian Charter of Rights and Freedoms.’”

It is suggested that the primary objective is to ensure that Canada meets its international obligations. While the question of surrender involves an executive act, there is ample authority for the proposition that a fugitive who is subjected to extradition is clothed with the protection afforded by the Charter. With respect, I do not agree with counsel for the United States’ argument that the function of an extradition hearing is as narrow as he suggests and that “certain protections guaranteed by the Canadian Charter of Rights and Freedoms” are “ordinary technical rules.” The Supreme Court of Canada has stated clearly that while courts must give a liberal interpretation to extradition treaties, the liberty of an individual

167 United States v. Alfaro (1990), 61 C.C.C. (3d) 474 (Que. C.A.) at 479.
168 Schmidt, supra, note 24, at 215, 218.
170 Supra, note 24.
must be protected. Moreover, treaty obligations aside, the Charter which applies to extradition hearings is the supreme law of the land.\footnote{\textit{U.S.A. v. Davis}, supra, note 155, para. 16, 18 and 21.}

The United States Court of Appeals for the Second Circuit determined in \textit{Murphy v. U.S.A.}\footnote{\textit{Murphy v. United States} (20 December 1999), U.S. Court of Appeals 2\textsuperscript{nd} Circuit, Docket No. 99-2016.} that Article 8 could not be used to apply an American statute of limitations to bar extradition to Canada where Canada had no such time limitation in criminal matters. In that case, the accused was charged with five counts of indecent assault, one of gross indecency and one of common assault in connection with allegations of sexual and physical abuse in Mount Cashel Orphanage in St. John's, Newfoundland, between 1951 and 1961.

\section{9. Fundamentals}

Article 9 of the Treaty stipulates that each request for extradition must be made through "the diplomatic channel" and must include such fundamentals (now incorporated in the Authority to Proceed) as a description of the person sought, a statement of facts, the text of the laws alleged to have been breached, the maximum punishment, and any limitations. The request must be accompanied by a warrant of arrest or judgment of conviction and sentence, as the case may be, along with evidence that the documentation refers to the person sought.

\section{10. Sufficiency of Evidence}

Article 10 of the Treaty requires as a condition precedent to extradition that "evidence be found sufficient, according to the laws of the place where the person sought shall be found, ... to justify his committal for trial" in the requested country.\footnote{\textit{Ibid.}, Article 10(1).} This provision is similar to the double criminality requirement, but refers specifically to the \textit{sufficiency of the evidence} rather than the \textit{conduct}. This means 1) sufficiency of evidence of conduct that constitutes a
crime or offence, and 2) properly authenticated or certified documentary evidence. The Treaty specifies that documentary evidence must be officially authenticated by officers of the Department of Justice (in cases emanating from Canada) or the Department of State (in cases emanating from the United States), and certified by the principal diplomatic or consular office of the requesting country. In Canada, the extradition judge determines that these documents are in order at an extradition hearing that resembles a preliminary hearing.

Following LaForest's lead in *Argentina (Republic) v. Mellino* (1987), Doherty J.A. of the Ontario Court of Appeal distinguished between the sufficiency of evidence required at an extradition hearing and that required at a preliminary inquiry:

The preliminary inquiry serves a discovery purpose in our domestic criminal law. The purpose dictates that the evidentiary scope of the hearing be expanded beyond evidence needed to establish a *prima facie* case to evidence which may assist the accused in making full answer and defence at trial. Extradition is a creature of statute. The purpose underlying the judicial phase of the extradition process must be found in the Act. *The sole purpose...is to determine whether the evidence adduced establishes a prima facie case against the fugitive.... Nothing in the statute speaks to a discovery function akin to that played by the preliminary inquiry.*

This reasoning of Doherty J.A. is particularly suspect when he says,

The extradition judge could not possibly determine whether certain evidence offered at the extradition hearing is relevant to a fugitive's right to make full answer and defence at some subsequent proceeding, when the extradition judge has no knowledge of what full answer and defence means in the context of the foreign proceeding and no

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174 *Ibid.*, Article 10(2). In Canada, the question of sufficiency of evidence in the first sense is the domain of the courts rather than the Minister, as s. 29(1)(a) of the Act make clear. 29(1) A judge shall order the committal of the person into custody to await surrender if (a) in the case of a person sought for prosecution, there is evidence admissible under this Act of conduct that, had it occurred in Canada, would justify committal for trial in Canada on the offence set out in the authority to proceed and the judge is satisfied that the person is the person sought by the extradition partner.

175 This provision is now incorporated into the current *Extradition Act* as s. 24(2): "For the purposes of the hearing, the judge has, subject to this Act, the powers of a justice under Part XVIII of the *Criminal Code*, with any modifications that the circumstances require." Part 18 of the *Criminal Code* governs preliminary hearings. See the following chapter for a discussion of the Act and Part 18 of the *Criminal Code*.

176 *Supra*, note 40, at 334 (S.C.C.).

knowledge of the legal matrix in which the ultimate adjudication of the merits of the charge would occur.\textsuperscript{178}

Although the judge cannot anticipate what information may or may not be helpful to a future proceeding any more than a preliminary inquiry judge can, the record of what was said at the hearing may well be of great benefit to the extradited party not only in the requesting jurisdiction but also in later submissions to the Minister of Justice. For example, Article 4(1)(iii) of the Treaty invites the person whose extradition is requested to "prove" that the extradition request has been made for the purpose of trying or punishing him for an offence of a political character. The matter of "proof" is surely something that can and should be determined by a qualified judge rather than a politician, despite the Act specifying that this consideration is within the discretion of the Minister.

Although "sufficiency" of evidence implies the leading of evidence sufficient to make out a prima facie case, the court is required to "hear" the evidence of the person sought where he or she wishes to raise Charter issues or other defences. Certainly the person facing extradition has a statutory right to adduce evidence, and at common law has a right to build a case for a purpose beyond the narrow requirements of the extradition judge. \textit{U.S.A. v. Bembenek (1992)}\textsuperscript{179} is authority for the proposition that the extradition judge has the discretion to receive evidence that could be used by the Minister to assess the political ramifications of carrying through with a surrender. Bambi Bembenek had been convicted of murdering the ex-wife of her husband, and had received a life sentence with little prospect of parole. She escaped custody and fled to Canada. The United States applied for her extradition. However, before her arrest could be ordered on the extradition warrant, she was arrested on an

\textsuperscript{178} \textit{Ibid.}, at 218.

immigration warrant, the Immigration Branch determining that she should be deported as an undesirable. Deportation procedure is far less complex than extradition, and so the Department of Justice bided its time, assuming that an order for her deportation would succeed. Preliminary to her deportation hearing, Bembenek applied for and received bail: since the last place she wanted to go was the United States, Bembenek was not considered a flight risk by the immigration tribunal. Upon her being granted bail, she was promptly re-arrested under the provisions of the Extradition Act. She applied to the Ontario Court (General Division) for an application for habeas corpus. Campbell J. seemed to consider the dual proceedings to verge on abuse of process:

It is a matter of particular concern that the government is proceeding with the immigration proceedings at the very same time it proceeds against the applicant on the extradition proceedings. Counsel for the Minister takes the position that the deportation and extradition should both proceed at the same time. Counsel was unable to say which proceedings will go first, which proceedings will take precedence, or which proceedings would defer to the other. The position, that both would proceed simultaneously, poses obvious practical problems. It aggravates the multiplicity of proceedings when the applicant has to face two simultaneous attacks on her presence in the country by two separate branches of the government at the very same time with no hint how the two simultaneous proceedings are intended to interact and no assurance that the practical problems of multiplicity have been or will be considered.\(^\text{180}\)

Campbell J. ultimately rejected Bembenek’s application for habeas corpus. After all, there was little doubt that she had been lawfully detained. However the habeas corpus application brought her case into the limelight, and the extradition court and the Minister thereafter proceeded very cautiously. For example, Watt J., the extradition judge, allowed extraneous evidence to be led regarding American sentencing and parole practice. Chances are, Bembenek, having once escaped, would have faced life imprisonment without possibility of parole for a long, long time upon her return to the United States.

\(^{180}\) Bembenek v. Canada (Minister of Employment and Immigration) (1991), 69 C.C.C. (3d) 34.
That the courts continued to exercise judicial discretion in assessing evidence under Article 10 was clearly illustrated in *U.S.A. v. Liang* (1995), where Oliver J. took it upon himself to strike out paragraphs of the authenticated record submitted by the United States that appeared to be hearsay, including one affidavit containing three paragraphs numbered "11". Oliver J. remarked, citing Mr. Justice Holmes in *U.S.A. v. Wong*: "It is difficult to believe that the material has been prepared, assembled, authenticated, reviewed and then filed in these proceedings by skilled attorneys and barristers' .... I share the 'difficulty of belief' expressed by my brother Holmes in the present case....

Apart from the slipshod and lackadaisical manner in which the documentation supporting this application for extradition has been prepared by those persons in the requesting state charged with that duty I make the following findings:

Firstly I find that what is left of the evidence of the United States of America after exclusion of inadmissible or otherwise improper material is insufficient to support the application before me.

Secondly, I am not satisfied by the evidence of identity of the accused as the person whose extradition is sought.

Thirdly, the fugitive — and I use that term in its technical extradition law sense — is wanted by the requesting state not upon the charge contained in the original Indictment for which he was tried, convicted and sentenced but for a breach of probation.\(^\text{181}\)

Thus some extradition judges showed a willingness to exercise judicial discretion under Article 10 to rectify a situation where otherwise a miscarriage of justice might have occurred. However, presented with similar facts, other judges chose not to\(^\text{182}\) — sometimes at their own peril. *U.S.A. v. Gillingham* (1998), (2003) remained before the courts for five years before a judge hearing his habeas corpus application recognized that Gillingham’s alleged breach of the terms of his probation in the United States had taken place entirely within Canada, and the


evidence gathered in support of the American extradition application had originated with a Canadian probation supervisor in Ottawa “acting on behalf of the Montana authorities in seeking Mr. Gillingham’s signature on a piece of paper designed to provide evidence of a purported breach of his obligations along with a waiver of extradition.”

Noting that “At the committal stage, the presiding judge must ensure that the committal order, if it is to issue, is the product of a fair judicial process,” Allan J. of the Supreme Court of British Columbia referred the matter back to the Court of Appeal and strongly recommended that Gillingham be appointed a lawyer. “Even aside from any claim of Charter protection, litigants are protected from unfair, abusive proceedings through the doctrine of abuse of process,” she said, citing Cobb. The Court of Appeal had said, “If inappropriate initiatives by Canadian authorities could be established, that might in itself be a ground for refusing surrender.”

As Chamberland J.A. of the Quebec Court of Appeal observed of Article 10(2) in Wacjman v. U.S.A. (2002), “These provisions mandate a departure from the technical rules of evidence applicable in Canadian domestic proceedings.”

11. Timing

Articles 9, 10 and 11 of the Treaty were reinterpreted in light of the new Act by Dambrot J. in United States v. Drysdale (2000):

The new Act places much of the foregoing in the statute for the first time, and augments it with time limits relating to the authority to proceed.... As is apparent, the new authority to proceed has been used as a safeguard to ensure that proceedings are commenced expeditiously in respect of persons who are provisionally arrested, in addition to the narrower safeguard respecting the time for receiving a request that may exist in a particular treaty.
Article 11 was amended by the 1988 Protocol (which entered into force in 1991) by the addition of a new Paragraph (3):

A person arrested shall be set at liberty upon the expiration of sixty days from the date of arrest pursuant to such application if a request for extradition and the documents specified in Article 9 have not been received. This stipulation shall not prevent the institution of proceedings with a view to extraditing the person sought if the request and documents are subsequently received.\textsuperscript{188}

In \textit{U.S.A. v. Wilson} (2002), the Court of Appeal for Ontario heard the application of a Canadian inmate who had escaped custody by walking away from a prison work site in Texas, where he was serving a cumulative sentence of 16 years after being convicted of multiple counts of burglary and forgery, mostly in Wisconsin. A month later, on 16 November 1999, Wilson was arrested in Canada on a provisional arrest warrant issued under s. 13 of the \textit{Extradition Act} for escaping from a secure correctional facility in Texas. On 13 January 2000, the United States formally requested his extradition on both the Texas and Wisconsin matters, later supporting the request with filed documents. The Minister of Justice issued an Authority to Proceed on 14 February 2000, some 90 days after the arrest. In March, the United States clarified that Wilson faced charges in both Texas and Wisconsin. On 25 April, 160 days after the arrest, the Minister issued a new authority to proceed. Saying that the Treaty and statutory deadlines exist to protect accused persons from being detained without charge, Gillese J.A. remarked that where a provisional arrest warrant has been issued, the deadlines of s. 14 of the Act, read in conjunction with Article 11 of the Extradition Treaty, meant that “the United States as requesting state, had sixty days within which to provide a formal request for extradition. Thereafter, the Minister of Justice had thirty days to issue an

\textsuperscript{188} Article 11(3). The new section instituted a deadline of 60 days, supplanting the previous deadline of 45 days.
190 Had Wilson been detained pursuant only to the November 1999 provisional arrest, said Gillese J.A., “he would be entitled to a s. 14 discharge in respect of his arrest on the Texas charge.” However, the provisional arrest had been superseded by a “straight arrest” in respect of the Texas charge based on the second authority to proceed issued on 25 April 2000. Section 4 of the Act (and Article 11 of the Treaty) did not preclude further proceedings, and therefore Wilson was not entitled to be discharged on the basis that the second authority to proceed was not issued within the time lines, because the new proceedings could have been brought “regardless of whether a s. 14 discharge was in place or could have been obtained.”

12. The Rule of Specialty

Once an individual has been surrendered to the requesting extradition partner, that country cannot pursue other charges that arose prior to the extradition without the express approval of the requested partner. Whether this principle gives the individual a right to argue that additional charges should not be laid has not been finally determined, although criminal proceedings against Inderjit Singh Reyat in the Air India bombing were in this category. Reyat was originally extradited from Great Britain for conspiracy to murder with respect to the bombing deaths of two baggage handlers at Narita Airport in Japan. Ten years later he was charged with the simultaneous bombing over the Irish Sea of an Air India plane with loss of all on board. British Home Secretary Jack Straw acceded to the Canadian request

190 Ibid., para. 39-40.
191 Ibid., para. 43-46.
to allow Canada to charge Reyat in connection with the second bombing without the need to return him to the United Kingdom. At the time of the original extradition, Canadian authorities had not amassed enough evidence linking Reyat to the Air India bombing to justify the laying of charges. On 4 September 2001, Reyat appealed Straw’s ruling to the High Court in London,\textsuperscript{193} but his appeal was dismissed. Eventually, Reyat pleaded guilty to manslaughter of 329 people and received a sentence of 5 years.\textsuperscript{194} By then, he had already served all ten years of his sentence for manslaughter in connection with the Narita bombing.

The principle of specialty remains an issue to be settled between the extradition partners, as is a matter of respecting their sovereignty. Therefore diplomacy ultimately governs, and the executive retains the discretion to allow trial on additional charges not the subject of the original extradition. However, under the protection provided by Article 12 of the Treaty, unless there is express agreement of the requested state at the time of extradition,\textsuperscript{195} once a person is extradited for a particular offence he cannot be detained, tried or punished for some other offence\textsuperscript{196} (unless it occurs after the extradition\textsuperscript{197}), or be extradited to a third state, unless he remains in the receiving country for 30 days after being free to leave, or leaves the country and returns voluntarily.\textsuperscript{198} Canadian legislation naturally does not govern a situation where a person has been returned to the United States from Canada, but s. 80 of the Act provides Article 12 protection for persons being extradited to Canada from the United States, and s. 40(3) empowers the Minister to make the surrender subject “to any conditions that the Minister considers appropriate, including a condition that

\textsuperscript{195} Treaty, \textit{Ibid.}, Article 12(1)(iii).
\textsuperscript{197} \textit{Ibid.}, Article 12(2).
\textsuperscript{198} \textit{Ibid.}, Article 12(1)(i), (ii).
the person not be prosecuted, nor that sentence be imposed on or enforced against the person, in respect of any offence or conduct other than that referred to in the order of surrender.” Of particular relevance within Canada is the right of specialty guaranteed by s. 80, which is subject to the terms of the relevant treaty and is not open to persons who have left or have had a reasonable opportunity to leave Canada after being surrendered. The right of specialty becomes defunct when a person waives extradition.

In his majority decision in *Gwynne v. Canada (Minister of Justice)* (1998), Goldie J.A. of the B.C. Court of Appeal started his reasons for judgment by referring to the argument of the Minister with respect to “specialty” under Article 12 of the Treaty, and there is little doubt that the court’s assumptions about specialty swayed the majority: “Article 12 of the Treaty ensures that Mr. Gwynne will not be detained, tried or punished for any other offences…. This ‘specialty’ protection, as it is called, binds the United States of America and all individual states, including Alabama.” Gwynne, a 57 year old Canadian Metis, had spent nine years of a 120 year sentence under appalling conditions in Alabama penitentiaries before escaping and “coming home” to Canada.

The *Gwynne* case demonstrates the ways in which an objective analysis, without judicious subjectivity, can lead to injustice simply by judges focusing on the parts of the issue without making the necessary subjective links to the whole situation entailed in well-reasoned and reasonable judgment-making. Goldie J.A. started his reasons for judgment by buying into the argument of the Minister with respect to “specialty”:

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"While escape from custody is an extraditable offence, the United States has not requested the extradition of Mr. Gwynne on that count... I wish to assure you that the speciality protection has never been violated by either Treaty partner. In my view, good faith on the part of the United States must be assumed and it is neither appropriate nor necessary for me to ask anything further from the Americans in this respect."  

Of course Gwynne would not be prosecuted for the entirely redundant and extraneous crime of escape from custody. Upon his return, the Alabama authorities would have Mr. Gwynne for the balance of his sentence – a potential 110 years. The corrections and parole system would impose its own form of trial and punishment on Mr. Gwynne for escaping lawful custody, which could have meant denying him parole for the rest of his life. As Goldie J.A. himself remarked in a classic understatement, "The prospects of parole... may have been diminished almost to the point of irrelevance by virtue of his escape."  

13. Mutual Cooperation  

The Treaty anticipates maximum cooperation between the extradition partners, and to this end provides for resolution of specific conflicts. For example, where more than one country requests the extradition of an individual, the requested country determines which of the requests will proceed, taking into account the seriousness of each offence, the place where the offence was committed, the dates of the requests, the possibility of a later extradition between the requesting states, and the provisions of any extradition agreement with the other requesting state(s). This is entirely within the domain of executive discretion.

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203 Ibid., at 4.  
204 Ibid., at 8. The Charter issues arising in this case are discussed in a later chapter.  
Once a decision on the extradition is made, the information must be conveyed through diplomatic channels and the individual concerned must be transported promptly to the requesting state. If the person is not removed within the time prescribed by law, he may be set free and the requested state may refuse to extradite him again for the same offence. This is a limit imposed upon executive discretion; any remedy against ministerial inaction would be the domain of the courts. In practice, an application brought by a person sought for extradition to quash an order of surrender on these grounds would simply be considered by the Minister as notice that the order needs to be perfected. Under these circumstances, the Attorney General would make a counter-application to the court for an extension of time to perfect the surrender. Nonetheless, the court has the discretion to interpret the Treaty strictly and order the release of the individual.

Any articles seized or otherwise acquired that may be used as evidence are to be surrendered to the requesting state, subject to the rights of third parties having a claim to them. In practice, the seizure of articles of evidence falls under the provisions of the Mutual Legal Assistance in Criminal Matters Act, and “the provisions of s. 39 give precedence to the terms of an extradition agreement over those of the Act in regard to the surrender of seized property.”

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206 Ibid., Article 14(1).
207 Under Article 16, persons surrendered by a process of extradition to either contracting party by a third state can be transported over the territory of the other contracting party where necessary to complete the surrender, where the extradition is warranted (although no mechanism for determining this question is provided), and where there is no concern for public order.
208 Ibid., Article 14(2).
209 Ibid., Article 15. This is reinforced by s. 39(1) of the Act: “Subject to a relevant extradition agreement, a judge who makes an order of committal may order that any thing that was seized when the person was arrested and that may be used in the prosecution of the person for the offence for which the extradition was requested be transferred to the extradition partner at the time the person is surrendered.”
210 Krivel, Beveridge and Hayward, supra, note 9, p. 304.
The legal officers of the requesting state are required by the Treaty to assist with presenting the case without the requesting state seeking compensation for any of the services provided, such as arrest, detention, examination and surrender. In response to this requirement in the Treaty, Departments of Justice routinely assign counsel to represent the requesting countries in domestic courts on a reciprocal basis, thereby avoiding the expense of hiring lawyers privately to prosecute extradition cases, as had been the practice. Regarding American practice, Christopher H. Pyle noted,

Within the Departments of Justice and State, legal bureaucracies were established to deal with these requests and to handle requests for the return of fugitives from American Law. Joining the State Department’s Office of Legal Advisor (OLA) was a new Justice Department Office of International Affairs (OIA), which not only coordinated extradition policy but also helped redraft treaties and plan litigation and legislative strategies.

The triumph of administrative routine over independent judgment, national neutrality, or considerations of justice was completed in the mid-1970’s, when the Justice Department decided, in order to enhance the reciprocal surrender of American fugitives, to represent all requesting regimes in American courts. The decision was most commonly portrayed as a mere administrative arrangement. In fact, it had serious policy implications, because it put U.S. attorneys automatically on the side of requesting regimes and against the persons whose extradition was sought.

As a result, extradition requests received by the United States grew from ten a year in 1967 to about 100 in 1977 and to 239 by 1987.

In Canada, the practice of using counsel from within the office of the Department of Justice/Attorney General to represent foreign governments naturally raised eyebrows, since it appeared that the same Minister was both prosecuting extradition claims and making the final decision on whether to surrender the fugitive. The argument that the Minister was thus made both an advocate and a judge first arose in Canadian jurisprudence in Re Sudor and U.S.A. Re

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211 Ibid., Article 17.
212 Pyle, supra, pp. 143-144.
Judicial and Executive Discretion in Extradition between Canada and the United States

Meier (1981), where Jerome, A.C.J. dismissed an application for an order restraining the Minister of Justice and his officials “from participating further in the [extradition] request of the Government of the United States” on the grounds that the Minister of Justice “now assumes responsibility to assist the foreign authority with the application”:

Since the Minister interprets this obligation to include, not only the assistance of his officials in the preparation of the application, but also the appearance of counsel for the Crown acting at the same time on behalf of the Minister and on behalf of the foreign Government, counsel contends that the inquiry will find a political element in this case ... [which] will ultimately impose upon the Minister the obligation to make a quasi-judicial decision. It is the essence of the submission on behalf of the appellant that the representations made at this stage of the proceedings on behalf of the foreign power by counsel instructed by the Minister will disable the Minister from the proper discharge of his duties due to a conflict of interests.

In rejecting this argument, Jerome J. pointed out that the Minister’s officials were “acting in conformity with what the Minister of Justice perceives to be his obligation under the treaties and the supporting statutes....

It is my view that the presiding Judge and the officials of the Minister of Justice, and counsel instructed by them to act on behalf of the Minister of Justice and on behalf of the United States of America, do not appear to be under any legal disability, but, rather clearly, appear to be acting in conformity with the law....

The issue arose again in the unrelated case of Meier v. Minister of Justice (1983), where the accused was sought by California for counseling murder. Esson J. of the British Columbia Supreme Court stated, “Even if there is anything objectionable to the practice, as to which I express no opinion, it cannot affect the jurisdiction of the extradition judge.” In striking out Meier’s statement of claim for declaratory relief against the Minister of Justice in the Federal Court Trial Division, Cattanach J. reviewed the role, duties and scope of discretion.

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215 Ibid. (F.C.T.D.) at 175.
216 Ibid., at 175-176.
218 Ibid., at 177.
of the Minister of Justice at some length. He held that the Minister of Justice was not a “federal board, commission or other tribunal” referred to in s. 18 of the Federal Court Act. “He is, at the most, an officer of the Crown vested with a discretion in this particular matter. Thus under s. 18 there is no jurisdiction vested in this court to grant the declaratory relief sought against the minister.” Since the Minister had not yet had an opportunity to exercise his discretion, the judge ruled, the statement of claim asking for declaratory relief was premature. With respect to Meier’s claim of “bias in that an officer of the Department of Justice assumed the conduct of the extradition proceedings on behalf of the State of California,” Cattanach J. referred to the decision in Sudar, and concluded, “Even assuming that bias in the legal sense may exist, then it is countenanced by the statute.” Thus, in Canada, the concerns expressed by Pyle in an American context received short shrift.

14. Joint Jurisdiction to Prosecute

Where both the United States and Canada have jurisdiction to prosecute the matter, the requested state will have the final decision of whether to prosecute or extradite, considering such factors as where the act or injury occurred or was intended to occur, the nationality of the victim or intended victim, the availability and location of the evidence, and the respective interests of the contracting parties. Although the fairness of the laws and judicial system of

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219 Meier v. Minister of Justice (1983), 6 C.C.C. (3d) 563 at 567-569. The Meier case had been initiated on the assumption that a cabinet minister making an administrative decision was a tribunal falling under s. 18 of the Federal Court Act, following Commonwealth of Puerto Rico v. Hernandez (1973), 14 C.C.C. (2d) 209, 41 D.L.R. (3d) 549, [1975] 1 S.C.R. 228. However, Hernandez had specifically been overturned by a unanimous seven-judge panel of the Supreme Court of Canada in Minister of Indian Affairs and Northern Development v. Ranville (1982), 139 D.L.R. (3d) 1.
221 Ibid., at 570, 572.
222 Ibid., at 571.
223 Supra, note 210.
224 Protocol of 1988, Article VII (This addition to Article 17 seems to be a non sequitur).
the requesting state is assumed, the requested extradition partner must determine whether it is appropriate to conduct the prosecution itself. In Canada, this is a matter wholly within executive discretion, but a common law test was developed in *U.S.A. v. Cotroni* (1989) that is still germane.

In *Cotroni*, the respondents, Frank Santo Cotroni and Samir El Zein, both Canadian citizens, were alleged to have participated in separate conspiracies to import and distribute heroin in the United States. El Zein had allegedly provided couriers in Montreal with two packages of heroin for transport to the United States. Cotroni was alleged to have given instructions to accomplices in the United States by telephone. All of their actions relating to the alleged conspiracy took place while they were in Canada; however, most of the evidence and all of the witnesses were located in the United States. Cotroni and El Zein argued that their rights as Canadian citizens would be infringed under s. 6(1) of the *Canadian Charter of Rights and Freedoms*, which guarantees every citizen of Canada “the right to enter, remain in and leave Canada.” The Supreme Court agreed that extradition was a *prima facie* infringement of s. 6, but that the infringement was (in the words of LaForest J.) “somewhat peripheral” compared to the pressing and substantial concern of defeating “national and transnational crimes” by the use of extradition. However, Cotroni’s s. 6 rights could not be ignored by those with the power to prosecute. Rather they must “in good faith” and in

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225 Section 47(d) of the Act provides,

47. The Minister may refuse to make a surrender order if the Minister is satisfied that

...(d) the conduct in respect of which the request for extradition is made is the subject of criminal proceedings in Canada against the person.


consultation with the requesting country consider whether prosecution in Canada could be effected as easily as elsewhere.\textsuperscript{228}

Factors to be considered included where the offence was actually perpetrated; where the offence was likely to have the greatest impact; where the evidence was located and whether it could be moved; which jurisdiction had the greater interest in prosecuting the offence, had developed the most comprehensive case, or had laid charges and was most ready to proceed to trial; in the case of several persons being accused, whether it was practical to try them all together; the severity of the sentence faced by the accused; and the nationality and residence of the accused.\textsuperscript{229} The Supreme Court also determined that the extradition court was not required to examine each individual case to determine whether the person subject to extradition was a Canadian citizen who could be charged in Canada. Any decision in this regard is made in consultation between the two countries and must apply the factors of the "\textit{Cotroni test}."\textsuperscript{230}

Under Article 17\textit{ bis} of the Canada-United States Extradition Treaty, four factors are enumerated that could be decisive in any \textit{Cotroni} analysis of whether to extradite or prosecute:

If both contracting Parties have jurisdiction to prosecute the person for the offense for which extradition is sought, the executive authority of the requested State, after consulting with the executive authority of the requesting State, shall decide whether to extradite the person or submit the case to its competent authorities for the purpose of prosecution. In making its decision, the requested State shall consider all relevant factors, including but not limited to:

(i) the place where the act was committed or intended to be committed or the injury occurred or was intended to occur;
(ii) the respective interests of the Contracting Parties;
(iii) the nationality of the victim or the intended victim; and
(iv) the availability and location of the evidence.\textsuperscript{231}

\textsuperscript{228} \textit{Ibid.}, at 224-225.
\textsuperscript{229} \textit{Ibid.}, at 225.
\textsuperscript{230} See Chapter Six, \textit{infra}.
\textsuperscript{231} Article 17\textit{ bis} of the \textit{Canada-United States Extradition Treaty}, effective 26 November 1991.
This amendment turned the issue of citizenship on its head, focusing on “the nationality of the victim or the intended victim” rather than the nationality of the accused.

The new Treaty provision covered a perceived hole in the former Act which was ameliorated to an extent by s. 47(d) of the current Extradition Act granting the Minister of Justice the discretion to refuse to make an order for surrender of the accused where “the conduct in respect of which the request for extradition is made is the subject of criminal proceedings in Canada against the person.” Otherwise, the extradition statutes of Canada and the United States are silent as to whether the requested country even has the right to prosecute an individual in the jurisdiction where he is found rather than extradite him for an offence committed outside the requested country.

Still, any arbitrary decision of the Minister to extradite rather than prosecute in Canada without first consulting with the requesting state and the attorney-general in the appropriate jurisdiction where the individual has been found may invite Charter scrutiny by the courts of appeal.232 This is especially the case where Canada has specifically taken jurisdiction of criminal cases, as in the new provisions of the Criminal Code governing terrorist activities.233

A more serious problem arises where the Minister does not apply the test, or applies it in such an arbitrary way that he has abrogated his duty, as in U.S.A. v. Reumayr (2003),234 where rather than applying the Cotroni test himself, the Minister stated that he had been “informed” that the Attorney General of British Columbia had “considered” the directions given by the Supreme Court of Canada in Cotroni.235 Mackenzie J.A. of the British Columbia

233 Including sections 7 and 83.1-83.18.
235 Ibid., para. 22.
Court of Appeal was clearly in error when he stated that “the Minister considered the \textit{Cotroni} factors.”\footnote{\textit{Ibid.}, para. 29.} This error was compounded, first by the failure of the Court of Appeal to itself properly apply the \textit{Cotroni} test, and further by its applying the wrong test – the “shock the conscience” test of \textit{Schmidt, Kindler, and Burns}.\footnote{\textit{Supra}, notes 24, 120, and 41 respectively.} The alleged criminal conduct, which the extradition court limited to possession of explosives preparatory to blowing up a segment of the Trans-Alaska Pipeline, took place entirely within Canada. Virtually all of the evidence, including a box of explosives and any tapes or testimony that could be supplied by the eavesdropping RCMP, was located in Canada. Since “it was clear that the Attorney General would revive the domestic prosecution if the appellant was not surrendered,”\footnote{\textit{U.S.A. v. Reumayr, supra}, note 234, para. 22. See Chapter 6, infra, for a more detailed discussion.} there was every reason to allow the domestic prosecution to proceed, especially given the fact that under the new \textit{U.S.A. Patriot Act}, the plot could be characterized as a terrorist act. Clearly, in \textit{Reumayr} the Attorney General of British Columbia deferred to the arbitrarily exercised discretion of the Minister of Justice, framed as a request – not the other way around.
CHAPTER FIVE
THE CURRENT LEGISLATIVE SCHEME, PART I:
FROM REQUEST TO HEARING

1. The Legislative Scheme

The Canada Extradition Act (1999) contemplates five distinct steps toggling back and forth between the executive and the judiciary.

1. Executive Discretion: the Authorization Process

2. Judicial Discretion: the Extradition Hearing

3. Executive Discretion: the Minister’s Initial Surrender Decision

4. Judicial Discretion: the Judicial Review and/or Appeal Process

5. Executive Discretion: the Minister’s Final Surrender Decision

These steps are bound to be followed in every case unless at some point along the way the person sought capitulates, or decides to waive extradition. This chapter will compare and contrast the competing roles of the executive, particularly the expanded role of Minister of Justice in step 1 and the diminished role of the judiciary in step 2.

Although this legislative scheme is more complex than the two-tier system that existed prior to passage of the Act, it is an attempt to codify and streamline the actual practice of the Department of Justice that has been in place for years. Doherty J.A. of the Ontario Court of Appeal noted in Russian Federation v. Pokidychev (1999),

The Minister of Justice ... effectively controls both ends of the process. No request goes forward without her approval and no sending order is implemented without her
approval. The central role of the Minister of Justice in the process reflects the essentially political nature of decisions involving international relations. These decisions properly rest with the executive arm of the federal government which is responsible for the conduct of Canada’s foreign relations.1

As Watt J. noted in *Germany (Republic) v. Schreiber* (2000), “In a temporal sense, the involvement of the Minister brackets that of the superior court judge.”2 The involvement of the Minister also brackets that of the provincial or territorial court of appeal.

The Act received first reading as Bill C-40 on 5 May, 1998 and second reading on 8 October 1998.3 While introducing the Bill to the House of Commons, Eleni Bakopanos, the Parliamentary Secretary to Minister of Justice Anne McLellan, gave a gloss of the legislative purpose of the Act, saying, “The bill overhauls extradition laws in Canada and creates a modern, effective system for extradition appropriate for the 21st century. It will help us to better meet our international commitments and ensure that Canada is not a safe haven for criminals seeking to avoid justice.” After referring to the expansion of the role of the Act to incorporate Commonwealth countries and countries with which Canada does not have extradition agreements or treaties, she added:

The current extradition process places onerous evidentiary requirements on foreign states and the legislation does not set out clear and adequate procedural and human rights safeguards for persons whose extradition is being sought. Given the increasing ease of international travel, the advancement of technology and the global economy, major crime and criminals are no longer local in nature. Transnational crime and criminals are now the norm, not the exception. Canada’s laws must be modernized in recognition of that reality....

Even with countries with a similar legal tradition such as the United States, we have heard on numerous occasions how difficult it is to obtain extradition from Canada.4

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The Act was passed by the House of Commons on 1 December 1998 without much fanfare. In the Senate, however, Bill C-40 was subjected to extensive hearings before the Committee on Legal and Constitutional Affairs, Senator Jerry Grafstein having proposed amendments removing discretion from the Minister to allow extradition to a country which allows the death penalty without first requiring that the state agree to a punishment upon conviction of not greater than life imprisonment.

During these hearings the Minister of Justice gave the impression that she had consulted with Mme Louise Arbour, the chief prosecutor for the International War Crimes Tribunal, while Mme Arbour was on leave of absence from her position as a justice of the Ontario Court of Appeal. Following the announcement of Mme Arbour’s appointment as a justice of the Supreme Court of Canada, the Leader of the Opposition in the Senate, John Lynch-Staunton, pressed the Senate Government Leader to obtain from the Justice Department an official denial that any such consultations occurred.\(^5\)

The Senate eventually approved the Bill with minor amendments, and the Extradition Act received Royal Assent on 17 June 1999.\(^6\) The official summary of the Act claimed that it creates “a comprehensive scheme, consistent with modern legal principles and recent international developments.” This “scheme” applies to all requests for extradition, including requests under a bilateral treaty.

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\(^5\) Michael Posluns, “Topical Hansard Files: Criminal Law” (Stillwaters Group, MPosluns@accglobal.net, 1 August 1999).

\(^6\) The full name of the Extradition Act is “An Act respecting extradition, to amend the Canada Evidence Act, the Criminal Code, the Immigration Act and the Mutual Legal Assistance in Criminal Matters Act and to amend and repeal other Acts in consequence.” S.C. 1999, c. 18, as am. S.C. 2000, c.24, ss. 47-53 (in force 23 October 2000). Section 1 invites citation as the Extradition Act. Section 2 (Part 1) provides common sense definitions to terms of art. “Attorney General” refers to the A-G of Canada rather than the provinces, for example, and “Minister” refers to the Minister of Justice. “Court” means the superior court in each province, and “court of appeal” means what it says. “Extradition agreement” is the new term for what used to be called an “extradition arrangement” or treaty. A “specific agreement” is one negotiated on an ad hoc or case-by-case basis with a country with which there is no extradition arrangement. “Extradition partner” means a “State or entity with which Canada is party to an extradition agreement, with which Canada has entered into a specific agreement or whose name appears in the schedule.” “State or entity” is further defined as “a) a State other than Canada; b) a province, state or other political subdivision of a State other than Canada; c) a colony, dependency, possession, protectorate, condominium, trust territory or any territory falling under the jurisdiction of a State other than Canada, d) an international criminal court or tribunal; or e) a territory.” A judge is a judge of the superior court, but a “justice” has the same meaning as “justice” in the Criminal Code, i.e. a justice of the peace, a provincial court judge, or “two or more justices where two or more justices are, by law, required to act or, by law, act or have jurisdiction.” Criminal Code, s. 2, s.v. “justice.”
It sets out in detail the procedures applicable to the extradition process, including the pre-hearing process and the hearing itself. It allows for the admission into evidence of documentation contained in a certified record of the case. It provides that extradition will be based on the principle of dual criminality, providing that the conduct would be punishable both in Canada, if it had occurred in Canada, and in the jurisdiction of the extradition partner by deprivation of liberty for no less than a specified minimum period, as set out in the Act or an extradition agreement.7

According to the official summary, the enactment specifies 1) the considerations for the extradition judge in deciding whether the person sought should be ordered to await surrender to the requesting State, and 2) issues for the Minister of Justice to consider in deciding whether to surrender the person sought to the nation seeking extradition.8 What was not said in the official summary was that the considerations for the extradition judge were much reduced, and that the issues for the Minister of Justice to consider were much expanded by the legislation. With the passage of the Extradition Act, executive discretion in extradition matters obtained preeminence over judicial discretion even in areas formerly (and traditionally) the domain of the extradition judge, such as receiving evidence of an offence of a political nature, or of situations faced by the accused which breached human rights.

As stated in the “General Principle” outlined in subsection 3(1) – the cornerstone of Canadian extradition policy – a person may be extradited, at the Minister’s discretion, in accordance with the Act and “a relevant extradition agreement” (such as the Canada-United States Extradition Treaty)9, upon the request of an extradition partner, to face prosecution or imposition or enforcement of sentence where the offence is punishable by imprisonment of at

7 “Summary” to Bill C-40, “as passed by the House of Commons December 1, 1998,” p. i.
8 Ibid., p. ii. The Act contains four uneven parts: Part One of the Act (s. 2) deals with interpretation, Part Two (ss 3 –76) deals with extradition from Canada, Part Three (ss 77-83) deals with extradition from Canada, and Part Four (ss. 84-130) pertains to transitional provisions arising from the legislation such as changes to the Criminal Code, most of which are already fait accompli.
9 Section 7: “The Minister is responsible for the implementation of extradition agreements, the administration of this Act, and dealing with requests for extradition made under them.” Italics added. See also s. 11(1): “A request by an extradition partner for the provisional arrest or extradition of a person shall be made to the Minister.” The request can be made to the Minister “through Interpol” (s. 11(2)).
Judicial and Executive Discretion in Extradition between Canada and the United States

least two years or more, unless a relevant extradition agreement specifies otherwise. The Canada-United States Treaty specifies that extradition can occur between those two countries for conduct that would garner a maximum “exceeding one year.” Although the Act specifies that its provisions are “subject to a relevant extradition agreement,” and therefore the Treaty trumps the Act, the extradition of a person to the United States on a charge that would garner a maximum sentence of less than two years would invite Charter scrutiny: Why should extradition from Canada to the United States have a standard half that of anywhere else?

Subsection 3(2) specifies, “For greater certainty, it is not relevant whether the conduct referred to in (1) is named, defined or characterized by the extradition partner in the same way as it is in Canada.” Subsection 3(3) specifies that extradition of sentenced persons will be granted only if at least six months remains to be served in the sentence. In U.S.A. v.

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11 Section 4 allows further extradition proceedings against a person who has been discharged, whether or not they are based on the same conduct, subject to the judge’s opinion “that those further proceedings would be an abuse of process.” See U.S.A. v. Wilson (19 December 2002) ONCA C37319, para. 45-46. “So long as the further proceedings did not constitute an abuse of process, s. 4 gave the Minister the authority to issue the second authority to proceed and the Attorney General the authority to apply for the s. 16 warrant, regardless of whether a s. 14 discharge was in place or could have been obtained.” Section 5 provides that a person may be extradited whether or not the conduct alleged occurred in the territory of the requesting nation, and “whether or not Canada could exercise jurisdiction in similar circumstances,” and appears to be a codification of the position taken in U.S.A. v. Lepine (1993), 163 N.R. 1 (S.C.C.), where LaForest J. held 1) that the extradition judge was not required to consider where the acts charged took place or whether they fell within the jurisdiction of the requesting state – those matters were “governed by the law of that state”; and 2) that the extradition judge had no jurisdiction to consider whether Canada could have taken jurisdiction in similar circumstances. Section 5 would obviate the situation encountered by Britain in the Pinochet case, where it could not assert jurisdiction over extraterritorial offences. R. v. Bartle, Ex parte Pinochet Ugarte (No. 3), (sub nom. R. v. Bow Street Metropolitan Stipendiary Magistrate), [1999] 2 All E.R. 97. It would also cover the situation encountered in Romania (State) v. Cheng (1997), 114 C.C.C. (3d) 289 (N.S. S.C.), dismissed as moot (1997), 119 C.C.C. (3d) 561 (N.S. C.A.), where it was alleged that three Romanian stowaways had been tossed overboard by the officers of a Taiwanese freighter en route to Canada. There, the extradition judge, MacDonald J., declined jurisdiction, saying that extradition was limited to crimes committed “within the geographical boundaries of the Requesting State.” Ibid., at 324. Section 6 gives retrospective effect to the Act, allowing it to be applied to extradition offences whether they were allegedly committed before or after the Act or extradition agreement came into force. This is consistent with Article 18(2) of the Treaty. Section 6.1 provides that no person who is the subject of a request for surrender by the International Criminal Court, or similar international criminal tribunal may claim immunity from arrest or extradition. This section was enacted by the Crimes Against Humanity and War Crimes Act, S.C. 2000, c. 24, s.
Conmisso (2000), O’Connor J.A. of the Ontario Court of Appeal stated at 170: “The extradition judge shall commit a fugitive for surrender if satisfied that the conduct that underlies the foreign charge, wherever it took place, would if it occurred in Canada constitute a prima facie case of any of the offences listed in the Extradition Act, or described in the relevant extradition treaty.”12 This echoed the opinion of LaForest J. in Re Schmidt: “A judge at an extradition hearing has no jurisdiction to deal with defences that could be raised at trial unless, of course, the Act or the treaty otherwise provides.”13 However, in U.S.A. v. Dynar (1997), Cory and Iacobucci J.J., citing LaForest writing for the majority in U.S.A. v. McVey (1992),14 stated that “courts must find a statutory source for attributing a particular function to the extradition judge.”15 Under the current legislative scheme, the extradition judge is bound by the Act, not by the Treaty, and judges are discouraged from interpreting the Treaty, which is the Minister’s domain.16 “As a result of the modest role assigned by statute, the Supreme Court of Canada emphatically rejected any role for the courts in monitoring treaty compliance.” In fact, the Supreme Court went so far as to say that “attempts by the courts to monitor treaty compliance were a usurpation of a function of the executive.”17

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48 and is consistent with Article 27 of the Rome Statute ratified by Canada in June, 2000, which established the International Criminal Court to “apply equally to all persons without any distinction based on official capacity.”


2. **Executive Discretion in the Authorization Process**

Section 7 of the *Extradition Act* grants to the Minister the responsibility "for the implementation of extradition agreements, the administration of this Act and dealing with requests for extradition made under them." As Watt J. noted in *Schreiber* (2000), the first case to address this provision, "The language of this enabling authority, s. 7 of the Act, is unconfined, at least in terms." Nothing resembling this provision existed in the former Act; rather, it appears to be a codification of the common law as it was expressed by Cory J. in *Idziak v. Canada (Minister of Justice)* (1992):

> The Minister must weigh the representations of the fugitive against Canada's international treaty obligations.... Parliament chose to give discretionary authority to the Minister of Justice. It is the Minister who must consider the good faith and honour of this country in its relations with other states. It is the Minister who has the expert knowledge of the political ramifications of an extradition decision.\(^{19}\)

Thus s. 7 enhances executive discretion of the Minister in dealing with requests. Specific procedures falling to ministerial discretion are outlined in and governed by sections 11, 12, 15 and 23 of the *Extradition Act*, a host of extradition and mutual legal assistance treaties,\(^{20}\) and the *Mutual Legal Assistance in Criminal Matters Act*.\(^{21}\)

Under the subheading, "**Minister's Power to Receive Requests,**" section 11 directs extradition partners to make requests for extradition or for provisional arrest of a person pending extradition (whether directly or through Interpol) to the Minister of Justice.\(^{22}\) Sections

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\(^{18}\) *Schreiber*, *supra*, note 2, para. 40, 60, 65, per Watt, J.

\(^{19}\) *Idziak v. Canada (Minister of Justice)*, *supra*, note 16, at 86.


\(^{21}\) R.S., 1985, c. 30 (4th Supp.), s. 7.

\(^{22}\) Section 11. **Section 8** specifies that an extradition agreement or "the provisions respecting extradition contained in a multilateral extradition agreement" must be published within 60 days after they come into force, either in the *Canada Treaty Series* or the *Canada Gazette*. The reference to "a multilateral extradition agreement" in this context means any multilateral agreement containing an extradition provision (s. 2).
12-14 deal with warrants for provisional arrest. When an extradition partner requests a provisional arrest prior to extradition, s. 12 specifically grants discretion to the Minister to authorize the Attorney General to apply for a warrant if the Minister is satisfied that a formal request for extradition will follow, and that the offence meets the punishment requirements of the general principle set out in s. 3(1)(a). The actual application for a provisional arrest warrant is made *ex parte* by the Attorney General or designate to a judge. By virtue of subsection 13(1), the judge may exercise his judicial discretion to issue the warrant "if satisfied that there are reasonable grounds to believe that

- it is necessary in the public interest to arrest the person, including to prevent the person from escaping or committing an offence;
- the person is ordinarily resident in Canada, is in Canada, or is on the way to Canada; and
- a warrant for the person’s arrest or an order of a similar nature has been issued or the person has been convicted."

Under s. 14, a person who has been provisionally arrested must be discharged “when the Minister notifies the court that an authority to proceed will not be issued” or when a time limit specified in an extradition agreement has not been met or extended.24 In the case of the Canada-United States Treaty, Article 11(3) specifies that “A person arrested shall be set at

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Subsection 8(3) declares that once published, extradition agreements are to be judicially noticed. *R. v. Waddell* (1992), 18 W.C.B. (2d) 183 (B.C. S.C.) rejected an argument that a similar statutory declaration of judicial notice appearing in the former Act was unconstitutional since it encroached on the exclusive discretion of the judiciary. Section 9 refers to designated nations that appear in a schedule of Commonwealth countries and other newcomers to the process who have been recently designated as extradition partners by virtue of the combination of the former Act with the Fugitive Offenders Act, amendments to the Crimes Against Humanity and War Crimes Act and similar tribunals, and other situations. Inexplicably, Costa Rica and Japan are included in the schedule. Subsection 9(2) provides for the Minister of Foreign Affairs, with the agreement of the Minister of Justice, to order additions to or deletions from the schedule. Section 10 pertains to concluding “specific agreements” with countries in cases where no treaty currently exists.23 The warrant, preferably identifying the Canadian rather than the American offence (although either will do – *U.S.A. v. McVey* (S.C.C.), *supra*, note 14), must name or describe the person to be arrested, and order that the person be arrested and brought before either the judge who issued the warrant or “before another judge in Canada” (ss. 13(2)). The provisional arrest warrant may be executed anywhere in the country without being endorsed (ss. 13(3)).

23 Paragraph 14(1)(a)
liberty upon the expiration of sixty days from the date of arrest” if appropriate documentation has not been received; however, extradition proceedings can be reinstated once the documentation is perfected. In *U.S.A. v. Wilson* (2002), the Minister issued an authority to proceed 90 days after Wilson’s arrest, but only for charges arising in Wisconsin; reference to additional charges in Texas were not addressed by the Minister until he issued a second authority to proceed 160 days after the initial arrest. Wilson applied for a stay of proceedings of the Texas charge of escaping lawful custody on the grounds that no authority to proceed had been issued within the period specified by s. 14(1)(b)(ii) of the Act. “If the appellant were being detained pursuant only to the November 1999 provisional arrest, he would be entitled to a s. 14 discharge in respect of his arrest on the Texas charge,” said Gillese, J.A. However, so long as the further proceedings did not constitute an abuse of process, s. 4 gave the Minister the authority to issue the second authority to proceed..., regardless of whether a s. 14 discharge was in place or could have been obtained. Therefore the extradition judge did not err in concluding that the appellant was not entitled to be discharged on the basis that the second authority to proceed was not issued within the time line imposed by s. 14 of the Act in respect of the Texas charge.

Gillese J.A. noted that there were two forms of arrest under the Act, provisional arrest under s. 13 and “straight” arrest under s. 16, issued pursuant to an authority to proceed. The appellant was in effect “arrested” on the second authority to proceed issued in April, even though the “straight” warrant was not issued until September 2000, 10 months after the initial arrest.

The primary discretionary power of the Minister at the “front end” of the extradition process is contained in s. 15, which concerns the issuing of an “Authority to Proceed” (dubbed

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27 Under subsections 14(2) and (3) of the Act, a judge has the discretion, on application from the Attorney General, to extend the timelines, and (under these circumstances) to grant judicial interim release or vary existing bail conditions.
by some judges the “ATP”28 – a new but important first step in extradition procedure that
gives the Minister more “executive discretion” than ever before, involving as it does
interpretation of both domestic and foreign law. Section 15(1) specifies:

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

The ATP authorizes the Attorney General (who is currently also the Minister of Justice) to
seek an order for the committal of the person sought by taking it to the second level – the
extradition hearing.29 As Watt J. remarked,

The Minister receives the request from the extradition partner. It is for the Minister to
decide whether she or he will authorize the Attorney General to apply for a provisional
arrest warrant. Further, it is for the Minister to say whether she or he will issue an
authority to proceed that authorizes the Attorney General to seek, on behalf of the
extradition partner, a judicial order of committal under s. 29 of the Act.…30

Although he recognized differences in the two processes, Dambrot J. suggested that the
function of the Minister in dealing with a request from an extradition partner and approving an
Authority to Proceed is analogous to the function of a senior Crown counsel dealing with a
request from the police and approving a criminal indictment.31

It does not require a detailed analysis of the provision in the Criminal Code
governing criminal pleadings to appreciate the similarity of purpose of an information
or indictment on the one hand, and the authority to proceed on the other. Of course,
having regard to the differences between a domestic prosecution and an extradition
proceeding, these purposes cannot be identical.32

28 Allan J. of the Supreme Court of British Columbia appears to have first used this useful abbreviation in U.S.A.
29 Extradition Act, sections 15, 23.
30 Schreiber, supra, note 2, para. 60.
32 Ibid., at 180, para 52. para. 83.
He regarded the document as important enough to warrant some minimal care in the drafting, requiring at least some thought as to what offences should be included:

I consider the authority to proceed to be a document of fundamental importance in an extradition hearing. The offences listed in it will provide the focus of the determination to be made. The thoughtful selection of offences, and their careful drafting, will be essential to the conduct of the proceeding. 33

This early statement of what was required of the Minister was quickly expanded by Loo J. in U.S.A. v. Shull (2001), 34 when he required that the ATP must include details of the alleged offences, including particulars of the conduct for which the extradition is sought. “The extradition judge acceded to the Applicants’ motion to quash the ATP on the basis that it was lacking in factual particularity and it failed to specify the relationship between the conduct in the ATP and the 45 offences in the U.S. indictment.” 35 Although the United States appealed, the appeal was abandoned in October 2001 and a new ATP was filed the following June, this time one that set out the particulars more precisely. 36 Subsequently in U.S.A. v. Reumayr, 37 Williamson J. refused to follow Shull, holding that it was “wrongly decided, and that it was an unconsidered judgment given in circumstances where the exigencies of the hearing required an immediate decision without the opportunity to fully consult authority.” 38

Dambrot J.’s statement that the ATP was similar but not identical to a criminal indictment was later seized on by Groberman J. of the British Columbia Supreme Court, in opposition to Shull, but following Reumayr:

Section 15 of the Extradition Act very clearly sets out the requirements of an Authority to Proceed. It does not include a requirement that the allegations upon which the

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33 Ibid., at 191, para. 83.
34 (29 June 2001), Vancouver Registry No. CC991440.
36 Ibid., para. 12.
37 Vancouver Registry No. CC991033.
extradition request is based be detailed; it is, in this regard, in stark contrast to the requirements of section 581(3) in respect of indictments.39

In U.S.A. v. Baubin (2002), Groberman J. held that the 1999 Extradition Act was “a complete code for hearing extradition matters…. [T]he court is not entitled to engraft additional procedural or substantive requirements on top of those provided by the statute.”40

Groberman J. noted that since Williamson J. in Reumayr regarded Shull to be “wrongly decided,” he himself was not prevented from departing from the decision in Shull:

Had I been the Extradition Hearing Judge in Reumayr, I might not have characterized the decision in Shull as coming within an exception to Re Hansard Spruce Mills. It is likely that I would have followed Shull as a matter of comity, though I think that it was wrongly decided. Having said this, I am arguably bound, as a matter of comity, to now follow Reumayr. There are no exceptions to the principles set out in Re Hansard Spruce Mills that would allow me to depart from it.41

Where competing requests are made by two or more extradition partners, the Minister must determine who has the better claim and determine the order in which the requests will be authorized to proceed.42 This of course may have political ramifications for Canada’s relations with the country who comes in first, second or last.

39 Ibid., para. 32.
40 Ibid.
41 Ibid., para. 11-12. See Chapter One, supra, note 50. In Re Hansard Spruce Mills Ltd., [1954] 4 D.L.R. 590, 13 W.W.R. 590, 13 W.W.R. (N.S.) 285, the only circumstances under which Wilson J. would go against the judgment of another judge of the same court were listed were where it was determined that:
a) Subsequent decisions have affected the validity of the impugned judgment;
b) It is demonstrated that some binding authority in case law or some relevant statute was not considered;
c) The Judgment was unconsidered, a nisi prius judgment given in circumstances familiar with all trial judges, where the exigencies of the trial require an immediate decision without opportunity to fully consult authority (at 286).

Searching for an excuse not to follow Shull, Williamson J. in Reumayr had concluded, without any evidence, presumably because he did not agree with it, that the judgment in Shull met exception c): it was “unconsidered, a nisi prius judgment,” where Loo J. did not have an opportunity to consult legal authority. See supra, note 38. Yet Loo J.'s judgment was not made under circumstances “where the exigencies of the trial require an immediate decision without opportunity to fully consult authority.” Applying the underlying principle in Hansard Spruce Mills, Williamson J. should have followed Shull.
42 Subsection 15(2).
Like the application for a provisional warrant, the ATP must contain the name or description of the person sought, the name of the extradition partner, and “the name of the offence or offences under Canadian law that correspond to the alleged conduct of the person” or (in the case of persons wanted for sentencing or to serve out the balance of a sentence) facing a remaining term of at least six months.\(^\text{43}\) The duties of the Minister under s. 15(3) were thoroughly canvassed by Watt J. in \textit{Germany (Federal Republic) v. Schreiber} (2000):

The requests for provisional arrest or extradition are made to the Minister. It is for the minister to review the materials offered by the extradition partner in support of the request to determine whether it is in order. This determination involves, amongst other things, a consideration of foreign law. It is the Minister who must be satisfied that the requirements of s. 3(1)(a) of the Act have been met before she or he is entitled to instruct the Attorney General to apply for a provisional warrant of arrest under s. 12 or issue an authority to the Attorney General to proceed under s. 15(1) of the Act. Section 3(1)(a) of the Act defines extraditable conduct. It also makes clear that the purpose of the extradition partner in requesting extradition must be any of

\begin{itemize}
  \item h) \textit{prosecuting} the fugitive;
  \item ii) \textit{imposing a sentence}; or,
  \item iii) \textit{enforcing a sentence} already imposed in the foreign jurisdiction.\(^\text{44}\)
\end{itemize}

If the request is simply \textit{for provisional arrest} of a person pending perfection of an extradition request, the Minister must be satisfied that the offence alleged is “punishable in accordance with paragraph 3(1)(a)” and that the requesting country will carry through with an extradition request before deciding whether to issue an authorization to the Attorney General to apply for a provisional arrest warrant.\(^\text{45}\) Once a request \textit{for extradition} is received, the Minister must be satisfied that “the conditions set out in paragraph 3(1)(a) and subsection 3(3)

\begin{itemize}
  \item Subsection 15(3), with reference to paragraph 3(1)(b).
  \item \textit{Supra,} note 2, para. 87.
  \item Section 12. Requests for provisional arrest prior to presentation of a formal extradition request must describe the person sought and where he is thought to be, state the offence with which he is charged (which must fall within the description of the Treaty, in the case of the United States, a maximum sentence of one year), describe the circumstances of the crime, provide details of the conviction or issuance of the warrant, and “describe the circumstances of urgency which led to the request for provisional arrest, e.g., the fugitive has a pattern of moving quickly and without warning.” \textit{United States Attorneys’ Manual,} ch. 15 § 9-15.210 (“Role of the Office of International Affairs”), (October 1997). Cited by M. Cherif Bassiouni, \textit{International Extradition: United States Law and Practice,} 4\textsuperscript{th} ed. (Dobbs Ferry, NY: Oceana, 2002), Appendix IV, pp. 965-966.
\end{itemize}
are met.” This decision involves consideration of the nature of the foreign offence. In the case of the United States, if a federal offence is alleged the Minister must consider the appropriate American federal law. If a state or territorial offence is alleged, the Minister must consider the applicable law of the state or territory which has applied for extradition through the federal Department of State.

The Minister is required to determine the Canadian and foreign law with respect to maximum sentencing. However, where requests from the United States are concerned, the process is simpler than it looks, if only because the American government is very particular in its requirements for extradition requests originating from state and federal authorities.

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46 Section 2 defines “State or entity” as (a) a State other than Canada; (b) a province, state or other political subdivision of a State other than Canada; (c) a colony, dependency, possession, protectorate, condominium, trust territory or any territory falling under the jurisdiction of a State other than Canada; (d) an international criminal court or tribunal; or (e) a territory."

47 “Memorandum” from the Office of the Legal Advisor, Department of State, on the preparation and handling of applications for the extradition of fugitives from justice located abroad. Eleanor C. McDonell, Extradition Procedure, 1976 Digest, ch. 3, § 5, at 106-13. Cited by Bassiouni, supra, note 45, Appendix V, p. 963. (“The extradition of a fugitive located abroad pursuant to a treaty should be requested only by the Department of State.”)

48 The process is made simple by the coordination of 1) the Office of International Affairs (O.I.A.), the branch of the Criminal Division of the United States Department of Justice responsible for extradition: “Every formal request for international extradition based on federal criminal charges must be reviewed and approved by OIA. At the request of the Department of State, formal requests based on state charges are also reviewed by OIA before submission to the Department of State. Acting either directly or through the Department of State, OIA initiates all requests for provisional arrest of fugitives pursuant to extradition treaties.” United States Attorneys' Manual, ch. 15 § 9-15.210 (“Role of the Office of International Affairs”), (October 1997). Cited by Bassiouni, supra, note 45, Appendix IV, p. 952. The minimum requirements for prosecutors seeking to apply for extradition were laid down in 1976 by the Office of the Legal Advisor of the United States Department of State. These requirements are still in place.

49 “If the person whose extradition is sought has not been convicted of, but is merely charged with, a crime, at least the following documents should be submitted:

1. A duly certified and authenticated copy of the indictment or warrant of arrest or order of detention issued by a judge or other judicial officer.
2. Certified and authenticated depositions or affidavits on the basis of which such warrant or order may have been issued. It is preferable that these include the depositions or affidavits of private individuals, if possible, in addition to those of police and other law enforcement officials. Such depositions should contain a precise statement of the criminal act or acts with which the person sought is charged.
3. An authenticated copy of the texts of applicable laws including:

   (a) the law defining the offense;
   (b) the law prescribing the punishment for the offense;
Assuming that the Office of International Affairs and the Department of State have processed the application in accordance with their own policies, the Minister is likely to be in a position to comply promptly with any request.

Watt J. described the Minister's role in deciding whether to issue an ATP:

It is inevitable, as it seems to me, that the Minister will be obliged to consider the purpose of the extradition request in determining whether the requirements of s. 3(1)(a) of the Act have been met. It is an integral part of administering the Act and dealing with requests for extradition made under it and any applicable treaty. This element of purpose is central to our extradition scheme: we do not extradite without reason....More to the point, however, is that the decision-maker on this issue is the Minister, not the extradition hearing judge.

His analysis defined the process in both positive and negative terms:

Unless the materials submitted by the extradition partner reveal one of these purposes, the Minister is not entitled to authorize the Attorney General to apply for a provisional arrest warrant under s. 12 of the Act, because the person is not arrestable. Nor could the Minister issue an authority to the Attorney General to proceed under s. 15 of the Act with an application for committal. The necessary foundation would not have been put in place.

In *U.S.A. v. Drysdale* (2000), Drambot J. of the same Ontario court more succinctly remarked:

It is the task of the Minister, by virtue of s. 15(1), after receiving an extradition request, to determine compliance with s. 3(1)(a), or s. 3(3) where applicable, and then to determine what offences under Canadian law correspond to the conduct alleged against the person in the requesting state, as distinct from the question of the sufficiency of the evidence.... The judge then determines whether the conduct of the person sought, as

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4. Data necessary to establish identity of the fugitive. Preferably such data will include a fingerprint record, photographs or affidavits describing the fugitive and distinguishing physical marks. Photographs should be permanently attached to affidavits by one or more identifying persons who have also signed the photograph on the back.”

“Memorandum,” in Bassiouni, *supra*, note 45, Appendix V, pp. 964-965. Similar requirements are specified for extradition requests for persons convicted of a crime, for which certified copies of the judgment of conviction and sentence and the time left in the sentence are also required. If the extradition is for more than one offence listed in the treaty, “copies of the several convictions, indictments, or informations and of the documents in support of each should be furnished.”

50 *Schreiber, supra*, note 2, para. 61-63.
disclosed in the evidence placed before him or her, satisfies the requirement of s. 3(1)(b).\textsuperscript{51}

Or, as Chamberland J.A. put it in \textit{Wacjman v. U.S.A.} (2002),

The extradition judge does not have the authority to order the actual surrender of the person sought to the Requesting State; that is the exclusive responsibility of the executive. Conversely, the Minister of Justice cannot exercise the power to surrender a person sought until that person has been committed for that purpose by a judge.\textsuperscript{52}

The Minister retains the discretion to substitute or withdraw an ATP at any time.\textsuperscript{53} If the person has not already been arrested or detained by the time an authority to proceed has been issued, the Attorney General follows the same procedure as for a provisional arrest warrant, applying \textit{ex parte} to a judge in the appropriate province for a warrant of arrest, or a summons setting a date for appearance within 15 days of issuance requiring the person to appear at a specific time and place, nominally "for the purposes of the \textit{Identification of Criminals Act}."\textsuperscript{54} Once the person appears in response to the summons, he is considered for the purposes of that Act "to be in lawful custody charged with an indictable offence."\textsuperscript{55}

In practice, the portfolios of the Attorney General and the Minister of Justice have been held by the same person since the legislation came into force. Before 1999, the Minister of Justice was responsible for prosecution of the extradition and also for adjudication of the final outcome. Arguments of apprehension of bias were dismissed by the Supreme Court of

\textsuperscript{51}\textit{Drysdale, supra}, note 31, at 190 (para 78).
\textsuperscript{53}\textit{Extradition Act}, s. 23.
\textsuperscript{54}Subsections 16(1)-(5).
\textsuperscript{55}Subsection 16 (6). Article 11(3) of the Treaty specifies: "A person arrested shall be set at liberty upon the expiration of sixty days from the date of arrest pursuant to such application if a request for extradition and the documents specified in Article 9 have not been received." Section 14 draws similar deadlines, but the Minister is given a further 30 days beyond the 60-day period to issue an Authority to Proceed, provided the first 60-day deadline for provision of documents is complied with. Under s. 22, either the Attorney General or the person detained may apply to the court for a change of venue "to another place in Canada" if the interests of justice so require. At any time before the extradition hearing begins, the Minister may at his or her discretion apply through the Attorney General to substitute, amend or withdraw the Authority to Proceed. The Minister may also re-issue a new Authority to Proceed on the same facts and foreign charges once the documentation is perfected.
Canada in United States v. Cotroni (1989)\textsuperscript{56} and Idziak v. Canada (Minister of Justice) (1992).\textsuperscript{57} In Cotroni, La Forest stated that he found no conflict where "the executive discretion to refuse surrender and the duty to present requests for extradition in court, both fall within the responsibilities of the Minister of Justice."\textsuperscript{58} In rejecting an argument that the twin duties of the Minister of Justice raised an apprehension of institutional bias, Cory J. in Idziak cited LaForest J.'s observation in Cotroni with approval, elaborating:

The appellant contends that a dual role has been allotted to the Minister of Justice by the Extradition Act. The Act requires the Minister to conduct the prosecution of the extradition hearing at the judicial phase and then to act as adjudicator in the ministerial phase. These roles are said to be mutually incompatible and to raise an apprehension of bias on their face. This contention fails to recognize either the clear division that lies between the phases of the extradition process, each of which serves a distinct function, or to take into account the separation of personnel involved in the two phases.

It is correct that the Minister of Justice has the responsibility to ensure the prosecution of the extradition proceedings and that to do so the Minister must appoint agents to act in the interest of the requesting state. However, the decision to issue a warrant of surrender involves completely different considerations from those reached by a court in an extradition hearing. The extradition hearing is clearly judicial in its nature while the actions of the Minister of Justice in considering whether to issue a warrant of surrender are primarily political in nature. This is certainly not a case of a single official acting as both judge and prosecutor in the same case.\textsuperscript{59}

Armed with an ATP, the Attorney General through counsel employed by the Department of Justice will initiate the application process that will eventually lead to a full hearing before a judge of the superior court.


\textsuperscript{57} Idziak supra, note 16, at 87.

\textsuperscript{58} U.S.A. v. Cotroni, supra, note 56, at 226.

\textsuperscript{59} Idziak, supra, note 16 at 87. See also Pacificador v. Canada (Minister of Justice) (1999), 60 C.R.R. (2d) 126 (Ont. Gen Div.) at 149-151.
3. Diminished Role of the Judiciary in the Pre-Hearing Process

The role of the judiciary in the pre-hearing process is diminished to that of issuing provisional arrest warrants on the *ex parte* application of the Attorney General, deciding whether a person is a flight risk or a risk to re-offend, ordering detention where it is deemed necessary, and setting terms for judicial interim release and dates for remands.\(^{60}\) The judge retains the discretion to order or deny bail and other terms of judicial interim release, following Part 16 of the *Criminal Code* ("Compelling Appearance of an Accused Before a Justice and Interim Release").\(^{61}\) The judge's decision is reviewable by a judge of the Court of Appeal following s. 679 of the *Criminal Code*.\(^{62}\) Such a review puts a reverse onus on the applicant to demonstrate reviewable error on the part of the extradition judge.\(^{63}\)

Whether or not the court is in session, the judge must set an early date for the extradition hearing (if the Minister has issued an ATP) or adjourn the matter from time to time (if the Minister has not), always keeping in mind the timelines of the Treaty and s. 14 of the Act.\(^{64}\) If the ATP is withdrawn, the court "shall discharge the person and set aside any order made respecting their judicial release or detention."\(^{65}\)

It is expected that defence counsel will take issue with requests to amend the ATP. If defence counsel submits that the evidence disclosed does not support the offence described in the ATP, and the judge agrees, a discharge will follow unless the judge accedes to a request by

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\(^{60}\) Subsection 13(1). The warrant must name or describe the person, set out the offence alleged, and order that the person be arrested without delay and brought before the judge who issued the warrant, "or before another judge in Canada" (ss. 14(2)). Within 24 hours of being arrested, or "as soon as possible" thereafter, the person wanted for extradition is to be brought before a judge (ss. 17(1)), or before a justice of the peace to be remanded in custody to appear before a judge (ss. 17(2)).

\(^{61}\) Sections 18-19.

\(^{62}\) Sections 18 (2), 20.


\(^{64}\) Paragraph 21(1)(a).

\(^{65}\) Subsection 23(3).
counsel for the Attorney General to amend the ATP to accord with the evidence. Thus where mistakes are made in the early exercise of executive discretion by the Minister, the courts retain a measure of judicial discretion either to remedy the error or to order discharge.

4. Diminished Judicial Discretion in the Extradition Hearing

The second step of the extradition process contemplated by the Act, the extradition hearing, is judicial in nature and is conducted before a superior court judge to determine whether the extradition is legally justified, applying the standards of a provincial court judge hearing a preliminary inquiry into an alleged indictable offence, as anticipated in sections 24 and 29 of the new Act.

From Confederation to the Great Depression, the judiciary had a great deal of discretion in determining who should be extradited. By contrast, the discretion of the trial judge under the new Act is so diminished that on the rare occasions when an accused is discharged by an extradition court, the Minister of Justice, through the Attorney General, will appeal a discharge — especially when the application hails from the United States.

a) The “Preliminary Inquiry” Standard

i) The Extradition Act and the Criminal Code

Once the judge receives an application from the Attorney General for an order for the committal of a person, he or she must hold an extradition hearing. In theory, the judge then

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66 Krivel et al., supra, note 17, p. 132.
67 Even in cases where abuse of process has led the extradition judge to refuse extradition, the Minister of Justice has said he would appeal, as in U.S.A. v. Licht (2002), 168 C.C.C. (3d) 287, 2002 BCSC 1151. See Paul Willcocks, “U.S. Agents Run Roughshod over Our Laws,” Vancouver Sun, Friday 9 August 2002, p. 1.
hears the case as if the fugitive were appearing before a "justice" or provincial court judge on an indictable offence committed in Canada. 68 Section 24 (1) states:

24. (1) The judge shall, on receipt of an authority to proceed from the Attorney General, hold an extradition hearing.

(2) For the purposes of the hearing, the judge has, subject to this Act, the powers of a justice under Part XVIII of the Criminal Code, with any modifications that the circumstances require.

Subject to the provisions of the Extradition Act itself, Section 24 virtually imports into the extradition procedure the detailed provisions of Part 18 ("Procedure on Preliminary Inquiry") from the Criminal Code, and in addition gives the judge broad discretion to make "any modifications that the circumstances require." 69 The purpose of the hearing was outlined by LaForest J. in R. v. Schmidt (1987) when he said that it "protects the individual in this country from being surrendered for trial for a crime in a foreign country unless prima facie evidence is produced that he or she has done something there that would constitute a crime":

It must be emphasized that this hearing is not a trial and no attempt should be made to make it one. The trial, when held, will be in the foreign country according to its laws for an alleged crime committed there, and it should require no demonstration that such a prosecution is wholly within the competence of that country. A judge at an extradition hearing has no jurisdiction to deal with defences that could be raised at trial unless, of course, the Act or the treaty otherwise provides. 71

Although the Act now provides Charter protection for persons facing extradition, 72 extradition judges are loath to apply any "modifications that the circumstances require," even though, as

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69 Several of the provisions of Part XVIII are anachronistic even in terms of preliminary inquiries, let alone extradition hearings. For example, s. 543(1) specifies that a justice may order that an accused be transferred to another jurisdiction "where an accused is charged with an offence alleged to have been committed out of the limits of the jurisdiction in which he has been charged." Clearly this provision does not apply to extradition cases; nor does it apply even to most preliminary inquiries, since provincial court judges usually have province-wide jurisdiction.
70 Re Schmidt, supra, note 13, at (33 C.C.C. (3d)) (S.C.C.), 209.
71 Ibid.
72 The power of extradition judges to consider Charter issues, originally added by amendment to the former Act in 1992, is now contained in s. 25.
Anne Warner LaForest has remarked, "the judiciary’s role is that of an intermediary between the state and the fugitive whose liberty is at risk." But since the passage of the *Extradition Act*, she noted: "It is difficult to understand why the judicial role has been retained in the new Act, as the extradition judge has little, if anything, to do."

The powers of a justice sitting on a preliminary inquiry are indeed extremely limited. First, the justice is required to inquire into the charge alleged, as well as "any other indictable offense ... founded on the facts that are disclosed by the evidence." In Canada-U.S. extradition cases, for "indictable," read "extraditable" – as defined by offenses garnering a maximum sentence exceeding one year, as specified in s. 3 of the Act read in conjunction with Article 2 of the Treaty. The justice has powers to remand the accused in custody, to adjourn the inquiry to another time or place, to resume the inquiry, and to order in writing that the accused should be brought before him at any time prior to the expiration of the remand period. The justice also has the power to grant or refuse counsel permission to open, sum up or reply – although failing to grant counsel for the accused the opportunity to present an argument at the end of the proceedings has been deemed a denial of natural justice. The judge has the discretion to receive additional evidence in reply or rebuttal once the main evidence has been presented. He has the discretion to clear the courtroom where it "appears to him that the ends of justice will be best served by so doing" – indeed to regulate the course of the inquiry in

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75 *Criminal Code*, s. 535(1).
any legal way that he desires. With consent of counsel, the justice has the discretion to arrange for direct electronic means of visual and oral communication, technology which will be particularly useful in extradition hearings where witnesses are located in far-flung provinces — and would be even more useful were it to apply to witnesses or deponents in foreign countries. However the provision applies only to “any part of the inquiry other than a part in which the evidence of a witness is taken.” The main utilitarian function of simultaneous visual and oral communication by electronic means — the testimony of a witness — is thereby thwarted.

The key section governing the sufficiency of evidence in a preliminary inquiry — tied by analogy for more than a century to the sufficiency of evidence for committal at an extradition hearing — is found at s. 548 of the Criminal Code:

548. (1) When all the evidence has been taken by the justice, he shall,
(a) if in his opinion there is sufficient evidence to put the accused on trial for the offence charged or any other indictable offence in respect of the same transaction, order the accused to stand trial; or
(b) discharge the accused, if in his opinion on the whole of the evidence no sufficient case is made out to put the accused on trial for the offence charged or any other indictable offence in respect of the same transaction.

78 S. 537(1)(i).
79 Section 537(1)(j) applies only to “any part of the inquiry other than a part in which the evidence of a witness is taken.”
80 If the accused requests a publication ban, the justice is compelled to order a ban on newspapers and broadcast media publishing details of the proceedings until the accused is discharged or, if committed to trial, until the conclusion of the trial. Subsections 539(1)(b), (2). The publication ban applies to newspapers and broadcast outlets in the jurisdiction, on pain of summary conviction charges being brought against journalists who fail to comply (para. 539(1)(a)). Although s. 539(3) specifies that every one must comply with the publication ban on pain of punishment by summary conviction, in effect it can only have application to newspapers and broadcasters within Canada. Hence an American broadcaster or newspaper covering a case that might be news in the United States is not restricted from publishing details of proceedings at home. The justice also has the discretion to impose a publication ban if counsel for the extraditing state makes such a request. Para. 539(1)(a). In any case, a statement or admission made by the accused or introduced by the prosecution in the course of the hearing is not to be published until after discharge or trial. S. 542(2).
With respect to the issue of the burden of proof, extradition cases have been at the forefront of defining this section of the Code. For example, in *Re Rosenberg* (1918),\(^1\) the Manitoba Court of Appeal held that the usual rule of criminal guilt at trial, “beyond a reasonable doubt,” is reversed in preliminary hearings so that any doubt is resolved in favour of committal rather than discharge.\(^2\) The criminal preliminary inquiry was a tool used to determine if there was a prima facie case against the accused sufficient that a reasonable jury, properly instructed, could convict.\(^3\) Hence a preliminary inquiry judge could not weigh evidence or try to determine what inference he would draw if he were sitting as a trial judge.\(^4\) However, in *R. v. Skogman* (1984),\(^5\) the Supreme Court of Canada held that one purpose of a preliminary hearing was also to protect the accused from an unnecessary trial where there was lack of evidence, to give the accused a chance to appreciate the case against him, and to allow an opportunity to make discovery. This purpose of the preliminary inquiry has been downplayed in extradition hearings; in fact, in one instance, LaForest J. of the Supreme Court of Canada attempted to limit the role of the extradition judge to a single function:

“The role of the extradition judge is a modest one; absent express statutory or treaty authorization, the sole purpose of an extradition hearing is to ensure that the evidence establishes a *bona fide* case that the extradition crime has been committed.”\(^6\)

This ignored the fact that even the old Extradition Act then in place invited extradition judges to follow the whole range of preliminary inquiry procedure.

**ii) Section 29 and the Sheppard Test**

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\(^1\) 29 C.C.C. 309 (Man. C.A.).
\(^2\) See *Caccamo v. R.* (1975), 29 C.R.N.S. 78 (S.C.C);
\(^3\) *Re U.S.A. and Smith* (1984), 10 C.C.C. 540 (Ont. C.A.) at 550, 552.
\(^4\) *R. v. Herman* (1984), 11 C.C.C. (3d) 102 (Sask. C.A.) (if he concluded that a reasonable jury properly instructed could infer guilt from the evidence, the justice should commit the accused for trial).
The litmus test of the *prima facie* legality of the extradition proceeding is governed by s. 29 (1) of the *Extradition Act*:

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

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

(b) in the case of a person sought for the imposition or enforcement of a sentence, the judge is satisfied that the conviction was in respect of conduct that corresponds to the offence set out in the authority to proceed and that the person is the person who was convicted.87

Section 29 (1)(a), like s. 18(1)(b) of the former Act, presumes a close statutory connection with the preliminary hearing procedure in the Code. This in turn led to *U.S.A. v. Sheppard*88 becoming the primary authority in the interpretation of the role of preliminary inquiries in criminal proceedings for some 25 years. That landmark case deserves especial scrutiny since it is one of the most widely cited in Canadian jurisprudence, not in connection with extradition hearings but in connection with the way preliminary inquiries are conducted in Canada.

*Sheppard* stands for the proposition, that “the weighing of evidence ... forms no part of the function of a ‘justice’ acting under s. 475 of the *Criminal Code*”89 or that of an extradition Judge in exercising his powers under the *Extradition Act*.90 Many Provincial Court judges interpreted this statement literally, even though such a reading effectively reduced their role to a simple screening process that belied the complexity of the provisions of Part XXVIII of the *Criminal Code*. However, in giving his judgment in *Sheppard*, Ritchie J. remarked:

87 Where a person has been tried and convicted *in absentia*, the judge will treat the matter as if the person was facing trial: subsection 29(5).


89 Now s. 548, with some modifications.

90 *U.S.A. v. Sheppard*, supra, note 88, at 434, per Ritchie J.
I agree that the duty imposed upon a “justice” under s. 475(1) is the same as that which governs a trial Judge sitting with a jury in deciding whether the evidence is “sufficient” to justify him withdrawing the case from the jury and this is to be determined according to whether or not there is any evidence upon which a reasonable jury properly instructed could return a verdict of guilty. The “justice”, in accordance with this principle, is, in my opinion, required to commit an accused person for trial in any case in which there is admissible evidence which could, if it were believed, result in a conviction.91

In the situation described by Ritchie J., the Crown has presented all of its evidence in accordance with the provisions of the Criminal Code and the Evidence Act. Considering that body of evidence, the accused should be committed for trial (or extradition) only where there is admissible evidence which could result in a conviction. This was further refined in various courts of appeal to mean that an accused should be committed for trial if there was sufficient evidence that a jury properly instructed could infer guilt.92

On the grounds that they were not conducting a trial or weighing evidence, extradition judges went through the motions of receiving certified evidence, usually in the form of depositions supplied by the requesting state upon which cross-examination was not allowed. As long as there was a morsel of “evidence,” they approved extradition applications, feeling compelled by interpretations of the law after Sheppard93 to commit a person for surrender even when there was “compelling” alibi evidence,94 or where it was clear that evidence contained in the authenticated record had been manufactured,95 or framed by co-accused anxious to avoid prosecution for themselves, thereby putting most of the blame on the

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91 Ibid.
93 30 C.C.C. (2d) 424 (S.C.C.).
fugitive.\textsuperscript{96} To the extent that the legislation has codified the limited role for superior court judges that began with LaForest J.’s judgment in Schmidt (1987)\textsuperscript{97}, it reflects the serious erosion of judicial discretion at the level of the extradition hearing in the last decade of the twentieth century.

Many judges have held forth on the standard to be applied in reaching a decision to commit a person for extradition. The test was set out by O’Connor J.A. of the Ontario Court of Appeal in \textit{U.S.A. v. Comisso} (2000)\textsuperscript{98}: “The extradition judge shall commit a fugitive for surrender if satisfied that the conduct that underlies the foreign charge, wherever it took place, would if it occurred in Canada constitute a prima facie case of any of the offences listed in the Extradition Act, or described in the relevant extradition treaty.”\textsuperscript{99} The court followed the line of cases represented by Schmidt (1987), \textit{U.S.A. v. McVey} (1992),\textsuperscript{100} and \textit{U.S.A. v. Dynar} (1997),\textsuperscript{101} of which s. 29 is a codification. However, in Dynar, Cory and Iacobucci JJ. for the majority went beyond the other decisions in describing the importance of the hearing for the individual concerned:

One of the most important functions of the extradition hearing is the protection of the liberty of the individual. It ensures that the individual will not be surrendered for trial in a foreign jurisdiction unless, as previously mentioned, the Requesting State presents evidence that demonstrates on a \textit{prima facie} basis that the individual has committed acts in the foreign jurisdiction that would constitute criminal conduct in Canada.\textsuperscript{102}


\textsuperscript{97} Schmidt, supra, note 13, at 209.

\textsuperscript{98} 143 C.C.C. (3d) 158 (Ont. C.A.).


\textsuperscript{100} \textit{U.S.A. v. McVey}, supra, note 14 at 26-27.

\textsuperscript{101} \textit{U.S.A. v. Dynar}, supra, note 15 at 520.

\textsuperscript{102} Ibid., at 521.
Subsection 29(2) of the Extradition Act specifies only that the order of committal must contain the name of the person, the place where he or she is held in custody, the name of the extradition partner, and "the offence set out in the authority to proceed for which the committal is ordered." This differs from the requirement that an authority to proceed must contain "the name of the offence or offences under Canadian law that correspond to the alleged conduct of the person or the conduct in respect of which the person was convicted." 103

In the case of convicted persons sought for extradition, where an authority to proceed does not contain a summary of the conduct that led to the conviction, the extradition judge is left with nothing with which to compare the Canadian offence brought forward by the Minister through the Attorney General. Thus in U.S.A. v. Persaud (1999), 104 one of the first cases to consider s. 29, the court could not determine that the offence set out in the American indictment was the same as the Canadian offence cited in the authority to proceed. Ewaschuk J. alluded to the "modern principle" that extradition is conduct based. "However, I must nonetheless be satisfied that the conduct underlying the foreign convictions corresponds in a general sense to the Canadian offences set out in the authority to proceed." 105 Although s. 29(1)(b) only requires a summary of the material facts underlying the foreign convictions, "In this case, the documents filed in support of the application make no reference whatsoever to the factual conduct underlying the convictions which would permit me to determine whether that conduct corresponds to the Canadian offences set out in the authority to proceed." 106

103 Section 15(3)(c).
105 Ibid., para. 10-12.
Similar complaints were heard from other judges attempting to apply s. 29. In *U.S.A. v. Debarros* (2000), LaForme J. of the Ontario Superior Court of Justice complained, “The authority to proceed ought to provide more detail as to the actual Canadian criminal offences that the Minister wishes the extradition judge to consider. This would be particularly helpful when dealing with multiple conspiracies.” Dambrot J. remarked in *U.S.A. v. Drysdale* (2000):

> With the greatest of respect to the drafter of these authorities to proceed, and taking into account the fact that the document is a very new innovation, I cannot avoid commenting that these lists are less than helpful. In a situation involving facts that give rise to numerous possible conspiracy offences, some broad, some narrow, some national, and some international, an effort ought to be made, in my view, to make clear what conspiracies under Canadian law the Minister wants the extradition judge to consider.

In that case, the counsel for the requesting state eventually specified what offences were actually intended to be considered – but only in the course of oral argument.

Krivel, Beveridge and Hayward give short shrift to matters which can be contested at extradition hearings: the failure to comply with statutory requirements governing the introduction of documentary evidence, the failure to establish identity, and the failure to prove that there is sufficient evidence that would result in committal for trial in Canada, as well as constitutional issues such as admissibility of evidence, statements made upon arrest without appropriate warnings, intercepted communications, illegal searches, and “the constitutionality of the legislation.” However they document at length what in their opinion the extradition judge cannot do: he or she cannot monitor treaty compliance, cannot interpret the foreign indictment, cannot require the production of certain “types of treaty documentation for ministerial use only,” cannot consider whether the person is subject to persecution in the

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108 32 C.R. (5th) 163 (Ont. S.C.J.) at 192, para. 83.
109 Ibid., para. 84.
110 Krivel et al., *supra*, note 17, p. 46.
requesting jurisdiction, cannot consider Charter issues that fall within the jurisdiction of the Minister (such as whether the person will receive a fair trial, or whether the person’s Canadian citizenship should be a consideration), cannot entertain “collateral attacks on foreign orders,” cannot query the classification of murder charges, cannot consider defences that would ordinarily be raised at trial, and (most controversially of all) “the extradition judge no longer has discretion to receive evidence for use at the ministerial level”:\(^\text{111}\)

Although there is no express prohibition in the new Act preventing the admission of evidence at the hearing for use during the ministerial phase of the proceedings, it may be argued that this line of authority does not continue to be applicable to proceedings under the new legislation. This position is supported by the fact that the new Act is more specific than was the former Act about the manner in which the proceedings are to unfold.\(^\text{112}\)

Unfortunately, extradition judges in Canada retain so little discretion under the Act that their function is no longer truly judicial but merely administrative. To use an analogy from a different Estate, superior court judges have been demoted by their job description from editors to proof readers. The judicial prong of what was once a balanced two-prong extradition process has been reduced to little more than a rubber stamp for the representations of the requesting country. These representations are usually made by affidavit without the possibility of cross-examination of the deponents – with great susceptibility to manipulation by law enforcement officials, as in the case of \textit{Peltier}\(^\text{113}\) and \textit{Wagner}.\(^\text{114}\)

\(^{111}\) \textit{Ibid.}, pp. 210-233.

\(^{112}\) \textit{Ibid.}, p. 232.


\(^{114}\) \textit{U.S.A. v. Wagner}, supra, note 94.
iii) Whittling Away the Sheppard Standard

Since the decision in Sheppard (1976), the courts have systematically whittled away the statutory comparison to the preliminary inquiry at the expense of the person in the dock. ¹¹⁵ This policy reached its nadir in U.S.A. v. Wagner (1995), where Ryan J.A. of the British Columbia Court of Appeal interpreted the “sufficient evidence” clause of Sheppard to mean “any evidence.” ¹¹⁶ Krivel, Beveridge and Hayward summarized the case thus:

In United States v. Wagner, the fugitive was sought for extradition on charges involving attempted burglary and rape in the state of Washington. The American evidence consisted of what the British Columbia court of Appeal described, at p. 70, as “weak” photographic identification evidence by the complainants and fingerprint evidence. With respect to one of the charges, the court noted that the eyewitness identification was made five years after the offence. At the extradition hearing, the fugitive presented alibi evidence. The fugitive also presented the evidence of a fingerprint expert challenging the fingerprint evidence of the requesting state. The court characterized the alibi evidence as “powerful” and made the following comment:

[14] Mr. Botting’s argument on the 1989 charges was the same. In that case the court had only the photograph of Mr. Peters and the statement of the witness that that was the man who had perpetrated the offences against her in 1989. The rest of the photographic montage was not placed before the extradition judge. In addition to the weak proof of identification offered by the extraditing country, Mr. Peters had presented powerful alibi evidence to support his story that he was in Victoria at the time of the 1989 offences. In upholding the committal for surrender, the court seemed to recognize that evidence might be called on behalf of a fugitive at an extradition hearing, but that this evidence would be of no effect given the test to be applied. ¹¹⁷

This was in contrast to U.S.A. v. Adam (1999), where the Ontario Court of Appeal said of evidence led by the accused, “It may be that the evidence could complement other evidence and lead to a conclusion that there is no prima facie case for extradition.” ¹¹⁸ As Krivel et al. noted, Wagner and Adam “appear to be somewhat at odds.

¹¹⁵ Ex parte O’Dell and Griffen (1953), 105 C.C.C. 256 (Ont. H.C.J.); Re Brooks (1930), 54 C.C.C. 334 (Ont. S.C.); Schmidt, supra, note 13.
¹¹⁶ Wagner, supra, note 94, at 76, per Ryan J.
¹¹⁷ Krivel et al., supra, note 17, pp. 208-209.
In the former case, the British Columbia Court of Appeal found that even powerful evidence led by the fugitive to contradict weak evidence adduced by the requesting state would have no impact on the prima facie risk assessment. In the latter case, ... the court appeared to invite a degree of weighing of the fugitive’s evidence and perhaps a drawing of certain inferences in favour of the fugitive. In the Supreme Court of Canada case of R. v. Arcuri (2001), 157 C.C.C. (3d) 21, the Supreme Court recognized in the domestic context at a preliminary inquiry that a limited weighing of defence evidence may be appropriate when the case against the accused is circumstantial.\footnote{Krivel et al., supra, note 17, pp. 209-210.}

In \textit{Adam} (1999), the extradition judge failed to allow the appellant to give evidence at the hearing,\footnote{Supra, note 13.} having been “under the mistaken impression that the law prevented him from hearing the appellant” because “this could only lead to an expectation that the evidence be weighed, which is not the proper function of an extradition judge.” In ordering a new hearing, the Ontario Court of Appeal reviewed the purpose of an extradition hearing – “to determine whether there is sufficient evidence to warrant sending the fugitive to the requesting state so that he may stand trial” – and the role of the extradition judge – “to determine whether the evidence produced establishes a prima face case that would justify the committal of the fugitive for trial, if the crime had been committed in Canada.” Citing \textit{Schmidt}\footnote{U.S.A. v. Smith, (1984), 15 C.C.C. (3d) 16 (Ont. Co. Ct.), affirmed (1984), 16 C.C.C. (3d) 10 (Ont. H.C.)} (“a fugitive in an extradition hearing is afforded the same protections that he would otherwise be entitled to at a preliminary inquiry for a charge to be tried in a Canadian Court”) and \textit{Smith}\footnote{Adam, supra, note 120.} (“the fugitive at an extradition hearing has the right to give evidence and can call witnesses, but it is not the role of the extradition judge to weigh the evidence or assess the credibility of witnesses”), the Court added: “One should not rush to the conclusion that evidence from the fugitive could not bear upon that issue.”\footnote{Adam, supra, note 120.}
Still, it had long been established that the putative fugitive could not use the preliminary inquiry to try to build a case. In *U.S.A. v. Houslander* (1993), Blair J. declined counsel's application to examine witnesses on matters that were not directly related to the sufficiency of the evidence for the purpose of committal, noting that extradition judges were empowered to receive other kinds of evidence only in the case of "political offences."

Thus, when Parliament wanted to give the judge an expanded jurisdiction to hear evidence beyond the question of sufficiency of committal, it said so. Had it intended to give the extradition judge an expanded responsibility to receive other evidence for the purpose of making a record for other proceedings on issues unrelated to the judge's area of determination, it would have said so as well. 124

This quotation has become a favourite among judges. For example, in British Columbia Supreme Court, Catliff J. in *U.S.A. v. Boje* (2000)125 used *Houslander* to punctuate the case, involving drug charges, stating with some cynicism: "In any event the respondent, if an order is made against her, will have full opportunity to present material to the appropriate authority to support her belief that she is being prosecuted for some political purpose. I decline to spend judicial time acting as a mere spectator in that endeavour." Rooke J. of the Alberta Court of Queen's Bench in *U.S.A. v. Parvulescu* (1999)126 also quoted *Houslander*, adding, "The agenda of the extradition hearing is limited and does not include discovery.... The committal hearing is neither intended nor designed to provide the discovery function of a domestic preliminary inquiry." Continuing his review of the case law since *Sheppard*,127 Rooke J. concluded (consonant with the British Columbia Court of Appeal in *Wagner*128) that

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128 *Wagner, supra*, note 94.
“the test, as in a preliminary inquiry, is whether or not there is any evidence on which a reasonable jury, properly instructed, could return a verdict of guilty.”\footnote{129} He specifically instructed himself that the extradition judge was not to weigh the evidence, test its quality or reliability (provided it is substantial), or “draw inferences of fact from the evidence.” Nonetheless, he denied the application of the United States to be allowed to lead affidavits, official transcripts and other non-\textit{viva voce} evidence that had originated in Canada, which would have bypassed the need to call witnesses in the extradition hearing. “Whatever evidence [the United States] wants to present from Canadian sources,” he held, “the presumption is that it will produce it through the witness box.”\footnote{130}

The number of offences for which a person has been convicted in the United States in the past would certainly be a factor in whether a case has been made out and whether the individual is to be surrendered on every count – especially in states such as California and Washington which practice the notorious “three strikes and you’re out” policy. But \textit{U.S.A. v. Knox}\footnote{131} stands for the proposition that where an accused has been convicted of only \textit{some} of the charges in the original indictment, he can be extradited on \textit{all} of the charges, subject only to the intervention of the Minister of Justice. This principle has now found its way into the statute under s. 59: “Subject to a relevant extradition agreement, the Minister may, if the request for extradition is based on more than one offence, order the surrender of a person for all the offences even if not all of them fulfill the requirements set out in section 3....” Accordingly, in extradition hearings, nowhere near the level of specificity is required as in

\footnote{129} \textit{U.S.A. v. Parvulescu}, supra, note 126, para 9 – emphasis Rooke J.’s.  
\footnote{130} \textit{Ibid.}, ruling, p. 2.  
preliminary hearings, even to the point that the location, or (in the case of the United States) even the specific State where the alleged offence took place need not be properly identified.\footnote{\textit{U.S.A. v. Ding} (1995), 27 W.C.B. (2d) 258 (B.C.S.C.), affd. 31 W.C.B. (2d) 207 (B.C.C.A.).}

Nor is the fugitive entitled to full disclosure, beyond production of the evidence used to establish a \textit{prima facie} case.\footnote{\textit{U.S.A. v. Dynar} (S.C.C), \textit{supra}, note 15 at 481.} Extradition judges in British Columbia in particular have been lax in insisting on such critical issues as precise photographic evidence used in identification, applying nowhere near the standards that would (or should) be applied in preliminary inquiries.\footnote{\textit{U.S.A. v. Wong}, (1995)m 98 C.C.C. (3d) 332, (C.A.); (1995), 101 C.C.C. (3d) vi (S.C.C); \textit{Wagner, supra}, note 94; \textit{U.S.A. v. Sanders} (1996), 31 W.C.B. 393 (B.C.S.C.).} However, s. 26 of the Act now allows either side to apply for a publication ban at the beginning of the hearing, just as is allowed at a preliminary inquiry, if publicity might jeopardize a fair trial. Under the old Act, a fugitive at an extradition hearing had no such protection.\footnote{\textit{Canadian Broadcasting Corporation v. Canada} (1992), 81 C.C.C. (3d) 431 (N.S.S.C.). The CBC’s application was in response to a publication ban in \textit{U.S.A. v. Legros} (1992), 77 C.C.C. (3d) 253, which followed \textit{Re McVey v. R.} (1987), 37 C.C.C. (3d) 444 (B.C.S.C.). \textit{Re McVey} stands for the proposition that an extradition judge has discretion to make such a publication ban order.} Yet even this is a hollow protection, since some judges have used their discretion inappropriately to thwart it, as in \textit{Amhaz} (2002),\footnote{\textit{U.S.A. v. Amhaz and the Vancouver Sun} (7 November 2001) Vancouver BL0249 (B.C.S.C.), para. 4.} where an extradition judge in British Columbia declared that since the allegations had already been publicized in the press in North Carolina, where the trial of the accused was likely to take place, no prejudice would be incurred by removal of a publication ban, despite the protest of the accused.

The detailed rules for taking evidence at preliminary hearings contained in s. 540(1) of the \textit{Criminal Code} apply to extradition hearings, including the taking of evidence under oath in the presence of the accused, the cross-examination of witnesses called, and the making of a record of the proceedings. In practice, however, the witnesses called at an extradition hearing usually serve only a limited purpose: introducing the authenticated record, or proving identity
of the person arrested. The deposition evidence contained in the record is not itself subject to cross-examination, although it must withstand scrutiny with respect to internal inconsistencies. Also, depositions must not rely on elements of the foreign law that are alien to Canadian law.

The rules for taking down depositions in writing\textsuperscript{137} do not as a rule apply to extradition cases where the affidavits or depositions of witnesses originate in the requesting jurisdictions, but may have application for proceedings on either side of the border in the unusual circumstance where an affidavit is taken before an extradition judge in Canada.

iv) Publication Bans

To reinforce the provisions governing the conduct of the extradition hearing as nearly as possible to a preliminary inquiry under s. 24, the extradition judge has the discretion under s. 26 to order a publication ban “on being satisfied that the publication or broadcasting of the evidence would constitute a risk to the holding of a fair trial by the extradition partner.” Either the Attorney General or the person concerned may bring such an application. Once such an order is made, it is considered a final order rather than an interim order, and therefore not reviewable by the same court that made the order in the first place.\textsuperscript{138} In \textit{U.S.A. v. D. (M.J.)} (2001), for example, Sun Media Corporation followed the advice of the extradition judge to seek leave to appeal directly to the Supreme Court of Canada pursuant to s. 40 of the \textit{Supreme Court Act}, but was unsuccessful in its application.\textsuperscript{139} Yet in \textit{U.S.A. v. Amhaz} (2001), the Vancouver Sun successfully applied to overturn an earlier publication ban made under section 19 of the \textit{Extradition Act} (incorporating s. 517(1) of the \textit{Criminal Code}) by appealing to the

\textsuperscript{137} S. 540(2) and (3).
\textsuperscript{139} \textit{Ibid.}, leave to appeal to S.C.C. refused 15 November 2001 (Doc. 28688, S.C.C.).
same judge who had made the initial order, asking Koenigsberg J. to reverse herself. The judge stated, "This case raises one particularly vexing issue in relation to the two sections of the Extradition Act: ss. 26 and 19. They appear to be in conflict."\textsuperscript{140} In a preliminary hearing, a publication ban is usually granted and goes into effect as soon as the accused applies for it, as had Amhaz at his bail hearing. Whether to grant a ban remains within the discretion of the justice. Koenigsberg J. ruled that in Amhaz, a publication ban would be of no effect, since there would be no jeopardy to him in Canada (he would not be tried there), and his case had already received major coverage in North Carolina, where he faced trial. Thus she reversed herself and removed the publication ban that she had earlier imposed.

This decision was not only improper, it was unreasonable. It is ludicrous to remove a statutory publication ban simply on the basis that the allegations to be heard by the court have already been circulated in the press in the foreign jurisdiction seeking extradition. Although there is little to stop the foreign press from publishing potentially damaging information about the accused in the foreign locale where he is expected to face trial when he or she is eventually surrendered, where a publication ban has not been ordered – or, worse, where it has been rescinded – the court gives the press tacit consent to publish and republish every detail of every allegation. The evidence supporting the allegations is clearly given more credence when it is presented in the portentous context of an extradition hearing, and therefore publication is bound to be damaging to the accused once he is returned for trial. In high-profile domestic cases such as Reyat and Pickton, provincial court judges hearing preliminary inquiries take great pains to preserve the statutory right of the accused to a publication ban under s. 517(1) for fear of tainting a potential jury and thereby generating a mistrial. What is the difference

\textsuperscript{140} U.S.A. v. Amhaz and the Vancouver Sun, supra, note 136, para. 4.
between that and an extradition case, where the accused may have grounds to appeal his eventual trial on the basis of abuse of process on the grounds that the objectivity of a potential jury has been compromised by publicity tacitly consented to by a Canadian judge? It may be a truism that no court can control the foreign paparazzi, short of holding the hearing in camera. But why encourage them? Judges should at least try to minimize the damage by ordering a publication ban where one is requested.

Section 27 grants authority to the presiding judge to order the exclusion of “any person” from the court for the duration of the hearing “if the judge is of the opinion that it is in the interest of public morals, the maintenance of order or the proper administration of justice to exclude the person.” This provision is an expansion of the discretion of a justice at a preliminary inquiry under s. 537(1)(h) of the Criminal Code, which states that the justice may “order that no person other than the prosecutor, the accused and their counsel shall have access to or remain in the room in which the inquiry is held.” That provision did not allow for exclusion of members of the media from other countries not bound by a publication ban, whereas s. 27 would seem to allow such selectivity – another indication that thedrafters of the legislation recognized a potential problem with press coverage at extradition hearings.\(^{141}\)

v) Building a Record and Transmitting a Report

Where the person is committed for surrender, the judge is authorized to keep him or her in custody (subject to judicial interim release) until the person is surrendered or discharged or a new hearing is ordered pursuant to an appeal.\(^{142}\) He must inform the person, “You will not be surrendered until after the expiry of 30 days. You have the right to appeal my order and


\(^{142}\) Section 30.
to apply for judicial interim release" – or words to that effect. The judge must then transmit to the Minister of Justice a copy of the order, a copy of the evidence adduced at the hearing, and "any report that the judge thinks fit." The importance of this report, linked to the creation of a record for use by the Minister to help him fulfill his executive functions, cannot be underestimated. In *U.S.A. v. Licht* (2002), Dillon J. used her judicial discretion to order extensive disclosure of documents, obviating the need to make a distinct record for the benefit of the Minister, which, however, she had been prepared to do even at a pre-hearing stage: "I would have been inclined to exercise discretion to allow disclosure so that the matter could be aired at the committal hearing to create a record for the Minister." Unfortunately, the supportive record, like the report, is discretionary on the part of the extradition judge, and to decline to supply one is not a reviewable error.

b) Admissible Evidence

Depositions, statements, certificates or judicial documents from the foreign state submitted as part of the record are to be received by the court under the relaxed rules of evidence contained in the new Act. Section 31 defines "document" to mean "data recorded in any form, and includes photographs and copies of documents." Section 32 provides that certain evidence is admissible "even if it would not otherwise be admissible under Canadian law," including the contents of documents contained in the certified record of the case, the contents of documents submitted in conformity with the terms of the treaty, and "evidence adduced by the person sought for extradition that is relevant to the tests set out in subsection

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143 Subsection 38(2).
144 Paragraph 38(1)(c).
146 Ibid., para. 34.
29(1) if the judge considers it reliable." Evidence gathered in Canada, however, must satisfy Canadian rules of evidence.

In *U.S.A. v. Akrami* (2000), Romilly J. of the British Columbia Supreme Court specifically analyzed the interplay between s. 29(1) and s. 32(1)(c) of the Act. In that case, an undercover narcotics agent in San Francisco had audiotaped conversations between the two accused, Rezi Akrami and Mohsen Lessan, who spoke in Farsi, their native tongue. The agent had ostensibly paraphrased and summarized the conversations in an affidavit in English, implicating Akrami and Lessan in attempts to deal in arms and heroin contrary to American law. Claiming that the agent had misrepresented what they had said, the respondents relied on s. 32(1)(c) to argue that the requesting state should disclose the tapes, transcripts and translations of the conversations relied on by the agent in order that they be able to adduce evidence tending to discredit the affidavit. Counsel for Akrami and Lessan argued that because a respondent in an extradition hearing is entitled to adduce reliable evidence, the judge has jurisdiction to order disclosure of the evidence so that it can be adduced “in accordance with their s. 32(1)(c) right.”

Although no previous case dealt specifically with the new legislation, Romilly J. relied on the highly suspect decision of the Manitoba Queen’s Bench in *U.S.A. v. Turenne* (1999), where Steel J. had stated not only that an extradition judge “cannot give credence, without further proof, to any sort of implication that the ... authorities cherry picked the evidence that they submitted based on an ulterior motive,” but added: “The cases indicate that evidence at
an extradition hearing should be accepted even if the judge feels it is manifestly unreliable, incomplete, false, misleading, contradictory of other evidence or the judge feels the witness may have perjured themselves— an observation outrageous on its face, but not too far removed from the British Columbia Court of Appeal’s decision that an order of committal should follow as long as there was any evidence that could be admissible at trial. In Akrami, counsel had argued that the undercover agent, S. A. Hamidi, had selected— "cherry picked"— aspects of the taped conversations to include in his affidavit, thereby rendering the document an inaccurate interpretation of events. Although Romilly J. recognized this allegation as “a grave reflection upon the motives of the Requesting State,” he refused to accept it without further proof. Yet he was “not prepared to order disclosure to test such an allegation.” In fact, he held that Section 32(1)(c) “merely codifies Steel J.’s conclusion ... that a fugitive in an extradition hearing has the right to adduce evidence while at the same time provides the threshold criteria upon which such evidence can be adduced, specifically, relevance and reliability”:

I do not believe Parliament wished for s. 32(1)(c) to be a tool enabling an extradition judge to order disclosure of primary evidence in the hands of a foreign state. To do so would render it very difficult indeed for Canada to honour its international obligations. In my view, if Parliament wished for this section to interfere with the expediency and reciprocity of the extradition process it would have said so expressly.

In my view, s. 32(1)(c) is simply an express acknowledgement of a fugitive’s right to adduce relevant evidence in his or her possession. It is not a tool empowering the courts to make discovery orders affecting foreign states in order to facilitate a fugitive’s right to adduce evidence under that section. Such an order would clearly run contrary to Canada’s international obligations.


155 U.S.A. v. Wagner, supra, note 94, per Ryan J.A.

156 Akrami, supra, note 151, para. 21.

157 Ibid., para. 30-31.
Courts have gone to great lengths to read down the legislation rather than declare it unconstitutional. In *Bougeon v. Canada (Attorney General) (2000)*,\(^{158}\) for example, Ewaschuk J. held that “to permit an extradition judge to admit evidence at an extradition hearing that would not otherwise be admissible at a Canadian hearing, in the absence of a statutory safeguard against the reception of unreliable evidence,” would violate s. 7 of the Charter.\(^{159}\) He remedied the lack of otherwise inadmissible evidence by adding to the end of s. 32(1)(a) and (b) the phrase, “if the judge considers it reliable” – importing this phrase from s. 32(1)(c). Boilard J. of the Quebec Superior Court followed suit in *United States v. Palmucci (2001)*.\(^{160}\) On its face, this approach would seem to violate the principle of interpretation, *expressio unius est exclusio alteriam*. In *U.S.A. v. Yang (2001)*\(^{161}\) the Ontario Court of Appeal disapproved of the approach taken in *Bougeon*, holding that s. 32 was not a violation of the Charter.

However, Anne Warner LaForest has suggested that *Yang* was wrongly decided. “An extradition hearing to assess whether there is sufficient evidence to establish a prima facie case should not be any less rigorous than the process for assessing whether an individual should be prosecuted in this country....

In this light, I submit that the provisions applicable to admissibility and sufficiency in the new *Extradition Act* are contrary to fundamental justice unless the courts interpret the evidentiary provisions of the new Act so as to re-establish an appropriate balance that allows the extradition judge to protect the liberty of the fugitive by assessing the weight and reliability of the evidence either at the stage of admissibility or in deciding whether there is sufficient evidence to commit the fugitive.\(^{162}\)

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\(^{158}\) 35 C.R. (5th) 25 (Ont. S.C.J.).

\(^{159}\) Ibid., at 306.

\(^{160}\) (4 June 2001), no. 500-36-002280-009 (Que. S.C.).

\(^{161}\) 157 C.C.C. (3d) 225.

Consistent with Article 10 of the Treaty, the record of the case must include a document summarizing the evidence to be used in the prosecution, and in the case of a person sought for sentencing or enforcement of sentence, both a copy of the document that records the conviction of the person and a document describing the conduct for which he was convicted.\textsuperscript{163} The record of the case may also include other relevant documents such as identification evidence.\textsuperscript{164} While the Act specifies that authentication of documents is no longer necessary,\textsuperscript{165} this specification is subject to an extradition agreement. Article 10(2) of the Treaty specifies that the record must be “authenticated by an officer of the Department of State of the United States” and “certified by the principal diplomatic or consular officer of Canada in the United States.” It has been held that it is not necessary for documents that are part of the record to be “certified” by a Canadian consular officer or diplomat in the United States. It is enough that the material bear a stamp indicating continuity, since it is the government of the United States, not the consular officer, who is the “authenticator.”\textsuperscript{166}

The “certification” required by s.33(3) of the Act is not the same as the certification alluded to in Article 10(2) of the Treaty; it is certification not by a consular officer of the requested country by rather by a judge or prosecutor – and the test for admissibility is ridiculously low:

\textbf{33(3)} A record of the case may not be admitted unless
\begin{enumerate}[label=(\alph*)]
  \item in the case of a person sought for the purpose of prosecution, a judicial or prosecuting authority of the extradition partner certifies that the evidence summarized or contained in the record of the case is available for trial and
  \begin{enumerate}[label=(\roman*)]
    \item is sufficient under the law of the extradition partner to justify prosecution,
    \item was gathered according to the law of the extradition partner.
  \end{enumerate}
\end{enumerate}

\textsuperscript{163} Subsection 33(1)
\textsuperscript{164} Subsection 33(2)
\textsuperscript{165} Subsection 33(4).
\textsuperscript{166} \textit{U.S.A. v. Sanders}, supra, note 134, at 393.
Despite the fact that this is not the kind of certification contemplated by the Treaty, it must not be taken lightly, as Stromberg-Stein J. remarked in the *Tarantino* case:

Certification is the mechanism which the *Extradition Act* provides to satisfy the court as to the foundation issue, whether there is evidence available in the requesting state. While sending a Canadian citizen to a foreign state through a streamlined presumptive process does not violate the *Charter*, nor constitute an abuse of process, a violation occurs where it is concluded that the diligence of the requesting state is not of a standard which justifies the granting of the presumption. A statutory shortcut that impacts on the liberty of a citizen and may result in extradition to a foreign country requires a careful, considerate approach by the foreign authority to the extraordinary powers granted them by the new *Extradition Act*. The court has the power to control its own process and should demand that the foreign certifying authority be diligent and accurate. Conduct of foreign officials seriously lacking in diligence and accuracy interferes with fundamental justice and protection of the liberties of Canadian citizens.

Deficiencies in the certified record may be seen as parallel to deficiencies in meeting the provisions of s. 15 of the *Mutual Legal Assistance in Criminal Matters Act* governing the sending of documents and other records to a foreign jurisdiction. In *U.S.A. v. Schneider* (2002), Cohen J. of the Supreme Court of British Columbia noted,

> The Requesting State's conduct which has resulted in an incomplete record of the evidence on the main issue is the paramount consideration for the court in this application.... In my opinion, if the legislative scheme created by the Act is frustrated by the conduct of the foreign state then the court cannot properly apply the provisions of the Act, and the foreign state should not have the benefit of the scheme. I agree with respondent's counsel that in protecting the integrity of the legislative scheme the court should demonstrate its willingness to enforce and give effect to the protective mechanisms reflected in the statute, both for the protection of the *Charter* rights of its citizens, and to maintain respect for the court's own process. If follows then that such a demonstration can only be made implicitly by refusing to allow the legislative scheme to be abused by a party taking the benefit of those aspects that work to its advantage and circumventing others.

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Whether the evidence led is by *viva voce* evidence or by affidavit, usual hearsay rules apply.\(^{170}\) Still, considering the already questionable quality of affidavit evidence, which cannot be tested by cross-examination,\(^{171}\) the courts in Canada understandably have a relaxed attitude, encouraged by the tone of the legislation and the enhanced role and responsibility of the Minister of Justice in the prescreening process, as to the quality of the material upon which they are prepared to rely.

In *U.S.A. v. McAllister*,\(^{172}\) the Quebec Court of Appeal held that it was not necessary to prove that the affidavits tendered were sworn before a person authorized to take such depositions. Under s. 34 of the 1999 Act, documents are deemed admissible where they are sworn or solemnly affirmed. No proof is required of the authenticity of documents purported to have been signed by officials in the requesting country, whether they be judges, prosecutors, or correctional officers.\(^{173}\) Even though the person is available to testify in person, affidavits have been used by the court instead of *viva voce* testimony,\(^{174}\) a major departure from preliminary inquiry procedure. One would expect Parliament to be more, not less, concerned about the quality of documentary evidence received from foreign jurisdictions, yet the test for admissibility of documents originating elsewhere is far less stringent than that for evidence gathered in Canada, to which Canadian rules of evidence apply in order for the

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\(^{170}\) *Re Harsha (No. 1)* (1906), 10 C.C.C. 433 (Ont. C.A.); *Re Grabowski* (1930), 53 C.C.C. 75 (N.S.S.C.); *Virginia v. Cohen* (1973), 14 C.C.C. (2d) 174 (Ont. H.C.J.).


\(^{172}\) (1994), 63 Q.A.C. 65 (Que. C.A.), leave to appeal to S.C.C. was refused 180 N.R. 160n.

\(^{173}\) Section 35.

\(^{174}\) *Re Deakins* (1962), 133 C.C.C. 275 (Ont. H.C.J.).
evidence to be admissible.\textsuperscript{175} Extradition judges have ruled consistently that persons facing extradition do not have the right to cross-examine deponents on their affidavits.\textsuperscript{176}

Even where a witness is called by the agent of the United States to give \textit{vive voce} evidence, counsel for the fugitive often has little leeway in cross-examination. For example, in \textit{Houslander},\textsuperscript{177} counsel was not permitted to use cross-examination to attempt to build a record for use in appeal hearings in support of a possible Charter argument; that behaviour was deemed to be "inconsistent" with the purpose and nature of extradition hearings. Counsel was limited by the court to issues related to sufficiency of the evidence. On the other hand, the Quebec Court of Appeal has held that a fugitive had been denied a full and fair hearing when the court refused to hear his evidence, or that of his witnesses,\textsuperscript{178} in an attempt to explain or contradict the evidence led on behalf of the requesting country.\textsuperscript{179}

Just as the preliminary inquiry and interim judicial release provisions of the \textit{Criminal Code} are imported into the \textit{Extradition Act}, so too are the provisions of ss 698-708 of the \textit{Criminal Code} to compel witnesses to attend bail or extradition hearings.\textsuperscript{180} Documents which comply with these provisions are admissible in evidence at an extradition hearing even though they may not meet the specific admissibility requirements of the \textit{Extradition Act}.\textsuperscript{181}

By contrast to the relaxed rules of evidence with respect to foreign documents, evidence originating in Canada must satisfy the rules of evidence under Canadian law to be

\textsuperscript{175} Section 32(2).
\textsuperscript{178} \textit{U.S.A. v. Alfaro} (1990), 61 C.C.C. (3d) 474 (Que. C.A.).
\textsuperscript{179} \textit{Berthelotte v. Institut Leclerc} (1986), 5 Q.A.C. 290 (Que. C.A.).
\textsuperscript{180} Section 28.
admissible. Evidence of identification includes a) similarity of the name of the person before the court to the name in the documents submitted, and b) similarity of the physical characteristics of the person before the court to those exhibited in a photograph, fingerprint or other description of the person sought. Thus, despite a person's protest that he or she is not the actual person wanted for the crime, a mere "similarity" to the perpetrator in name or appearance may carry the day. Applying this section along with the standards of the preliminary inquiry established by s. 24(2), a person with a similar name to an accused who happens to look like his namesake in a single photograph – or even resembles the accused by description – could be extradited to face prosecution in the foreign country on the basis of that single photograph, even where there is clear evidence that the person was hundreds of miles away in a different country at the time of the offence. Thus the new legislation appears to reaffirm the propriety of the courts sending a person to the extraditing state if there is any evidence, no matter how minuscule – and no matter how inconvenient the jeopardy might be to the innocent accused.

Once the Department of Justice has closed its case on behalf of the requesting country, the judge invites the accused to tender evidence, with a prescribed warning as to the consequences of doing so, namely that all evidence adduced may be used against the accused and none of what he has to say is likely to advance a defence, since the attorney-general only has to present a prima facie case for an order of committal to follow. In the context of the history of extradition law, this is a deceit that tends to bring the administration of justice into

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182 Extradition Act, s. 32(2). Notable exceptions include admissibility of documents (s. 34), translations (s. 36) and identification (s. 37). Documents are admissible whether or not they are solemnly affirmed or under oath (s. 34). A translation of a document into French or English "shall be admitted without any further formality," including, apparently, verification (s. 36).
183 Ibid., s. 37.
184 Wagner, supra, note 82, where photo identification five years after the fact proved to be defective.
185 Subsection 541(2).
disrepute. While the presumption of innocence is not a principle that applies to extradition, where the evidence clearly exonerates the accused – proving his innocence on the balance of probabilities, or even beyond a reasonable doubt – surely this evidence must be taken into consideration, given the jeopardy the innocent man faces. Simple justice demands that where a person can prove his innocence (as opposed to the Crown proving his guilt) beyond a reasonable doubt, extradition to a possible hostile climate of prosecution should not follow.

In the past, failure of the accused to testify that the motivation of the alleged crime was political was also used against the accused, as in the *Peltier* case.\(^\text{186}\) The judge then invites the accused to call witnesses, again following the procedures for taking evidence prescribed at s. 540(1). Once called, witnesses are compelled to testify and generally to cooperate with the process on pain of incarceration.\(^\text{187}\) They are subject to cross-examination. It is therefore foolhardy for a person facing extradition to testify on his own behalf or even to have close friends testify on his behalf as character witnesses. The judge is compelled to make his judgement strictly on whether there is enough evidence to put the accused on trial, not to determine his innocence, even in cases were the exculpatory evidence is powerful.\(^\text{188}\)

Where an accused absconds in the course of an extradition hearing, he is deemed to have waived his right to be present at the hearing.\(^\text{189}\) The judge then has the discretion to issue a warrant for the arrest and adjourn the hearing,\(^\text{190}\) or continue with the hearing in the absence of the accused. If the hearing continues to its conclusion in the absence of the accused, the judge may give an order of committal or discharge, depending on whether there is sufficient

\(^{186}\) *Supra*, pp. 109-116.

\(^{187}\) Section 545.

\(^{188}\) *Wagner, supra*, note 82, per Oppel J. (at the extradition hearing), and Ryan J.A. (on appeal).

\(^{189}\) Paragraph 545(1)(a).

\(^{190}\) Subparagraph 544(1)(b)(ii).
evidence to commit, but the judge is entitled to draw an adverse inference from the failure to appear.\textsuperscript{191} The accused still has the right to counsel, even in his physical absence, and counsel has the right to call witnesses on the person's behalf if that is deemed necessary.\textsuperscript{192}

Where confusion arises from an irregularity or defect in the warrant leading to an accused being deceived or misled, the judge has the right to adjourn the proceedings and grant interim release.\textsuperscript{193} Finally, if the judge makes an order of committal, she may also order the transfer to the requesting country of evidence seized when the person was arrested, for use in his prosecution, with appropriate orders regarding its preservation and eventual return to Canada – always taking into consideration the property interests of third parties.\textsuperscript{194}

c) Diminished Judicial Discretion to Examine Foreign Law

Extradition judges have in the past taken the liberty at least of looking at the foreign indictment to ascertain the nature of the specific charges what they were dealing with. Citing the Quebec cases of \textit{U.S.A. v. Manno} (1996)\textsuperscript{195} and \textit{U.S.A. v. Tavormina} (1996),\textsuperscript{196} O'Connor J.A. of the Ontario Court of Appeal remarked in \textit{United States v. Commisso} (2000),\textsuperscript{197} "The double criminality rule does not permit an extradition judge to base the committal decision on evidence of conduct that 'has nothing to do' with the conduct charged in the foreign jurisdiction." He added:

I interpret this requirement, that the court should only look to the conduct underlying the foreign charge to mean that the conduct to be considered in the ... assessment must have some connection to the foreign charge or must constitute some evidence of that charge. The extradition judge may look to the foreign indictment, but only for the

\footnotesize{\textsuperscript{191} Sections 544(1)(b)(i), 544(2), 548.  
\textsuperscript{192} Subsections 544(4), (5).  
\textsuperscript{193} Section 547.  
\textsuperscript{194} Section 39.  
\textsuperscript{195} 112 C.C.C. (3d) 544 (Que. C.A.) at 558-559.  
\textsuperscript{196} 112 C.C.C. (3d) 563 (Que. C.A.) at 569.  
\textsuperscript{197} 143 C.C.C. (3d) 158 (Ont. C.A.), leave to appeal to S.C.C. refused (2000), 261 N.R. 197n (S.C.C.).}
purpose of determining what conduct is to be included in the assessment.... The foreign indictment enables the extradition judge to identify the conduct with which a fugitive is charged in the requesting jurisdiction. In referring to the foreign indictment however, the court must not be concerned with whether the conduct establishes the commission of the foreign charge nor with whether the foreign court has jurisdiction to try the charge.198

O’Connor J.A. was referring to the scheme under the old Act, and it seems equally reasonable under the new Act that to ensure adhesion to the principle of double criminality, an extradition judge should look at the indictment. However, former officials of the Department of Justice, Krivel, Beveridge and Hayward – the pre-eminent authorities from within the Department of Justice – disagree:

As the passage above indicates, having reference to the foreign indictment sometimes led hearing judges to impermissibly consider foreign law, or to go further than the former Act mandated by considering whether the foreign charges had been made out rather than simply determining whether there was conduct disclosed which amounted to any Canadian offence. As a result of the introduction of the Authority to Proceed, the extradition hearing judge will now have no occasion to refer to the foreign indictment and as a result the focus of the inquiry will be directly related to an assessment of the evidence in relation to the Canadian offences identified by the Minister in the authority to proceed.199

They maintain that the role of the extradition judge in assessing double criminality has been “diluted” by s. 15:

Under the new Extradition Act, the extradition judge is no longer concerned with determining whether the crime is covered by the treaty either by way of a list of extradition crimes or through a penalty-based criteria. Rather, this is one of the matters that must be considered by the Minister of Justice.... The double criminality assessment by the extradition judge under the former Extradition Act has been diluted. In the new Act, the extradition judge only measures the alleged conduct against the already defined offence which is set out in the authority to proceed. The judge does not determine what Canadian offence the conduct constitutes or whether the offence is described or listed in the relevant treaty.200

198 Ibid., at 168.
199 Krivel, supra, note 17, pp. 82-83.
200 Ibid., pp 182-183.
They never tire in pounding home the understatement that the new procedure “should result in a more expeditious proceeding.”

However, judicial discretion at the extradition hearing is not quite as limited as they suggest. The extradition judge is still required to determine whether the evidence justifies the surrender of the fugitive, and this power is “derived entirely from the statute and the relevant treaty.” Although their statutory powers are limited, hearing judges “may receive sworn evidence offered to show the truth of the charge or conviction, receive evidence to show that the particular crime is not an extradition crime, and take into account sworn, duly authenticated depositions or statements taken in a foreign state.” In fact, Ewaschuk J. opined in *U.S.A. v. Persaud* (1999) that s. 29 requires even more judicial scrutiny regarding the validity of foreign convictions than did the former s. 18, especially where “documents filed in support of the application make no reference whatsoever to the factual conduct underlying the convictions which would permit me to determine whether that conduct corresponds to the Canadian offences set out in the authority to proceed.”

d) “The Rule of Non-Inquiry” As a Fetter to Discretion

When a person is ordered to be returned to the requesting state pursuant to an extradition treaty and enabling legislation, it is presumed that the accused will receive a fair trial and a fair sentence. This presumption triggers “the rule of non-inquiry” – a specific principle of extradition which serves to fetter the discretion of both the Minister and the

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Court. As LaForest J. stated in *Re Schmidt v. The Queen*, “The country seeking surrender under a treaty must be trusted with the trial of offences.” Indeed, the entire treaty system that has developed in the past century operates under the assumption that justice will ultimately prevail once a person is returned to the requesting state. As LaForest J. made clear, his priorities where the “salutary system” of extradition was concerned were 1) the honouring of international obligations, and 2) efficiency. An extradition court’s involvement in issues more appropriately left to trial judges in the receiving jurisdiction would compromise both priorities, he said.

LaForest’s assumption in *Schmidt* has now become a presumption. Where an extradition treaty is in place, extradition judges, bound by the rule of non-inquiry, have with rare exceptions sedulously ignored what actually happens in the receiving country, even when the law or judicial system of that country does not recognize the presumption of innocence, natural justice or the primacy of the rule of law. That being the case, it is hardly surprising that extradition judges and Ministers of Justice are even less inclined to fret over the type of reception a returned accused may face once surrendered to lands where these principles are well formulated and applied. Such issues are deemed to have been thoroughly canvassed in

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the course of treaty negotiation. For LaForest, keeping international obligations to extradite was a matter of "honour" on the one hand and "good faith" on the other.\textsuperscript{211}

However, even in jurisdictions such as the United States of America, where until very recently the principles of democracy, presumption of innocence and the rule of law were so taken for granted that they seemed virtually unimpeachable, it can be a misplaced faith, especially where there may be a racial, ethnic, religious or political element to the extradition that may escape Canadian courts or the executive. John Beverley Robinson seemed oblivious to the fact that John Anderson might be facing a lynch mob if he were to be sent back to Missouri to face murder charges for killing a white man. Indeed, Duff J. later paid homage to Robinson's judgment in \textit{Anderson}, as did E.G. Clarke,\textsuperscript{212} who admired Robinson's legalistic bent. Robinson, like LaForest J., was a good mechanic. However, as Dickson J. noted with respect to LaForest's text on extradition, a focus on "the more mechanical aspects of the process" does not assist the court in determining the broader rights of an accused or his counsel.\textsuperscript{213} Sometimes, following suspect judgments brings the entire system of justice into disrepute.

On occasion, courts of appeal have lifted the carpet of the law of punishment in the United States to examine the sweepings, as in \textit{Gwynne}, where Southin J. expressed her horror of the "appalling" conditions in the Alabama penal system, saying that these in combination with a lengthy sentence were fundamentally unacceptable.\textsuperscript{214} The majority, while recognizing that Gwynne was likely to die in a squalid Alabama prison, upheld the surrender. Despite his

\textsuperscript{211} \textit{Ibid.}, (C.C.C.) 209-210, (S.C.R.) 514-515.

\textsuperscript{212} \textit{Re Anderson} (1860), 20 U.C.Q.B. 124; E.G. Clarke, \textit{A Treatise upon the Law of Extradition}, 4\textsuperscript{th} ed. (London: Stevens & Haynes, 1903); \textit{Re Collins (No. 3)} (1905), 10 C.C.C. 80 at 103, 2 W.L.R. 164, 11 B.C.R. 443 (B.C.S.C.). \textit{Peltier, supra}, note 113.

\textsuperscript{213} \textit{Vardy v. Scott} (1976), 28 C.C.C. (2d) 164 (S.C.C.) at 171.

\textsuperscript{214} \textit{Gwynne v. Canada (Minister of Justice)}, [1998] B.C.J. No. 222 (C.A.)
recognition that "the reasons [in Gwynne] include an extensive review of the prison conditions in Alabama which supported the conclusion that the conditions were inhumane," Mackenzie J.A. for the Court of Appeal for British Columbia followed Gwynne in U.S.A. v. Reumayr (2003), where the accused, charged with attempting to blow up the Trans-Alaska Pipeline, faced a cumulative 90 years in jail in New Mexico: "The question that the Minister addressed was whether those conditions are so shocking as to be simply unacceptable," he wrote. "I think that his conclusion that the appellant’s surrender would not violate fundamental justice is not inconsistent with Gwynne."\(^{215}\)

e) Limited Charter Jurisdiction

Perhaps because G.V. LaForest and those who followed his judgments put Canadian superior court judges into the position of screening extradition files in an administrative rather than judicial manner – a task that required little or no exercise of discretion, and could in any case be pre-empted by their Federal Court cousins, who alone had the power to review the judgments of superior court judges sitting as extradition judges – in 1992 the former Act was amended ostensibly to provide extradition judges with some of the respect that they deserved:

9. (3) For the purposes of the Constitution Act, 1982, a judge who is a superior court judge or a county court judge has, with respect to the functions that the judge is required to perform in applying this Act, the same competence that that judge possesses by virtue of being a superior court judge or a county court judge.\(^{216}\)

Section 25 of the current Act is not unlike s. 9(3) of the old one:

25. For the purposes of the Constitution Act, 1982, a judge has, with respect to the functions that the judge is required to perform in applying this Act, the same competence that that judge possesses by virtue of being a superior court judge.


\(^{216}\) An Act to Amend the Extradition Act, S.C. 1992, c. 13, s. 3.
In introducing the amendment to s. 9 in 1992, Minister of Justice Kim Campbell remarked that the extradition judge could “now know the recourse under the *Canadian Charter of Rights and Freedoms* that may apply to the duties he is required to perform in applying this law”:

> In developing a more streamlined appeal and review system, I have been guided by the following principles. First, the appeal and review process of extradition matters should resemble as nearly as possible the remedies available to those charged with criminal offences in Canada. Second, the person whose extradition is sought should enjoy the protections of the *Canadian Charter of Rights and Freedoms*. Third, to the extent possible, duplication of proceedings should be avoided.217

Thus the clear legislative purpose of the change in the law was to expand the role of the extradition judges to recognize the rights of persons facing extradition. This was in accordance with Article 8 of the Treaty, and flew as directly as possible in the face of the earlier judgments of LaForest J. Given this new role, it is surprising that judges continued to follow LaForest’s judgments in *Schmidt* and *Mellino*, arguing for the continuation of an extremely limited role for the extradition hearing, even though it now incorporated the essence of the habeas corpus court. For example, in *U.S.A. v. Kwok* (1998), Charron J.A. remarked, “Pre-amendment cases on the modest role of the judiciary in the extradition process are still applicable. Whatever Charter jurisdiction is conferred upon the extradition judge by s. 9(3) must be read in the light of this limited role.”218 On the other hand, in *Idziak v. Canada* (Minister of Justice) (1992), Cory J. of the Supreme Court of Canada described the judicial phase as encompassing court proceedings “which determine whether a factual and legal basis for extradition exists…. The first decision-making phase is certainly judicial in its nature and...”

warrants the application of the full panoply of procedural safeguards." This sounds very much like "the right to use all remedies and recourses of the law" anticipated in Article 8.

Only in situations where agents or employees of the Government of Canada or one of the provinces, in the course of duty, are located outside the country (including, for example, Canadian police officers taking statements while engaged in narcotics or other investigations overseas) would Charter obligations extend beyond the territorial jurisdiction of Canada. Hence, statements taken from a suspect by American police officers without a Charter warning would be considered to be admissible in a Canadian court as not violating Charter protections, whereas had the same statements been taken in the same location by the RCMP in the same manner, i.e., without a Charter warning, they would not have been admissible.

Judicial interpretation of the newfound power of extradition judges contained in s. 9(3) of the former Act followed two main lines of authority, one narrow and the other expansive. The narrower view, beginning with \textit{U.S.A. v. Leon} (1994), held that the Charter relief alluded to referred only to the duties already assigned to the extradition judge. This line of cases follows the many assertions of LaForest J. that the judiciary should not usurp the position of the executive: "A court must firmly keep in mind that it is in the executive that the discretion to surrender a fugitive is vested.... The executive should not be pre-empted." LaForest J. hammered this point home again and again in judgments spanning a decade.

In \textit{Leon}, Hayes J. said that it was within his jurisdiction as an extradition judge to consider whether seizure of eight kilograms of cocaine allegedly purchased in the United

States but seized in an Ontario warehouse violated s. 8 of the Charter governing search and seizure: "The fugitive is entitled to have this extradition judge consider the facts as they relate to an alleged breach of s. 8 and such consideration is not prohibited by s. 32 [of the Charter]. By virtue of s. 9(3) [of the former Extradition Act], this court is competent to consider the breach of s. 8. It is a function that I am required to perform when applying the Extradition Act." After hearing the evidence, he found no Charter breach. Subsequently, the Court of Appeal agreed with his approach, saying that "Hayes J. recognized that he had jurisdiction to grant Charter remedies and he entered into and disposed of an application by the appellant alleging that the search of the warehouse in Toronto violated s. 8 of the Charter." Although the appeal in Leon reached the Supreme Court of Canada, the issue of application of s. 9(3) was not dealt with at that level. In fact, the Supreme Court of Canada chose to hear only one of the many cases which like Leon had adopted the narrow view in the lower courts – and then only to reverse the extradition court’s order to commit for surrender (affirmed by the Ontario Court of Appeal) and the Minister’s order to surrender. That case was U.S.A. v. Shulman (2001) – of which, more later.

The broader view, mostly originating in Quebec, followed the line of cases beginning with U.S.A. v. Cazzetta (1996). Cazzetta had been the target of a reverse sting operation set up by Canadian and United States federal drug-enforcement agents to trap traffickers on the American side of the border, specifically so that they would be subjected to penalties for drug

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dealing harsher than corresponding penalties in Canada. Chamberland J.A. found that to return Cazzetta to the United States under these circumstances would be "fundamentally unjust," and ordered his release.

Hawkins J. as extradition judge followed Cazzetta in the case of U.S.A. v. Cobb, which was directly connected to U.S.A. v. Shulman, based as it was on the same facts. Cobb, Tsioubris and Shulman were three of several co-accused in an alleged telemarketing scam. After Shulman’s extradition hearing, but before Cobb’s hearing, the judge and prosecutor at the trial of their several co-accused in Philadelphia made some remarks which indicated that defendants remaining in Canada would be punished more severely if they delayed matters by taking advantage of Canadian extradition procedures. Not only that, said the prosecutor, but should the accused eventually be incarcerated, they would be put in a place where each accused was at risk of becoming “the boyfriend of a very bad man.” It fell to Arbour J., in one of the first cases she decided after being appointed to the Supreme Court of Canada, to apply to extradition cases “all remedies and recourses” provided by the law, including the Charter.

The dark phase of Charter rights that began with LaForest’s gloomy and ends-driven trilogy of cases in 1987 appeared to have ended with a new trilogy of cases that might bode well for application of the Charter in extradition cases of the future. However this line of cases, too, came to a crashing end in 2001 with the release of Arbour J.’s judgment in U.S.A. v. Kwok (2001) in which she opined that Cazzetta had been wrongly decided:

In my view, the 1992 amendments did not confer unlimited Charter jurisdiction on the extradition judge and therefore do not render obsolete all previous extradition case law.

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227 Ibid., at 552.
Section 9(3) clearly confers Charter jurisdiction upon the extradition judge insofar as the issues are specific to the functions of the extradition hearing, and to the extent that the Charter remedies could have previously been granted by the habeas corpus judge.... Through s. 9(3), the extradition judge acquired the jurisdiction formerly reserved to the habeas corpus judge, and nothing else.231

It appeared that between Shulman and Kwok – both judgments of Arbour J. for the court en banc – the Supreme Court of Canada had put itself into stalemate on the issue of whether a broad or narrow application of the Charter was appropriate.232

Although extradition judges have had superior court jurisdiction to determine constitutional issues since 1992, it is still an open question whether this expanded jurisdiction extends to introducing evidence under s. 7 to help determine whether offences are of a political nature, whether a person faces intolerable persecution, or similar possible security of the person issues, at least by laying down a record for the Minister at the hearing level. In U.S.A. v. Dickinson (1995),233 the Ontario Court, General Division ruled that a fugitive could adduce evidence that the matter was of a political character, but subsequently ruled that the evidence could not be led with a view to contradicting the evidence of the requesting state.234 The Act sheds little light on whether judges may allow introduction of such evidence in an extradition hearing for the eventual benefit of the client and the Minister in exercising his or her executive discretion while considering the final decision to surrender. The discretionary provisions refer only to not surrendering an individual where, in the Minister’s estimation, he has a valid claim that the offence or procedure is (for example) politically motivated.235

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231 Ibid., at 254-255.
232 The Department of Justice attempted to revisit the issue in Shulman, but reconsideration by the Supreme Court of Canada was refused (Docs. 26912, 27610, 17774, S.C.C., 14 June 2001).
233 29 W.C.B. (2d) 467 at 468.
234 Ibid. at 467.
235 See ss. 44(1)(b), 46(1)(c), (2). See the discussion on the Treaty above.
A parallel situation is the introduction of information with respect to citizenship defences under s. 6 and 7 of the Charter. In *U.S.A. v. Kwok*, Arbour J. said that although under s. 25 the extradition judge can grant a Charter remedy, "he or she can only do so on matters relevant at the committal stage." But she added:

Exceptionally, extradition judges retain a limited discretion to hear evidence relating to an alleged violation of s. 6 of the *Charter* when it is efficient and expedient to do so, yet they cannot decide on the merits of the issue. Alleged s. 6 violations are not relevant at the committal hearing. It is for the Minister to consider a fugitive's mobility rights under s. 6, and an alleged violation of s. 6 cannot be remedied until the Minister has rendered a decision to surrender.\(^{236}\)

Similarly, in *Shulman* Arbour J. noted that an extradition judge could exclude evidence gathered by foreign authorities outside Canada if it could be demonstrated that it had been obtained "in such a manner that its admission *per se* would be unfair under s. 7."\(^{237}\)

Since the passage of the *Extradition Act* in 1999, a few other cases have recognized the jurisdiction of extradition judges to consider Charter challenges to the introduction of evidence, although generally not successfully on the merits.\(^{238}\) However, the Supreme Court of Canada made it clear in *U.S.A. v. Burns* that "the phrase 'shocks the conscience' and equivalent expressions are not to be taken out of context or equated to opinion polls.... The words were not intended to signal an abdication by judges of their constitutional responsibilities in matters involving fundamental principles of justice. In this respect, Canadian courts share the duty described by President Arthur Chaskalson of the Constitutional Court of South Africa in declaring unconstitutional the death penalty in that country:

Public opinion may have some relevance to the enquiry, but, in itself, it is no substitute for the duty vested in the Courts to interpret the Constitution and to uphold its provisions without fear or favour. If public opinion were to be decisive, there would be no need for constitutional adjudication.... The very

\(^{236}\) Kwok, supra, note 225 at para. 5-6.


reason for establishing a new legal order, and for vesting the power of judicial review of all legislation in the courts, was to protect the rights of minorities and others who cannot protect their rights adequately through the democratic process. 239

Thus the Supreme Court of Canada has invited extradition judges to be more proactive in using their judicial discretion to apply Charter remedies to extradition cases – and in some cases, such as U.S.A. v. Licht, 240 extradition judges have accepted the invitation. There, British Columbia Supreme Court Justice Janice Dillon was so suspicious of manipulation and illegal activity by U.S. Drug Enforcement Agency (DEA) agents bent on “getting their man” that she refused to order the surrender the accused, Brent (Dave) Licht, whom the United States sought to extradite to face cocaine trafficking charges. Dillon J. described the incursion of the DEA into Canada to pursue a sting operation against a Canadian as a shocking abuse of Canadian law: “The illegal conduct is extremely offensive because of the violation of Canadian sovereignty without explanation or apology,” she said. 241 Although the DEA initially followed protocol, contacting the RCMP and Immigration authorities, the operation fell through when the RCMP withdrew cooperation and the operative’s immigration permit expired.

Nonetheless, one of the DEA’s agents entered the country illegally and without consent and offered drugs for sale to Licht, thus breaking Canadian law, Dillon J. found. Although Licht travelled to California to trade marijuana and cash for 50 kilograms of cocaine, he evaded a DEA dragnet and returned to Canada, from where the United States sought to extradite him. Dillon J. said the DEA sting constituted “an act so wrong that it violates the conscience of the

community." Documents presented at the hearing showed that the RCMP had approved the first operation only because they feared the DEA would act illegally if they did not cooperate. Their suspicions were borne out when the DEA went behind the backs of the RCMP in the second operation. Said Dillon J.:

This is one of those rare cases where an abuse of process is readily apparent. A United States police agent entered Canada without proper immigration status to carry out an illegal activity without the knowledge or consent of the RCMP and knowing that the RCMP had withdrawn consent to further involvement in the reverse sting operation. This conduct is clearly contrary to Canadian sovereign interests.  

She said the illegality was magnified by the fact that the agent knew that the RCMP had withdrawn consent for the operation, and that his conduct was illegal under Canadian law. Furthermore, the United States was implicated, since it had not repudiated the illegal conduct but rather had sought to exploit it by bringing the charges against Licht:

The conduct of a United States civilian police agent entering Canada without the knowledge or consent of Canadian authorities, in defiance of known Canadian requirements for legal conduct, with the express purpose to entice Canadians to the United States to commit criminal acts in that jurisdiction and acting illegally to offer to sell cocaine in Canada is shocking to the Canadian conscience. It is a serious violation of the sense of fair play and decency that has been established in cooperation agreements for mutual assistance in criminal matters. It is also a serious violation of Canadian legality in the circumstances of clear defiance of Canadian law without explanation....

The illegal conduct of the United States DEA is so shocking here and so detrimental to international cooperative agreements to assist in criminal matters that I would be inclined to order a stay on that basis alone.... Blatant acts in disregard of Canadian sovereign values and law by this requesting state is so egregious as to warrant a stay.  

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242 Ibid., p. 2.
243 Licht, supra, note 243, para. 56.
244 Ibid., para. 59-60.
And a stay of proceedings she ordered, on the grounds that “the conduct of United States agents in this case is so egregious as to constitute an abuse of process to disentitle the requesting state from the assistance of the court.”

Paul Willcocks, a seasoned syndicated columnist, attempted to obtain a statement from the office of then Minister of Justice Martin Cauchon on the Licht case, but found that “talking to the federal government from B.C. is generally like shouting down a long, hollow tube to a deaf man.” After two days, a spokesman for Cauchon stated that the Minister had no comment, “although he was considering an appeal – on behalf of the Americans.”

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245 Ibid., para. 64.
247 Ibid., p. 2.
1. To Surrender or Not To Surrender

a) The Increased Powers of the Minister of Justice

In the last chapter, it was noted that Canada's *Extradition Act* contemplates five distinct steps toggling back and forth between the executive and the judiciary. This chapter examines steps 3, 4 and 5, including the increased role of the Minister of Justice in exercising the initial and final discretionary decisions to surrender, and the diminished role of courts of appeal conducting appeals and judicial reviews.

The third step in the extradition process (after the initial decision to issue an authority to proceed and the extradition hearing) once again devolves to the Minister of Justice, who uses executive discretion to determine whether it is politically expedient both at home and abroad, and not fundamentally unjust, for Canada to extradite or refuse to extradite the person requested. Subsection 40(1) gives the Minister the general power to order surrender:

> 40. (1) The Minister may, within a period of 90 days after the date of a person's committal to await surrender, personally order that the person be surrendered to the extradition partner.

The traditional role of the Minister in extradition matters was described by Cory J. of the Supreme Court of Canada in *Idziak* in 1992: 

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Parliament chose to give discretionary authority to the Minister of Justice. It is the Minister who must consider the good faith and honour of this country in its relations with other states. It is the Minister who has the expert knowledge of the political ramifications of an extradition decision. In administrative law terms, the Minister’s review should be characterized as being at the extreme legislative end of the continuum of administrative decision making.  

This part of Cory J’s statement of the Minister’s role remains accurate. However, Krivel, Beveridge and Hayward tend to put a lot more stock in Idziak than that case deserves. The 1992 Supreme Court of Canada decision is dated law in that the case fell not only under the old Act but under the old Act before the 1992 amendments came into force. Under the new Act it would be overly simplistic to say (as did Cory J. in Idziak) that “the Act simply grants to the Minister a discretion as to whether to execute the judicially approved extradition by issuing a warrant of surrender,” or that “the extradition hearing is clearly judicial in nature while the actions of the Minister of Justice in considering whether to issue a warrant of surrender are primarily political in nature.”

Nor is it correct to say that “at the ministerial phase, there is no longer a lis in existence.” Clearly under the new scheme the legal issues continue to exist; legal arguments are still afloat on the host of discretionary (and mandatory) considerations raised in the legislation. Quasi-judicial decisions are yet to be made by the Minister of Justice – decisions that are vulnerable to statutory judicial review. Since judicial review is woven into the process as a matter of legislated procedure, judicial discretion is potentially revitalized at the level of the Court of Appeal.

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3 *Idziak*, supra, note 1, at 87.

4 Ibid.

The Minister cannot merely acquiesce in the surrender of the accused, once an extradition court has decided that there is no legal bar to extradition. Rather the Minister must ask certain questions, and may ask others, regarding the applicable principles and safeguards outlined in the Act. A great deal of legal interpretation is involved at this level, since the Extradition Act provides the Minister with a whole new set of obligatory and discretionary powers, each of them subject to legal interpretation. Surrender of a fugitive is therefore no long "primarily" a political decision, even though the Minister is granted a great deal of discretion within the parameters specified in the Act. The Minister has discretion not only whether to seek or insist on assurances of one kind or another from the extradition partner as a condition precedent to surrender, but also with regard to a number of administrative matters such as extension of timelines, especially where the individual has made submissions to the Minister or has filed an appeal. The Minister also has the discretion “to amend a surrender order at any time before its execution”; however, if the Minister chooses not to order surrender, the person must be discharged – not by the Minister but by the court. Although this final step is within the power of the court, it in no way adds to but rather diminishes judicial discretion since it indicates once again the essentially administrative function of the superior courts in extradition matters.

From the standpoint of a practicing lawyer, by far the most important process in the entire extradition procedure is – or at least should be – the preparation of submissions to the

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6 Subsections 40(3) and (4).
7 Sections 40(5), 40(6), and 41.
8 Section 42.
9 Subsection 48(1).
10 The grounds for refusal do not apply to cases where a request for surrender has been made by the International Criminal Court. Section 47.1.
Minister on "any ground that would be relevant to the Minister in making a decision in respect of the surrender of the person."\(^{11}\)

Defence counsel accustomed to criminal proceedings tend to put altogether too much stock in the extradition hearing, which has increasingly become a mere formality, rather than focusing on the all-important submissions to the Minister. It is here, not in the extradition hearing, that evidence ruled inadmissible or factual material (including foreign law and circumstances) not allowed into evidence by the extradition judge must be raised. Compelling arguments in the submissions, supported by strong precedents, can make a tremendous difference. Since the Act does not specify any format, it is wise to present facts and argument, supported by legal citations, in factum format, and to accompany the “factum” with a book of documents and a book of authorities as if this were an appeal. Supportive documents would be mostly new material “such as letters from family and friends, periodical literature, and material from experts.”\(^{12}\)

In *Gwynne v. Canada (Minister of Justice)* (1998), for example, where Gwynne faced extradition to Alabama to “complete” a 120-year sentence for extortion (he had escaped after serving nine years in an Alabama prison under conditions which were appalling), Gwynne’s counsel submitted a substantial affidavit documenting Gwynne’s experience in jail, supported by a report from an expert who could attest to the generally abominable conditions of American prisons. While the evidence convinced Southin, J.A., that Gwynne should not be

\(^{11}\) Subsection 43(1).

\(^{12}\) Krivel, Beveridge and Hayward, *supra*, note 2, p. 323.
surrendered, the majority held the day, holding that it was not “proper” to interfere with the Minister’s decision to surrender Gwynne, despite the “shocking” conditions.13

In practical reality, the Minister relies on the legal opinions provided by the International Assistance Group (IAG) within the Department of Justice. IAG is the Canadian counterpart to the Office of International Affairs (OIA) in the United States. As in the OIA, IAG counsel are primarily dedicated to facilitating the extradition process. In the final decade of the 20th century, the Minister relied heavily on IAG legal opinions and arguments, coupled with IAG summaries of the facts and law of the case. Only the summaries were shared with counsel for the person sought. The Minister almost invariably exercised discretion to surrender the person, arguing that since a superior court judge had determined that the process up to that point was legal, no further inquiry was required. Krivel, Beveridge and Hayward gave the “inside story” on submissions practice within the Department of Justice:

Submissions should be forwarded to the Department of Justice’s International Assistance Group (IAG) in Ottawa. During the ministerial phase of extradition proceedings, the IAG acts as the Minister of Justice’s counsel. Therefore, the IAG not only forwards submissions to the Minister but gives the Minister advice on the issue of surrender. The advice takes two forms: firstly, a memorandum of legal argument that includes a recommendation on the issue; secondly, a ministerial brief that summarizes submissions of counsel for the person sought and includes information on various issues raised by counsel. Counsel for the person sought does not receive a copy of the memorandum of legal advice and recommendation to the Minister. It is deemed privileged on the basis that it is legal advice (Idziak v. Canada (Minister of Justice) (S.C.C.), supra, at p. 89). However, counsel does receive a copy of the ministerial brief and does have an opportunity to comment on the brief. The brief, counsel’s comments on the brief, counsel’s submissions, and the memorandum of legal advice are then forwarded to the Minister.14

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14 Krivel et al., supra, note 2, p 328.
Defence counsel should use the various considerations specified in the Act under "Reasons for Refusal" as a guideline in preparing and documenting legal briefs, addressing as many of these reasons as applicable with reference to the facts and law. Charter arguments should initially be raised at the extradition hearing, since judges retain their power to consider such issues; however "political offence" arguments and other issues that under the new legislation are considered to be the exclusive domain of the Minister must be addressed in the application to the Minister. Courts of appeal will almost certainly not consider Charter arguments that were not raised with appropriate notice at the extradition hearing stage, nor will they deliberate on statutory exceptions such as the political offence exemption unless these issues were first raised with the Minister in the submissions contemplated under s. 43(1).

Where a person wanted for extradition has claimed Convention refugee status – that is to say, seeks asylum from the United States on the basis of fear of persecution or abuse of process in the United States, the Minister of Justice "shall" consult with his or her cabinet colleague holding the Citizenship and Immigration portfolio prior to issuing any order to surrender the individual. Whether this "consultation" would have any practical effect whatsoever seems moot: the Extradition Act clearly take precedence over s. 69.1 of the Immigration Act, as amended by the transitional provision of s. 96 of the Extradition Act, which added the following subsections:

(12) If an authority to proceed has been issued under section 15 of the Extradition Act with respect to a person for an offence under Canadian law that is punishable under an Act of Parliament by a maximum term of imprisonment of 10 years or more, a hearing under subsection (1) or (2) shall not be commenced with respect to the person,

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15 Sections 40(2) and 44-47.
16 Subsection 40(2). Emphasis added.
17 Subsection 4(2.1) Immigration Act states that the right granted to a Convention refugee to remain in Canada is subject to "any other Act of Parliament." See Pacificador v. Canada (Minister of Justice) (1999), (sub nom Philippines (Republic) v. Pacificador) 60 C.R.R. (2d) 126 (Ont. Gen. Div.), at 171, per Dambrot, J.
or if commenced, shall be adjourned, until the final decision under that Act with respect to the discharge or surrender of the person has been made.

(13) If the person is finally discharged under the *Extradition Act*, the hearing may be commenced or continued, or the Refugee Division may proceed, as though there had not been any proceedings under the *Extradition Act*.

(14) If the person is ordered surrendered by the Minister of Justice under the *Extradition Act* and the offence for which the person was committed by the judge under section 29 of that Act is punishable under the an Act of Parliament by a maximum term of imprisonment of 10 years or more, the order of surrender is deemed to be a decision by the Refugee Division that the person is not a Convention refugee.

The person cannot claim to be a Convention refugee once the Minister orders his or her surrender.18

Although the “mandatory” wording of subsection 40(2) of the *Extradition Act* appears to give the potential Convention refugee extra care and consideration, in practice this and other “mandatory” provisions of the *Extradition Act* are diluted by the reference in the same section to the Minister’s exercise of *discretion* in the form of the Minister being “satisfied.” It is mandatory under the Act that the Minister *shall not* surrender individuals *if* he or she is “satisfied” that the surrender would be unjust or oppressive.19 It is also mandatory that the Minister *shall not* surrender that individual *if* satisfied that prosecution in the requesting nation is barred by virtue of limitation or proscription under the foreign law,20 that the person is sought for a non-criminal military or political offence,21 or that the person is being prosecuted, punished, or prejudiced by virtue of race, religion, nationality, ethnic origin, language, color, political opinion, sex, sexual orientation, age, mental or physical disability, or social status.22

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18 *Immigration Act*, as amended, s. 69.1(15).
19 *Extradition Act* (1999), s. 44(1)(a).
20 *Extradition Act*, s. 46(1)(a).
Paragraph 44(1)(a) states: "The Minister shall refuse to make a surrender order if the Minister is satisfied that the surrender would be unjust or oppressive having regard to all the relevant circumstances." This has been described as "a broad 'catch-all' phrase which codifies the Minister's obligation, in the exercise of his or her executive discretion to surrender, to give due regard to Charter considerations." It is a codification, in fact, of a principle which first arose in Schmidt (1987), where LaForest J. stated, "In some circumstances the manner in which the foreign State will deal with the fugitive on surrender, whether that course of conduct is justifiable or not under the law of that country, may be such that it would violate the principles of fundamental justice to surrender an accused under those circumstances." This refrain was picked up in Kindler v. Canada (Minister of Justice) (1991), which held that "the Charter required a balancing on the facts of each case of the applicable principles of fundamental justice" and that surrender would be fundamentally unjust where it would "shock the Canadian conscience" and be "simply unacceptable." In U.S.A. v. Burns (2001), the Supreme Court of Canada en banc elaborated on what came to be called "the Kindler balancing test":

Use of the "shocks the conscience" terminology was intended to convey the exceptional weight of a factor such as the youth, insanity, mental retardation or pregnancy of a fugitive which, because of its paramount importance, may control the outcome of the Kindler balancing test on the facts of a particular case. The terminology should not be allowed to obscure the ultimate assessment that is required: namely whether or not the extradition is in accordance with the principles of fundamental justice. The rule is not that departures from fundamental justice are to be tolerated unless in a particular case it shocks the conscience. An extradition that violates the principles of fundamental justice will always shock the conscience. The

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23 Krivel et al., supra, note 2, p. 342-343.
The death penalty was one example of "shocks the conscience" terminology, the Court ruled in *Burns*. So was "stoning to death individuals taken in adultery, or lopping off the hands of a thief. The punishment is so extreme that it becomes the controlling issue in the extradition and overwhelms the rest of the analysis."27

Interestingly, this was a view enunciated by Arbour J. 13 years earlier when she sat as a Justice of the Ontario High Court hearing a habeas corpus application in *Larabie v. The Queen*.28 Although Arbour J. refused to grant the application for habeas corpus despite uncontraverted evidence of experts that the extradition proceedings, let alone the trial, might tip Larabie over the edge, causing a "relapse into a psychotic state," she recognized the possibility that in other conditions the extradition process could "be so extreme as to outrage the standards of decency":

Consequently, if the evidence in this case was such as to allow the conclusion that if extradited, the accused would then become unfit to stand trial in the United States, I would be inclined to think that the decision to extradite him would outrage the standards of decency and would constitute a violation of his rights under s. 12 of the Charter.29

That she retained this view in *Burns* is borne out by the observation (as part of the en banc decision) that s. 12 of the Charter ("Everyone has the right not to be subjected to any cruel and unusual treatment or punishment") forms "part of the balancing process engaged under s. 7"30 to be considered by the Minister of Justice.

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27 Ibid., at 129.
29 Ibid., at 390.
This implies that at least some Charter issues can be raised ab initio at the ministerial level. However, the Minister has up to now been reluctant to exercise discretion to refuse extradition. Prior to Burns, which with Cobb and related cases was something of a watershed for extradition in Canada, the Minister invariably took the position that such matters were for the courts in the receiving jurisdiction to determine\textsuperscript{31} – even in cases where the Treaty encourages the executive to seek assurances that the death penalty will not be sought. As a result there are few precedents for refusing to surrender a wanted person. The influence of LaForest J. is unmistakable:

> When the prerequisites for the surrender of a fugitive have been satisfied, the Minister of Justice has the power to surrender the fugitive. It should be observed that the Act does not provide that he must order surrender, only that he may. However, this discretion should only rarely be exercised, and in practice, this is in fact the case. If the Minister failed to surrender on requisition, Canada would commit a breach of its international obligations unless the discretion had been exercised within the terms of the treaty.\textsuperscript{32}

In \textit{U.S.A. v. Taylor} (2003),\textsuperscript{33} the British Columbia Court of Appeal determined that the Minister’s reasons in support of surrender were “not responsive to the applicant’s submissions.” Taylor, 62, a diabetic with no criminal record, had argued that his being returned to the United States to face 15 years in jail for theft over $400 and attempted grand theft, leaving behind a suicidal schizophrenic wife who depended on him, “would be unjust or oppressive having regard to all the relevant circumstances.”\textsuperscript{34} The Minister disagreed, saying that Taylor’s health and personal circumstances “must be carefully weighed against Canada’s

\textsuperscript{31} Ibid.
\textsuperscript{34} Ibid., para 2, 6.
commitments under the Treaty and the Charter” – a bizarre twist in logic when it comes to Charter considerations:

In my view, the circumstances of this case do not justify an exercise of my discretion to deny surrender on humanitarian grounds.... In my view a decision to surrender Mr. Taylor given the nature of the alleged offences and his personal circumstances would be neither unjust nor oppressive and would not “shock the conscience of Canadians.” While it appears that Mr. Taylor has family responsibilities and significant health problems, and his surrender will undoubtedly cause hardship for him and his family, his circumstances are not of such a nature as to justify ignoring Canada’s obligations under the Treaty.35

The Court of Appeal disagreed:

[W]hile [the Minister] stated that he had given the matter full consideration, his reasons are conclusory and do not demonstrate that he performed his mandatory duty under s. 44(1)(a) to have regard to “all the relevant circumstances.” The Minister did not say whether he considered that the hardship to Mrs. Taylor was relevant to the question before him. If he did consider that it was relevant, he failed to state why he concluded that his hardship would not make the surrender “unjust or oppressive” under 44(1)(a), alone or in combination with the circumstances relating to the applicant personally. In other words, the Minister did not explain why he reached his conclusion. This amounts to a failure to afford the applicant procedural fairness.36

The Court set aside the Minister’s decision to surrender Taylor and referred the question of surrender “back to the Minister for determination in accordance with these reasons.”37 The determining precedent used by the Court was not an extradition case but Baker v. Canada (Minister of Citizenship and Immigration) (1999),38 where L’Heureux-Dubé J. stated:

In my opinion, it is now appropriate to recognize that, in certain circumstances, the duty of procedural fairness will require the provision of a written explanation for a decision. The strong arguments demonstrating the advantages of written reasons suggest that, in cases such as this where the decision has important significance for the individual, when there is a statutory right of appeal, or in other circumstances, some form of reasons should be required. This requirement has been developing in the common law elsewhere. The circumstances of the case at bar, in my opinion, constitute one of the situations where reasons are necessary. The profound importance

35 Ibid., para. 9. Emphasis that of Smith, J.A.
36 Ibid., para. 18.
37 Ibid., para. 19.
of a [humanitarian and compassionate] decision to those affected...militates in favour of a requirement that reasons be provided. It would be unfair for a person subject to a decision such as this one which is so critical to their future not to be told why the result was reached.\(^3\)

This decision amounts to a warning to the Minister of Justice that his reasons can no longer be ill-thought-out political stance-mongering to placate the requesting state, but must be responsive to the substantive issues raised by the applicant in accordance with the new Act.

One notable exception to the propensity of the Minister of Justice to surrender under any circumstances was the case of Richard Witney, who had walked away from a three-day furlough from a Massachusetts jail after serving 14 months of a four-to-ten-year jail term for armed robbery of a supermarket in 1972. A Canadian from Quebec, Witney already had a criminal record in Canada for breaking and entering, house breaking, and creating a disturbance.\(^4\) Witney and his co-accused, Norman Dionne, both pled guilty to armed robbery, and despite the fact that Dionne was the only person carrying a weapon (a toy gun) and faced other robbery charges at the time, they received identical sentences.\(^5\)

Like Witney, Dionne had walked away from a furlough – in his case after serving 21 months of his four-to-ten year sentence. He, too, had a Canadian criminal record, but applied for and received a pardon for all Canadian convictions in 1982. Like Gwynne, Witney faced an additional sentence of up to 10 years in the United States for being unlawfully at large.

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However, upon his return to Canada, Witney eventually made a respectable name for himself as a restaurateur, even receiving a reward for “honesty.”

The extradition request had been initiated by the United States by diplomatic note on 30 December 1993, more than 20 years after Witney had been sentenced and 19 years after his escape. The United States wanted him to serve the remainder of his sentence, and to stand trial for escaping lawful custody. Bouck J. of the Supreme Court of British Columbia dismissed Witney’s primary s. 7 Charter defence of delay, reasoning that the delay was caused by American authorities who were not bound by the Charter. Witney appealed.

Documents from Massachusetts in the authenticated record claimed that “United States officials have advised that since the time of his escape attempts were made to locate Mr. Witney through local and state agencies but without success.” However, Witney’s counsel, Robert Moore-Stewart, took pains to point out, “In contrast to the statements of Massachusetts’ officials in this case (that attempts were made to find Mr. Witney over the years), in the Dionne case, Massachusetts advised that it did not have a fugitive unit until 1984-85 and these matters were pursued only recently.”

In Dionne’s case, American authorities were aware of where he lived, and in 1987 sent a diplomatic note seeking his extradition. The Canadian authorities sought supplementary materials necessary to support the requisition, but these were not supplied, and the United

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42 Ibid., at 3. In theory, the International Assistance Group serves as neutral legal counsel to the Minister, presenting both sides of the issue. In fact, the “Group” usually serves the process in much the same way as a “case presenting officer” does in an Immigration and Refugee Appeal Board hearing – with an element of prosecutorial bias. The Witney summary is unusually objective.
43 Witney summary, supra, note 40, pp. 1-2.
44 Ibid., pp. 2-3.
45 As Kimberly Prost, senior counsel to the International Assistance Group, communicated to the Minister in her supplementary summary, supra, note 41.
46 Ibid., p. 1.
47 Witney summary, supra, note 40, pp. 4-5.
States officially withdrew its extradition request, issuing a new diplomatic note in 1990. The tardiness of the Massachusetts authorities was a major factor in the decision of Minister of Justice Jean-Jacques Blais to refuse to surrender him. In his letter to Witney’s lawyer dated 23 March 1995, then Minister of Justice, Allan Rock, referred to Blais’s earlier decision in the Dionne case. He dismissed a constitutional argument, saying that since the situation faced by Mr. Witney would not “shock the conscience of Canadians” or be “simply unacceptable” (the tests adopted in other earlier cases), there is no constitutional impediment to surrender.” However, there remains my discretion to refuse surrender where as noted by the Supreme Court of Canada in United States v. Cotroni for high political purposes or for the protection of an accused”, the government might choose to refuse to surrender. I believe that this is one of those rare cases. I reach this decision taking into account all of the circumstances of the case in particular the length of the delay, complete rehabilitation of the fugitive, the devastating impact of surrender on the life of a person who has become a valued and contributing member of our society, that it is unlikely he serves his sentence in Canada despite an international agreement to that effect and the decision taken in the parallel case of Mr. Dionne.

Rock concluded his letter to Witney’s counsel, “I must caution that my decision in the particular circumstances of this case does not detract in any way from Canada’s strong commitment to its international obligations.” As is the case with most quasi-judicial precedents, the Minister of Justice had not wanted to set a precedent.

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51 Ibid., emphasis added.

52 Clearly, the Minister did not want to open the “floodgates” of high expectation among persons caught up in the extradition machinery. But what “floodgates”? As Donald J.A. remarked in Burns, “The Minister seems to be struggling with an illusory problem.” Although Burns was a case involving the death penalty, it could be argued that extradition cases themselves are not “so numerous that there are ‘routine’ cases and ‘special’ cases..... Each
b) To Extradite or Prosecute

One consideration of the Supreme Court in Cotroni was the fact that Canada showed a disinterest in pursuing prosecution.\(^{53}\) The issue of whether a particular country, province or state would under any circumstances be interested in taking on the huge expense of prosecuting an accused in a complex criminal case where another jurisdiction had already expressed a willingness to undertake that cost was not touched on by the court. However, the cost of prosecution is an issue of some importance, especially where proceedings under the Criminal Code involve the discretion of the provincial Crown authorities to proceed with the prosecution. As the Supreme Court stated in Cotroni, without a specific charge in place in Canada, the Minister of Justice has limited discretion to refuse surrender.\(^{54}\) Nonetheless, the Court received into law a list of factors that the Minister of Justice should consider in deliberating whether to extradite or prosecute:

- Where was the impact of the offence felt or likely to have been felt?
- Which jurisdiction has the greater interest in prosecuting the offence?
- Which police force played the major role in development of the case?
- Which jurisdiction has laid charges?
- Which jurisdiction has the most comprehensive case?
- Which jurisdiction is ready to proceed to trial?
- Where is the evidence located?
- Is the evidence mobile?

\(^{53}\) Supra, note 49 at 1477, 1509. For a more detailed examination of the Cotroni test, see Chapter 4, supra, note 224.

\(^{54}\) Cotroni, supra, note 49, at 226.
. How many accused are involved?
. How easily can all of the accused be gathered together in one place for trial?
. In what jurisdiction were most of the acts alleged to be criminal committed?
. What is the nationality and the residence of the accused?
. How severe are the sentences faced by the accused in each jurisdiction? 55

Only after the appropriate authorities have decided to prosecute will the Minister of Justice be able to exercise the discretion not to extradite provided by s. 47 of the Extradition Act. This is more limiting than the provision in the Treaty, which only requires "jurisdiction to prosecute the person for the offence." In Cotroni, where trade in heroin was alleged, Canada rather than the Province of Quebec had the jurisdiction to prosecute. However, the Department of Justice expressed no interest in prosecuting, inviting questions of conflict of interest, especially where the decision to extradite rather than prosecute was prejudicial to the accused, the penalties for conspiracy to traffic in heroin being substantially greater in the United States than they were in Canada. The "Cotroni issue," as it is known in the popular parlance of extradition law, therefore remains a "very live issue." 56

The current practice provides for involvement of provincial prosecutors where the Criminal Code is involved. However, provincial prosecutors are not directly involved in options arising from the extradition process. Nor is it appropriate for the Minister of Justice or federal Attorney General to make that determination, except in cases where the federal government has jurisdiction to prosecute. It would be most appropriate for the extradition

55 U.S.A. v. Reumayr, [2003] BCCA 375, para. 23. Adapted from a list first identified by Hanssen J. of the Manitoba Queen’s Bench in Swystun v. United States of America (1988) and later adopted by the Supreme Court of Canada in U.S.A. v. Cotroni, supra, note 49, at 225. The accused need not necessarily have entered the requesting country for the extradition crime to be deemed to have been committed there, provided that the relevant evidence is located in a requesting state that has a "real and substantial connection" to the crime.

56 Krivel et al., supra, note 2, p. 370.
court, which by definition is the superior court of the province,\textsuperscript{57} to determine if justice can best be served by ordering the prosecution of a case rather than extradition.

Under the new Act, the decision to prosecute rather than to extradite falls to the discretion of the Minister. However, where the criminal litigation is likely to be complex and expensive, the province is all too willing to withdraw domestic charges in favor of extradition, once the Minister of Justice “consults” with or informs the Attorney General of the province that an extradition request has been made. In fact, the Attorney General may opt to waive prosecution even in straightforward, seemingly simple cases, as was the fact situation underlying \textit{U.S.A. v. Reumayr} (2003). As police listened, Reumayr told an police informant that “he intended to buy futures in oil and gas and then to disrupt the supply of oil to the United States by blowing up the Alaska Pipeline and other energy sources.

\begin{quote}
He expected thereby to cause a shortage of oil and a resulting increase in the price of oil stocks. He would then sell the futures and make a large profit. He said that he intended to execute the plan around the new year of 2000, to capitalize upon the fears of the public at large concerning the much discussed millennium change, that is to say, Y2K.\textsuperscript{58}
\end{quote}

After the RCMP listened to the details of his fantastic get-rich-quick scheme, they arrested Reumayr and (unlike the situation in \textit{Cotroni}, where no domestic charges were laid) charged him with six offences under the \textit{Canadian Criminal Code}. Reumayr allegedly gave the informant two boxes of explosives, which the informant handed over to the RCMP for testing.

\textsuperscript{57} \textit{Extradition Act}, s. 2: “court” means:
(a) in Ontario, the Ontario Court (General Division) (renamed the Ontario Superior Court as of 19 April 1999;
(b) in Quebec, the Superior Court;
(c) in New Brunswick, Manitoba, Alberta and Saskatchewan, the Court of Queen’s Bench;
(d) in Nova Scotia, British Columbia, the Northwest Territories, the Yukon Territory and Nunavut, the Supreme Court; and
(e) in Prince Edward Island and Newfoundland, the Trial Division of the Supreme Court.

\textsuperscript{58} \textit{U.S.A. v. Reumayr}, supra, note 55, para. 15.
The contents of one of the boxes was PETN, a high explosive. However, Reumayr was alleged to have “possessed” explosives only in Canada, not in the United States.

Although the United States later asked for Reumayr’s extradition for attempt arson, attempt mischief and possession of explosives arising out of these events, the extradition judge found a *prima facie* case only for the possession charges, not the attempts. Yet when the Minister of Justice informed the Attorney General of British Columbia that the United States had requested the extradition of Reumayr for “attempting to bomb the Trans-Alaska Pipeline by means of explosive devices and aiding and abetting in the attempted bombing,” the Attorney General of British Columbia suspended the domestic charges “in deference to the U.S. prosecution,” even though Reumayr had been charged in New Mexico (where the alleged plot had come to light) not in Alaska (where the putative target pipeline was located). Realizing that he faced up to 90 years in jail for the charges brought against him by the United States, Reumayr agreed to plead guilty to the six counts charged in British Columbia if the Minister would only stop the extradition proceedings. Mackenzie J.A. noted,

> The Minister’s reasons record that *he was informed* that the Attorney General of British Columbia had considered the directions of the Supreme Court of Canada in *Cotroni* and that he had decided not to proceed with prosecution in Canada. He correctly noted that the Attorney General was the competent authority to conduct a prosecution in Canada. He stated it was not his role to revisit that discretionary decision of the Attorney General but he added: “I must ensure that surrender of Mr. Reumayr is made in accordance with the [Charter].” In my view, the Minister’s approach reflects a proper balance in the exercise of his statutory obligation. He was entitled to consider the Attorney General’s decision not to proceed with prosecution and recognized that he had a duty to ensure that surrender was in conformity with the appellant’s *Charter* rights, independently of the Attorney General’s decision.60

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Nonetheless, the court recognized that “it was clear that the Attorney General would revive the
domestic prosecution if the appellant was not surrendered.”

Mackenzie J.A. focused on the severity of sentence not as part of the Cotroni test upon
which he had embarked, but as part of the broader s. 7 Charter test as to whether the penalty
“sufficiently shocks the Canadian conscience,” or faces “a situation that is simply
unacceptable.” In doing so, he failed to examine and balance the many factors of Cotroni,
saying only that the Minister had said that he had considered them. However, the Minister
did not at any time say that he had considered the factors. Rather, he stated that he had been
informed that the provincial Attorney General had done so. This passing of the buck is simply
not acceptable to a process as important as extradition in a post 9/11 world, where the
individual faces trial for what from an American point of view has all the makings of a
“terrorist act.”

Had the Minister and the Court of Appeal applied the 12 factors in Cotroni, the
analysis would have gone something like this: 1) the locale of the impact of the offence of
“possession” of explosives (all that was made out, on the evidence) was Canada, despite the
fact that the eventual target may have been the Trans-Alaska Pipeline; 2) although the United
States (but not New Mexico) was said to be a target for the underlying offence, the RCMP had
conducted the investigation in Surrey, and British Columbia had as great an interest as the
United States (and far more of an interest than New Mexico) to ensure that Canada not be used
as a staging ground for such plots; 3) Canadian police played the major role in the
development of the case; 4) the charges were laid in Canada; 5) Canada had the more

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61 Ibid.
62 Ibid., para. 29
63 Supra, note 55.
comprehensive case against Reumayr; 6) the Attorney General of British Columbia was ready to proceed to trial; 7) some of the evidence (the explosives, for example, and police testimony), was not easily mobile; 8) the evidence was gathered in and located in Canada; 9) there was only one accused; 10) most of the acts in furtherance of the crime were conducted within Canada; 11) Reumayr was Canadian and lived in Canada, and in fact had complied with the law by not setting foot in the United States, from which he was barred by virtue of an earlier conviction; and 12) (last, but certainly not least), Reumayr faced a maximum sentence of two and possibly three consecutive 30-year sentences if convicted in the United States. In short, of the dozen factors listed in Cotroni, none weighed in favour of extradition; three were neutral or relatively equally balanced; and nine factors weighed in favour of prosecution in Canada. Yet the Minister had not exercised his discretion under Article 17 bis of the Treaty, which he could have done in conjunction with s. 47(d) of the Act.

Although the Court set aside the surrender order, it was only to the extent of directing that the order reflect the limitations of the earlier committal order, to include only the possession charges, not the “attempts.”\(^64\) Still, much more consideration should have been given to the Cotroni test and to the fact that the Attorney General of British Columbia remained willing to proceed with the Canadian criminal charges.

c) Holding All the Marbles

By giving huge discretion to the Minister in sections 44-47, the Extradition Act effectively removes the judicial discretion traditionally enjoyed by judges sitting as extradition courts. They cannot order that the person be discharged on the basis that surrender would be unjust or oppressive having regard for all the circumstances, since that is within the discretion

\(^64\) Ibid., para. 38-44.
of the Minister. They cannot consider whether the request is made for an improper purpose such as persecution by reason of race, religion, nationality, ethnic origin, language, color, political opinion, sex, sexual orientation, age, mental or physical disability or status. Although such matters are clearly not “political” as opposed to “judicial” considerations, the legislation places them within the discretionary domain of the Minister, as if they were somehow parallel to the consideration of whether to seek assurances that an accused person will not face the death penalty for his deeds if returned to the retentionist state where he allegedly committed them.\textsuperscript{65} Such quasi-judicial considerations should be assigned to a neutral tribunal, and what better “tribunal” is there than the extradition court?

Even matters that would seem to require judicial expertise are removed from the domain of extradition hearing judges by the new Act and have been placed within the purview of the Minister. For example, the Minister, not the judge, determines whether “the person would be entitled, if that person were tried in Canada, to be discharged under the laws of Canada because of a previous acquittal or conviction.” The primary consideration, here, is “the laws of Canada,” by definition well within the expertise and training of superior court judges, even in their diminished capacity as extradition judges! They are in a better position than the Minister to hear and weigh evidence to determine whether a person has been convicted \textit{in absentia} and was not able to have his case reviewed; whether the person was under the age of 18 at the time of the alleged offence and would lose the protection of legislation like the \textit{Youth Criminal Justice Act} if surrendered; whether the person faces criminal proceedings in Canada for the same conduct; or, indeed, whether none of the conduct

\textsuperscript{65} \textit{Ibid.}, s. 44.
alleged occurred within the territorial jurisdiction of the requesting country.\textsuperscript{66} Similarly, the judge cannot determine whether the conduct in respect of which extradition is sought is a non-criminal military offence, for that too would entail looking at foreign military and criminal law – although the provision is ambiguous as to whether the “criminal offence” exception refers to foreign or Canadian criminal law.\textsuperscript{67}

It will be objected that all these issues involve, at least to a degree, questions of foreign law, and Canadian superior court judges are not equipped to make decisions pertaining to foreign law. But as Duff J. demonstrated in \textit{Re Collins (No.3)},\textsuperscript{68} there is a perfectly sound way for judges in extradition hearings to consider and weigh evidence of foreign law: by admitting the evidence through an expert, who presents the law (or the political scenario) as a matter of fact. An expert on the country’s laws or politics should be able to tell the extradition judge whether the prosecution of a person is barred by limitation under the law that applies to the requesting country, for example. Currently, examination of foreign law remains the domain of the Minister and his staff, and their opinions are virtually unchallengeable.

The old Act granted judges discretion which is now closed to them under the new Act. For example, in the area of offences of a political character, the old Act provided:

\textbf{15.} The judge shall receive...any evidence tendered to show that the crime of which the fugitive is accused or alleged to have been convicted is an offence of a political character, or is, for any other reason, not an extradition crime, or that the proceedings are being taken with a view to prosecute or punish the fugitive for an offence of a political character.

\textsuperscript{66} \textit{Ibid.}, s. 47.
\textsuperscript{67} \textit{Ibid.}, s. 46(b).
\textsuperscript{68} \textit{Re Collins (No. 3)} (1905), 10 C.C.C. 80, 11 B.C.R. 443, 2 W.L.R. 164 (B.C.S.C.).
That provision, plainly granting judges broad discretion, is now the domain of the Minister. Perhaps the early legislators of the first Canadian *Extradition Act* had more faith in the courts than today’s legislators. Or perhaps they had less faith in the staff of the Department of Justice – who unabashedly drafted the *Extradition Act* to provide as much discretionary power as possible to themselves and the Minister, and as little as possible to the courts.

Theoretically, the *Extradition Act* provides a system of checks and balances, the executive attempting to fulfill its international obligations, and the judiciary making sure that the process is above-board and the rights of the accused are protected. However, the process invites an element of deceit, if not political self-service, at the expense of the requested person and possibly at the expense of the administration of justice. The extradition judge can always rationalize a difficult or unpopular decision that to the average layman may seem "unfair" by reminding the accused or the press that the final decision will be made, not by the court, but by the executive. When the other shoe drops and the political judgment of the Minister comes into question on precisely the same issue – the difficulty or unpopularity or fairness of returning a specific fugitive to a foreign country to face trial – the executive can always point to the outcome of the extradition hearing and say that the decision to return a fugitive on the basis of the Minister’s ATP was found to be "legal" by a duly qualified extradition judge.

Courts of appeal have not been blind to this conundrum, and have pointed out LaForest’s oft-quoted homily that the role of the extradition judge is a modest one. That being the case, the role and responsibility of the Minister of Justice is huge – not only compared to the role of the extradition judge, but also compared to his role under the previous statute. The Minister of Justice can no longer be glib or dismissive of the issues or deliberately
misinterpret the provisions of the Act or be generally unreasonable without being brought to

A classic case of the Minister being unreasonable on several fronts was that of Josiah
Umezurike of Nigeria, also known as Tilo Johnson, who was ordered surrendered by Justice
Minister Martin Cauchon on 6 May 2002. Umezurike had pled guilty to passing counterfeit
bills in Georgia in 1996 and received six months imprisonment (which he served) plus three
years probation. One of the conditions of probation was that he not leave the judicial district
without permission of the court or probation officer to whom he was required to report once a
month. He reported on 27 April, but in the following month received a letter from the United
States Immigration and Naturalization Service stating that he should leave the United States
voluntarily within 60 days. He followed the dictates of this departure notice, and went to
Canada, where as a Nigerian he applied for refugee status. On 14 January 1998, a warrant was
issued for his arrest for breach of probation. On 5 April 1999, the INS ordered his deportation
to Nigeria. On 28 July 2000, he was arrested in Canada under a Warrant for Provisional
Arrest and held in custody at Toronto East Detention Centre. He was to stay there for two

On 27 September 2000 the U.S. Embassy requested Umezurike's extradition by
diplomatic note, and two days later the Minister of Justice issued an Authority to Proceed
based on the offences for which Umezurike had already done his time – uttering and
possessing counterfeit money. On 9 November the Minister issued a second ATP for
“enforcement of sentences.” The extradition court issued a committal order on 23 November
2001 and the Minister ordered surrender to the United States on 6 May 2002.

Gillese J.A. could find no error in the decision of the extradition judge, since her role was limited by the Act – despite the fact that a plain reading of section 3(3) of the Act would have dictated that the case be thrown out, since Umezurike had already done his substantive time in jail.\(^71\) Rather, the Court zeroed in on the Minister’s responsibilities, citing “the standard of review by this court, of the Minister’s surrender decision” set out by Laskin J.A. in *U.S.A. v. Whitley*:

> [If] the Minister violates the fugitive’s constitutional rights or otherwise errs in law, or if the Minister denies the fugitive procedural fairness, acts arbitrarily, in bad faith or for improper motives, or if the Minister’s decision is plainly unreasonable, then the reviewing court is entitled to interfere; otherwise, the court should defer to the Minister’s surrender decision.\(^72\)

The Minister had failed to protect Umezurike’s liberties, rights and interests in several different ways. First, and perhaps most obviously, the Minister had not consulted with the Minister of Citizenship and Immigration, as he was required to do under s. 40(2) of the Act, since Umezurike claimed to be a Convention refugee. Secondly, the Minister had treated the fact that he had spent 22 months in custody in Canada as irrelevant and something that he could raise at trial in America – despite the fact that a briefing note prepared by the Minister’s staff indicated that the American trial court was unlikely to take that into account.

The Minister erred in law in treating this lengthy period of time, for which the appellant may receive no credit, as irrelevant. The fact that the appellant has spent more time in custody in Canada, in harsh conditions, than he would have received for the offence for which his extradition is being sought is a relevant factor under s. 44. A surrender in those circumstances is capable of being unjust or oppressive.\(^73\)

Thirdly, the Minister failed to consider that Umezurike left the United States in compliance with a departure notice ordering him to do so. As his lawyer had submitted to the Minister, “It

\(^{71}\) *Ibid.*, para. 21.


thus appears that the government now seeking Umezurike’s return is the same government that ordered his removal.” To which Gillese J.A. responded: “If the appellant committed the offence, in part, at the direction of the United States government, it could be unjust to now return him to the United States.”

A fourth error on the part of the Minister was his failure to determine whether the United States intended to act on the outstanding deportation order, once Umezurike was returned to Georgia. “If the appellant is sent back to the United States for an enforcement of sentence hearing, will he be subject to deportation? If so, extradition in such circumstances may be unjust, particularly given the appellant’s assertion that his life will be in danger if he is deported to Nigeria.”

Of more general concern, “it is possible that detention in the circumstances, amounts to an abuse of process that would shock the Canadian conscience.” The Minister had not considered this. Nor was there any evidence, that the Minister had considered “all relevant circumstances, singly and in combination, to determine whether surrender would be unjust or oppressive.” Finally, the Minister had failed to give written reasons “responsive to the factors relevant to his situation.” The Court set aside the Minister’s decision and referred the matter back to him for reconsideration of the matters raised by the court. In effect, the Court of Appeal had done the Minister’s homework for him – work that under the new legislation should have been performed by the Minister and his staff from the outset.

74 Ibid., para. 28.
75 Ibid., para. 42.
76 Ibid., para. 43.
77 Ibid., para. 44.
78 Ibid., para 45-46.
79 Ibid., para. 46-47.
In the United States, once a court certifies that an individual is extraditable, the Secretary of State has the discretion (once all habeas corpus challenges are over) to determine whether or not the person should be surrendered to the custody of the requesting state, based on whether there are humanitarian or other considerations. Although the determination of whether extradition should be denied on humanitarian grounds falls to the Secretary of State rather than to the courts, the American courts have jurisdiction to determine whether the political offence exception should apply in a particular case, and at least to this extent retain the discretion to bar extradition. They also retain the power to determine constitutionality and the power to grant applications for habeas corpus based on the substantial precedent established relatively early on by the Supreme Court of the United States in cases following Grin v. Shine (1902).

In marked contrast to American practice, defence evidence contemplated under the stated categories of sections 44-47 of the new Canadian Act – including alibi evidence or evidence that the alleged offence is of a political character – fall under the discretionary domain of the Minister of Justice rather than the extradition judge. Although alibi evidence would seem to be most adequately covered under the trial process in the requesting country, the fact remains that the accused, once sent back, may face incarceration for months if not years as his trial is prepared – before he has a reasonable chance to raise this defence. If as in the case of David Wagner all the “fugitive’s” alibi witnesses are from Canada (in that case, prepared to attest that Wagner was working on Vancouver Island on the day the abduction of

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82 Ibid. (Pitawanakwat), at 10, citing Quinn v. Robinson, 783 F. 2d 776, 786 (9th Cir), cert denied 479 U.S. 882 (1986).
which he was accused took place a day’s drive away in Redmond, Washington), there is the
added difficulty and cost of calling unsubpoenable Canadian witnesses to testify in an
American trial. This is precisely the kind of unfair situation that a judge exercising judicial
discretion can influence, as indeed Oppel J. tried to do in Wagner. Oppel J. stated that the
alibi evidence, particularly of Peters’ foreman, was “powerful.” This remark, in the body of
the judgment, was clearly intended to be a broad hint to the Minister that justice would be best
served by giving considerable weight to this obvious proof of innocence. Unfortunately, the
judge did not spell this out in a separate report (which is provided for by the s. 38 of the
legislation but rarely used), and the Minister remained opaque to his judicial “hints.”

Under the spate of Supreme Court of Canada decisions that came down on 5 April
2001, even most Charter decisions fall to the Minister rather than the courts. The “rule of
non-inquiry” introduced by John Beverley Robinson in Anderson, preserved by Lyman Duff
in Re Collins, and developed by LaForest in Schmidt v. The Queen, dictate that the Minister
and courts must assume that the criminal procedure in a foreign jurisdiction recognized by
treaty will be fair. Therefore, the Minister will usually decide not to exercise his or her
legislatively-supported discretion, preferring instead to leave such considerations up to the
trial judge in the receiving country.

Under the new legislation, the Minister holds all the marbles, but refuses to play.

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(3d) vi (note) (S.C.C.)
85 Re Anderson (1860), 20 U.C.Q.B. 124; Re Anderson (1861), 11 U.C.C.P. 9.
86 Re Collins (No. 3), supra, note 67.
87 Schmidt, supra, note 24.
2. Appeal and Judicial Review

  a) A Dual Process

The fourth step in the extradition process is the combined process of appeal of the extradition hearing and judicial review of the executive decision by courts of appeal and, on exceptional occasions, the Supreme Court of Canada. Perhaps because of the propensity of the extradition court and the Minister of Justice to point to (or at) each other for justification of their decisions, the *Extradition Act* provides for a form of judicial review of the Minister’s discretionary decision as well as for appeal of the extradition judge’s decision. This process replaces the cumbersome habeas corpus review of past ages. The appeal examines the application of the law to the facts as set forth in the opinion of the extradition judge. In addition, the court of appeal of the province in which the committal was obtained has exclusive original jurisdiction to hear an application for judicial review of the Minister’s decision to surrender.\(^88\) The judicial review determines whether the Minister used the discretion available, and used it correctly. Where the exercise of executive discretion is demonstrably wrong or absent, the court of appeal has the opportunity to correct the deficiency or refer the matter back to the Minister.

In practice, both the appeal of the extradition court’s decision to commit for surrender under s. 49 and the judicial review under s. 57 are combined in a single hearing before a single panel of the court of appeal.\(^89\) Subsection 57(9) provides,

\(^{88}\) Section 57. This provision for judicial review was instituted in the 1992 amendment as s. 25.2. The deadline for application for judicial review is 30 days from the time the Minister’s decision was first communicated. The court has discretion to extend the deadline by another 30 days (s. 57(3)).

\(^{89}\) *U.S.A. v. Kwok*, *supra*, note 84. See ss. 57(9).
(9) If an appeal under section 49 or any other appeal in respect of a matter arising under this Act is pending, the court of appeal may join the hearing of that appeal with the hearing of an application for judicial review.

With respect to the powers of the court of appeal at this stage, ss. 57(6) states:

(6) On an application for judicial review, the court of appeal may

(a) order the Minister to do any act or thing that the Minister has unlawfully failed or refused to do or has unreasonably delayed in doing; or
(b) declare invalid or unlawful, quash, set aside, set aside and refer back for determination in accordance with any directions that it considers appropriate, prohibit or restrain the decision of the Minister referred to in subsection (1).

The court of appeal has the discretionary power to grant relief provided by s. 18.1(4) of the *Federal Court Act* governing judicial review of federal tribunals as well as provincial rules of judicial review where they are not inconsistent with the provisions of the Act. Section 18.1 of the *Federal Court Act* provides the court with discretion to grant relief if it is “satisfied” that the tribunal: a) “acted without jurisdiction, acted beyond its jurisdiction, or refused to exercise its jurisdiction”; b) ignored a principle of natural justice or procedural fairness; c) erred in law; d) made an erroneous finding of fact in a “perverse or capricious manner” or in disregard to the evidence before it; e) was swayed by fraudulent or perjured evidence; or f) “acted in any other way that was contrary to law.”

Since 1 December 1992, the statutory right to appeal and judicial review have replaced habeas corpus except in clear cases of delay or abuse of process on the part of the Minister – specifically where the Minister has failed to surrender the person within 45 days after the order of surrender or final decision of the court of appeal is made. Under those circumstances, “A judge of the superior court of the province in which the person is detained who has the

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90 Subsection 57(7).
91 Subsection 57(10).
power to grant a writ of habeas corpus, may ... order the person to be discharged out of custody unless sufficient cause is shown against the discharge. However, the phrase “unless sufficient cause is shown against the discharge” invites the Minister to provide reasons or excuses for the delay that are likely to be accepted by the court unless the person can demonstrate harm arising from abuse of process.

b) The Appeal Process

The method of getting an appeal before the court of appeal is precisely delineated in the legislation. Either party may appeal as of right on a question of law alone, and at the discretion of the court of appeal or of a judge of the court, either party may appeal on a question of mixed fact and law. The court of appeal also has judicial discretion to allow an appeal on any other “sufficient ground.” These provisions appear to be broader than the previous habeas corpus remedy, and more generous even than criminal appeal provisions. However, it must be remembered that the appeal is from the decision of the extradition judge, whose own decision-making capability is seriously limited by the new legislation. Although a court of appeal now has the right to question the judgment of the extradition judge instead of merely determining whether there was a sound basis for the judgment, the appellate court must keep in mind the limited role played by the extradition judge in the extradition process.

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92 Section 69. Where no appeal has been launched, a person has the right to apply for habeas corpus after 90 days (or if an extension has been taken, 150 days) – ss 69(a)(i) and 40(1) and (5).
93 A party who intends to appeal must file a notice of appeal or application for leave to appeal within 30 days of the order of committal or discharge – s. 50.
94 Section 49(a).
95 Section 49(b).
96 Section 49(c).
The court of appeal has the discretion to allow an appeal where the order of committal is unreasonable or not supported by the evidence, where a wrong decision was made in the court below on a question of law, or where there has been a miscarriage of justice. Failing that, the court may dismiss the appeal. But s. 53(b)(ii) adds the curious proviso that “if it is of the opinion that no substantial wrong or miscarriage of justice has occurred and the order of committal should be upheld,” the court may dismiss the appeal even though the court of appeal is of the opinion that the committal was based on a wrong decision on a question of law, and even where the court is of the opinion that the appeal may be decided in favor of the appellant. This provision invites arbitrariness, and in turn invites constitutional challenge.

Upon allowing the appeal, the court is obliged either to discharge the person, order a new extradition hearing, or “amend the order of committal to exclude an offence in respect of which the court is of the opinion that the person has not been properly committed.” As noted under the discussion of the Treaty, there is no requirement on the court to consider foreign law, since that function is reserved to the Minister. However, where a conviction has been registered in the United States, the court may find it helpful to look at the American law to determine whether the offence for which the fugitive was convicted is also an offence in Canada. In *U.S.A. v. Stewart*, the former vice-president of an American bank faced two counts of extortion and ten counts of “bank fraud” under United States federal law. The American federal brand of extortion considers only the subjective state of mind of the “victim” rather than the intent of the accused. Hall J.A. of the British Columbia Court of Appeal

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98 Sections 53-55.  
99 Section 54  
examined the nature of the "extortion" alleged against Stewart under United States law and found that it lacked the major objective element of threat that is found in the *Canadian Criminal Code*. Someone feeling threatened that there may be some consequence – real or imagined – if they failed to do something for a second party was not of itself proof that the second party was criminally responsible for making them feel that way. Similarly the ten counts of "bank fraud" – serious racketeering charges under the federal law of the United States – pertained to the alleged submission of receipts which were processed as construction work done on a bank. While the receipts, if actually submitted, may have been evidence of common fraud in Canada, the allegations were hardly at the level of racketeering! The Court thus allowed Stewart's appeal with respect to extortion, and ordered his committal for surrender only on charges equivalent to ordinary fraud in Canada.

In cases of appeals against discharge of a person or against stays of proceedings, the court of appeal has the discretion (upon exercising its discretion to allow the appeal in the first place) to order a new hearing or to order the committal of the person.\(^{103}\) Although appeals in extradition cases are supposed to be given priority in terms of scheduling,\(^{104}\) the court of appeal may defer an appeal against committal until the Minister has made a surrender decision,\(^{105}\) and in practice this is what usually happens. The Supreme Court of Canada also retains the discretionary right to defer further appeal until the Minister makes a surrender decision, or until the court of appeal has disposed of any judicial review still pending.\(^{106}\)

\(^{103}\) Section 55.
\(^{104}\) Section 51(a).
\(^{105}\) Section 51.
\(^{106}\) Section 56.
c) Judicial Review

Compared to the appeal of the extradition hearing, the judicial review of the Minister’s decision retains many of the restrictions formerly seen in habeas corpus applications. A surrender application by a Minister of Justice is an exercise of discretion on the part of the executive, and therefore is governed primarily by political rather than legal considerations. Accordingly the court of appeal will not lightly interfere with the Minister’s decision, nor will it substitute its own opinion for that of the Minister. The main considerations of the Court are 1) whether the Minister violated the fugitive’s constitutional rights or erred in law in some other way; 2) whether the Minister denied the fugitive procedural fairness by acting arbitrarily, in bad faith, or for improper motives; and 3) whether the Minister’s decision is patently unreasonable. It follows that the Minister must give sufficient reasons for the decision to indicate that all the relevant facts and arguments in the submissions of the fugitive were at least considered.

Despite the classic powers of administrative review codified in the Federal Court Act, the traditional attitude of the courts of appeal in Canada has been, to cite T.S. Eliot’s The Love Song of J. Alfred Prufrock, “deferential, glad to be of use.” In U.S.A. v. Whitley (1994), Laskin J.A. of the Ontario Court of Appeal stated that “the court should defer to the Minister’s surrender decision” unless “the Minister violates the fugitive’s constitutional rights or otherwise errs in law, or if the Minister denies the fugitive procedural fairness, acts arbitrarily, in bad faith or for improper motives, or if the Minister’s decision is plainly unreasonable.”

Only then is the reviewing court entitled to interfere.\textsuperscript{110} Donald J.A. of the British Columbia Court of Appeal affirmed this in \textit{U.S.A. v. Stewart} (1998), when he said, citing Witney, “On the general question of surrender much deference ought to be accorded to the minister.” However, he added that deference to the Minister was not appropriate in Charter matters since the court had “exclusive original jurisdiction” to hear such reviews, and many Charter matters were determined for the first time by the Minister in the course of making her surrender decision. Although the judgment in \textit{Stewart} preceded passage of the current Act, Donald J.’s assessment of the Minister’s role was prescient:

While the present structure of the process makes it necessary for the minister to determine these matters in the first instance, it should be recognized that what the minister is really deciding is whether her executive act would violate the \textit{Charter}. If deference were accorded her assessment of the constitutional validity of her own act then I believe that judicial review would be unacceptably attenuated. In my opinion, a person affected by an executive decision is entitled to the full measure of \textit{Charter} scrutiny unrestricted by notions of deference. It is only at the review stage that a neutral, uninvolved examination of the decision can take place.\textsuperscript{111}

This assessment was borne out in \textit{U.S.A. v. Kwok} (2001), where Arbour J. distinguished between the high level of deference to be given ministerial decisions concerned with prosecution of a fugitive and the comparative low level of deference to be given ministerial decisions concerned with the violation of Charter rights: “While prosecutorial discretion is at the heart of the ministerial function and attracts a high standard of deference on judicial review, much less deference is due on the issue of whether the Minister properly considered the fugitive’s constitutional rights.”\textsuperscript{112} The Supreme Court of Canada stated in \textit{Burns} (2001), “The customary deference to the Minister’s extradition decisions is rooted in the recognition

\textsuperscript{110} \textit{U.S.A. v. Whitley}, supra, note 48.
\textsuperscript{112} \textit{Kwok}, supra, note 84, at 265.
of Canada’s strong interest in international law enforcement activities.” This remark in turn was alluded to by Sharpe J.A. of the Ontario Court of Appeal in *Canada (Minister of Justice) v. Pacificador* (2002):

Ministerial decisions assessing the appropriate balance between the rights of the individual and the considerations favoring surrender are entitled to curial deference. Extradition is based upon principles of comity and mutual cooperation and respect between states. Extradition plays a vital role in the international community’s effort to fight crime and to ensure those accused of serious wrongdoing are brought to trial. On the other hand, these important values are subject to the rights guaranteed by the Charter. Where an individual establishes that he or she would face a situation that would be “simply unacceptable” or that would “shock the conscience”, a s. 7 claim has been established and Ministerial order must be set aside.

Rather than giving “deference” to the Minister, McLachlin J. used a standard of “extreme circumspection” to describe the role of courts of appeal and review. In *Kindler v. Canada (Minister of Justice)* (1991) she stated,

> In recognition of the various and complex considerations which necessarily enter into the extradition process, this court has developed a more cautious approach in the review of executive decisions in the extradition area, holding that judicial scrutiny should not be over-exacting. As the majority in *Schmidt* pointed out, the reviewing court must recognize that extradition involves interests and complexities with which judges may not be well equipped to deal (p. 215). The superior placement of the executive to assess and consider the competing interests involved in particular extradition cases suggests that courts should be especially careful before striking down provisions conferring discretion on the executive. The court must be ‘extremely circumspect’ to avoid undue interference with an area where the executive is well placed to make these sorts of decisions.

This last refrain was echoed in *Pacificador* (1999) and *Burns* (2001).

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115 *Kindler*, supra, note 25.
116 “Having regard to the extreme circumspection which I am called upon to exercise, I have concluded that I can find no proper basis for concern that the death penalty assurance will not be effective in this case.” *Canada (Minister of Justice) v. Pacificador*, initial decision of Dambrot J. (18 January 1999), para. 55-56, cited in the Court of Appeal decision, supra, note 114 at p. 6, para. 32.
In fact, while paying lip-service to “deference” and “extreme circumspection,” various courts of appeal have in several recent judgments demonstrated a willingness to rein in the Minister when he or she failed to exercise discretionary powers or showed a willingness to wink at common sense when it came to foreign assurances that all was on the up and up.

i) Gwynne v. Canada (Minister of Justice)

In her strong dissent in Gwynne v. Canada (Minister of Justice) (1998), Southin J.A. of the British Columbia Court of Appeal reviewed the history of the penal system of Alabama, where Gwynne had done time before escaping lawful custody by walking away from a work site. She noted that in that system, “violence and terror reign,” and prison facilities “are barbaric and inhumane.” The courts of Alabama had tried to intervene to correct the system but had encountered “indifference and incompetence” on the part of the Board of Corrections. Southin J.A. remarked: “On the evidence in this case, prisoners such as the applicant live in Alabama prisons in a continuing state of fear. That is psychological torture. It is beyond ‘harsh.’ This applicant, if returned, will enter a long, long, tunnel with little, if any, prospect of emerging into the light....

Where, in my opinion, the Minister erred fundamentally, was in uncoupling the length of the sentence from the conditions of the sentence. A sentence of life imprisonment, which the applicant’s sentence may in fact be, although it is not so expressed, is not ipso factor fundamentally unacceptable and, indeed such a sentence is lawful in Canada. Dreadful prison conditions, although they would not be lawful in Canada, may indeed deter a person released, after being subjected to such conditions, from ever committing another crime. I cannot say. But to impose such a sentence by founding it upon crimes already dealt with by this country and then

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119 Ibid., at 25.
120 Ibid., at 26.
121 Ibid., at 27.
require it to be served under the conditions disclosed in the evidence is, in the year 1998, fundamentally unacceptable.\(^{122}\)

Southin J.A. was referring obliquely to Gwynne's background as a resident at St. Joseph's Residential School for Boys in Alfred, Ontario, where as a young teenager he suffered severe physical and sexual abuse, part of an endemic pattern that has since led to class action litigation against the school by former students.\(^ {123}\) She was also alluding to the fact that Gwynne had skipped parole in Canada in 1972 on a 10 year sentence for armed robbery, rape, fraud and break and enter, which followed hard on the heels of a 5 year sentence for armed robbery.\(^ {124}\) “Thus, it will be seen that the length of the applicant’s Alabama sentence was based, insofar as it exceeded 10 years on each count, on the crimes he had committed in Canada and for which, by the law of this country, he had been tried, convicted and sentenced.”\(^ {125}\) The specifics of what Gwynne experienced\(^ {126}\) were described even by Goldie J.A. for the majority as “subjectively shocking,”\(^ {127}\) – but he was quick to quote McLachlin J.’s statement in \textit{Kindler}:\(^ {128}\)

> “In determining whether…the extradition in question is ‘simply unacceptable’, the judge must avoid imposing his or her own subjective views on the matter…. [The judge should] 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…. 

> “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 situations.”\(^ {129}\)

\(^{122}\) \textit{Ibid.}, at 46-47.
\(^{123}\) \textit{Ibid.}, at 20; Supreme Court of Canada filed Application for Leave, p. 145.
\(^{124}\) \textit{Ibid.}, at 21.
\(^{125}\) \textit{Ibid.}, at 23.
\(^{126}\) \textit{Ibid.}, at 47-65.
\(^{127}\) \textit{Ibid.}, at 12.
\(^{129}\) \textit{Ibid.} See also p. 29, per Southin J.A.
Southin J.A. set out the *Schmidt* test (whether the imposition of the penalty by the foreign state “sufficiently shocks” the Canadian conscience), and the *Allard* test (whether the fugitive establishes that he faces “a situation that is simply unacceptable”). If these tests, first established by LaForest J. in his early Supreme Court of Canada judgments in extradition matters, were calculated to resolve any ambiguity, they failed abysmally.

After reviewing the standard of deference accorded the Minister in *Schmidt* and *Kindler*, Goldie J.A. concluded, “The standard of review in this court is one at the high end of deference accorded to tribunals subject to judicial review. Moreover, a court of law is poorly-equipped to go into the weight the Minister is required to give the issues arising under extradition treaties.”

But the severity alone of Mr. Gwynne’s sentence is not in itself ground for refusing to extradite him. It is harsh indeed to impose consecutive sixty year sentences. Nevertheless, it is possible under the *Criminal Code of Canada*, although not for crimes of extortion, for a person to be sentenced for a term during which he or she is ineligible for parole that could cause a middle-aged offender to doubt his or her normal life expectancy would exceed the period of parole ineligibility.

The sole criterion was whether the harsh sentence was “imposed by law.” Since it was imposed by law, said Goldie, the Minister could not be faulted for exercising his discretion.

By extrapolation, if torture or flogging were punishments imposed by law, that would have been acceptable to Goldie J.A. In this case, there was ample evidence, as Southin J.A. noted, of flogging and psychological torture not imposed by law but palpably there nonetheless, since the evidence included instances of guards opening cell doors in the middle

130 *Supra*, note 24 at 208, 217.
131 *Supra*, note 25, at 57-58.
132 *Gwynne, supra*, note 118, at 7.
of the night to allow vengeful inmates to attack sleeping fellow inmates with clubs or knives— a brazen form of "extrajudicial punishment." Gwynne deposed,

"If you send me back, you're sending me to a death sentence. It's an inhumane system. It's something that you cannot believe unless you're actually there, and it's a death sentence for my wife and I. That's as blunt as I can be about it. That is exactly what it is, a death sentence. There's no forgiveness for what I did. You do not escape from Alabama and not pay the consequences of it. I will die in an Alabama prison. And if you have any compassion ... if you have any compassion at all, I would ask that you take seriously the inhumanity of my past treatment in the Alabama prison system and the terrible consequences I will face if I am sent back to serve my one hundred and twenty year sentence." 

Goldie J.A. went so far as to pay lip service to these appalling penitentiary conditions described in the material before the court:

If this matter revealed no other circumstance than service of the unexpired portion of an admittedly harsh sentence, but one imposed by law, and the allegation of procedural unfairness on the part of the Minister, I would not be prepared to conclude he had exercised his discretion in a manner which would permit this court to interfere on either Charter or non-Charter grounds.

But the matter does not stop there. Mr. Gwynne's affidavit of his incarceration in Alabama (annexed to my colleague's reasons for judgment) and the supporting materials reveal conditions that were degrading, dangerous and apparently endemic within the prison system of that state. It is the cumulative effect of the combination of the harshness of the sentence and the apparent conditions under which it is to be served, including the prospects of parole which may have been diminished almost to the point of irrelevance by virtue of his escape, that must be weighed in terms of the Charter requirements.

However, the other shoe never drops. Instead, Goldie J.A. states,

I am of the opinion that what is objectively "simply unacceptable" is that which is, at bottom, extrajudicial in the sense of infliction of punishment not sanctioned by a law of general application under which the fugitive has been tried or will be tried....

Despite the apparent subjectivity of the phrase "shocks the conscience," the case at bar presents circumstances subjectively abhorrent but which are not, in my view contrary to the principles of fundamental justice.

135 Ibid., at 57.
136 Ibid., at 64-65.
137 Ibid.
138 Ibid., at 10.
Gwynne had served more than nine years of punishment under “barbaric” conditions, until his escape in September 1993. He faced more than 110 years of additional incarceration in the same system to finish his sentence for two counts of attempted extortion. “At the end of the day,” said Goldie J.A., “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 situations.”

Predictably, the Minister did nothing of the kind, but sent Gwynne back to face yet more incarceration in Alabama.

ii) U.S.A. v. Burns

In Burns, the Minister of Justice refused to seek Article 6 assurances from the United States even though the facts of the case were graphic enough that the two Canadian citizens would likely face the death penalty in Washington State. The two teens were alleged to have murdered Rafay’s parents and sister with a baseball bat. They applied in the British Columbia Court of Appeal for appeal of the extradition judge’s order of committal, and for judicial review of the Minister’s decision to surrender.

In reaching a decision to order surrender without assurances, the Minister had relied on Kindler and Ng in which the Supreme Court of Canada affirmed that the extradition

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139 Ibid. See also p. 29, per Southin J.A.
140 Through his Canadian lawyers, Gwynne was able to apply under the Transfer of Offenders Act to do the balance of his time in Canada. Under Canadian penal law, a person who receives a term of less than life imprisonment must be considered for parole after one third of sentence, seven years maximum. Gwynne had yet to be released on parole. Conversation with Gwynne’s counsel, Michael Jackson QC.
142 Kindler, supra, note 25. See William A. Schabas “Kindler and Ng: Our Supreme Magistrates Take a Frightening Step into the Court of Public Opinion” (1991) 51 R. du B. 673; UN Human Rights Committee,
court and the Minister were correct in their refusal to apply Charter remedies to situations where the alleged Charter breach arose, or might arise, outside Canada. Donald J.A. distinguished those cases since Kindler and Ng were not Canadians, whereas Burns and Rafay were Canadian citizens. Donald J.A. was of the view that Charter rights, including the rights of citizenship under s. 6 and the right to life, liberty and security of the person under s. 7 of the Charter, did indeed apply where a Canadian citizen faced the death penalty. Section 6(1) of the Charter specifies, "Every citizen of Canada has the right to enter, to remain in and leave Canada." Section 7 specifies, "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." Speaking for the majority, Donald J.A. stated with a touch of irony: "Where extradition could lead to execution, the act of surrender enables the termination of all rights of citizenship.

.. .The absolute nature of capital punishment makes it profoundly different from all other forms of punishment and therefore engages both s. 6(1) and s. 7. It is said on behalf of the Minister that if this is so, s. 6(1) could also be invoked as protection against the alternate penalty for aggravated first degree murder in Washington State namely, life imprisonment with no chance of parole. This is arguably another form of exile. The answer can be found in the homely adage "where there is life there is hope."
While McEachern C.J.B.C. concurred with Donald J’s reasons, he added his own remarks regarding ministerial determination of Charter rights, implying that there seemed to be an element of conflict of interest or abuse of process:

To state the matter bluntly, it seems highly doubtful to me that the initial determination of the important Charter rights of fugitives can lawfully be made by the Minister of Justice who, with respect, is not an independent and impartial tribunal. The Minister was, in fact, the head of a Ministry of Government that assumed responsibility for the conduct of extradition proceedings on behalf of the country requesting extradition. In a very real sense, the Minister is at the head of the direct line of responsibility for the prosecution of the fugitives in the extradition proceedings.\(^{146}\)

It would seem that the new legislation was drafted with a view toward resolving one of the several problems identified by McEachern C.J.B.C. by distinguishing between the roles of the Minister of Justice and the Attorney General. But both hats were, and continue to be, worn by the same person. Like John Jay and John Beverley Robinson in the past, this type of conflict must be addressed in practical terms, along with the other concerns expressed in the judgment by British Columbia’s then Chief Justice.

The Minister of Justice was quick to appeal the Burns decision to the Supreme Court of Canada, and the case remained in legal limbo for four years – along with extradition law generally. With the retirement of LaForest J. from the bench, and a new Extradition Act in the wings, the Supreme Court of Canada seemed unwilling or unable to enter into the fray. Suffice to say that in the late 1990s, the Supreme Court of Canada turned down dozens of requests for appeals in extradition matters,\(^{147}\) and for a period of four years from U.S.A. v.
Dynar (1997)\textsuperscript{148} to U.S.A. v. Burns (2001)\textsuperscript{149} issued no decisions with respect to appeals of extradition matters in which the United States was a party.

At first, the Supreme Court of Canada refused to hear the Burns case, but then reversed itself and gave leave to appeal. The appeal was heard by the whole court, led by Lamer C.J., on 22 March 1999, the month before the current Extradition Act passed into law. The case was reheard on 23 May 2000 and 15 February 2001 by a newly constituted Court led by the new Chief Justice, Beverley McLachlin, Lamer C.J. having retired along with Cory J. The new appointments to the court, Arbour and Binnie JJ., participated in the rehearing of the case and in decision of the Court \textit{en banc}. The tone for that decision was set in paragraph 38:

We affirm that it is generally for the Minister, not the Court to assess the weight of competing considerations in extradition policy, but the availability of the death penalty, like death itself, opens up a different dimension. The difficulties and occasional miscarriages of the criminal law are located in an area of human experience that falls squarely within “the inherent domain of the judiciary as guardian of the justice system”.... It is from this perspective, recognizing the unique finality and irreversibility of the death penalty, that the constitutionality of the Minister’s decision falls to be decided.\textsuperscript{150}


\textsuperscript{148} 115 C.C.C. (3d) 481 (S.C.C.).
\textsuperscript{149} Burns, supra, note 26 (S.C.C.).
\textsuperscript{150} Ibid., p. 119, para. 38.
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(1865), the Court determined that s. 6 of the Charter did not invalidate extradition without assurances. In *Burley*, Richards J. stated that "a British subject who is in other respects brought within the law, cannot legally demand that he ought not to be surrendered merely because he is a natural born subject of Her Majesty."\(^{151}\) Although s. 6(1) of the Charter guaranteeing the right of Canadian citizens to remain in Canada had *prima facie* application to extradition, that violation of the Charter was justified under s. 1 by virtue of the "pressing and substantial" concerns addressed by the *Extradition Act*, including "the investigation, prosecution, repression and punishment of both national and transnational crimes for the protection of the public."\(^{152}\) The Court determined that the efforts of Donald J.A. "to stretch mobility rights to cover the death penalty controversy are misplaced."\(^{153}\) Similarly, the right "not to be subjected to any cruel and unusual punishment" guaranteed by s. 12 could not apply in *Burns* since the Charter does not apply directly to the actions of foreign governments but only to the actions of the Government of Canada and provincial governments.\(^{154}\) "The degree of causal remoteness between the extradition order to face trial and the potential imposition of capital punishment as one of many possible outcomes to this prosecution make this a case more appropriately reviewed under s. 7 than under s. 12."\(^{155}\) In its review of s. 7, the Court determined that "in the absence of exceptional circumstances, which we refrain from trying to anticipate, assurance in death penalty cases are always constitutionally required."\(^{156}\)

In reaching this conclusion, the Court approved the balancing process set out in *Kindler* and *Ng*, taking into consideration the global context of extradition and possible

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\(^{152}\) Ibid., para. 48.

\(^{153}\) Ibid., para. 53, 56.

\(^{154}\) Ibid., para. 57.

\(^{155}\) Ibid., para. 65.
infringement of constitutional rights, using such tests for prescribed or anticipated treatment or punishment that it is "simply unacceptable,"\textsuperscript{157} "shocks the conscience" of Canadians,\textsuperscript{158} violates "the Canadian sense of what is fair and right,"\textsuperscript{159} or "is so excessive as to outrage the standards of decency".\textsuperscript{160}

While we affirm that the "balancing process set out in \textit{Kindler} and \textit{Ng} is the correct approach, the phrase "shocks the conscience" and equivalent expressions are not to be taken out of context or equated to opinion polls. The words were intended to underline the very exceptional nature of circumstances that would constitutionally limit the Minister's decision in extradition cases.\textsuperscript{161}

Although the Minister could fairly argue that "expressions of judicial deference to ministerial extradition decisions extend in an unbroken line from \textit{Schmidt} to \textit{Kindler},"\textsuperscript{162} other factors outweighed the tradition of deference, including (for example) changes in international attitudes towards the death penalty; disclosures of wrongful convictions for murder in Canada, the United States and the United Kingdom; the death row phenomenon; and evidence that the United States has generally given assurances when asked for them, when the alternative was to abandon the extradition.\textsuperscript{163} "In our opinion, while the government objective of advancing mutual assistance in the fight against crime is entirely legitimate, the Minister has not shown that extraditing the respondents to face the death penalty without assurances is necessary to achieve that objective."\textsuperscript{164} Furthermore,

there is no evidence whatsoever that extradition to face life in prison without release or parole provides a lesser deterrent to those seeking a "safe haven" than the death penalty, or even that fugitives approach their choice of refuge with such an informed appreciation of tactics. If Canada suffers the prospect of being a haven from time to

\textsuperscript{158} Schmidt, supra, note 24, at 522.
\textsuperscript{159} Kindler, supra, note 25, at 850, per MacLachlin, J.
\textsuperscript{160} Miller v. The Queen, [1977] 2 S.C.R. 680, at 688, per Laskin C.J.
\textsuperscript{161} Burns, supra, note 26, at para. 66-67.
\textsuperscript{162} Ibid., para. 74.
\textsuperscript{163} Ibid., para. 79-125.
\textsuperscript{164} Ibid., para. 134.
time for fugitives from the United States, it likely has more to do with geographic proximity than the Minister’s policy on treaty assurances. 165

The Minister was therefore “constitutionally bound” to ask for and receive, as a condition of extradition, the assurance that the death penalty would not be sought. 166

3. The Minister’s Final Decision

The fifth and final step in the extradition process is the Minister’s actual decision to surrender a person for extradition – a partly political, partly administrative decision taking into account all the facts and law presented by the requesting state at the various hearings; the factual and legal representations made by counsel for the accused; the decisions and any directives or other suggestions or comments arising from the court of appeal; and political input from the community, constituents, the caucus, the cabinet, and in high-profile cases possibly the Prime Minister.

After the appeal and judicial review, the person subject to extradition may make more submissions to the Minister on any ground that would be relevant to deciding whether to surrender the individual to the requesting state. Where the Minister has made a decision to surrender and new facts come to light that may help the accused – for example, evidence of abuse of process – the person should apply to the Minister for an extension of time and make a new application under subsection 43(2). 167 Occasionally, the Court of Appeal may itself submit the file back to the Minister for reconsideration, as in U.S.A. v. Stewart (1998), where the federal charges of “extortion” were dropped by the British Columbia Court of Appeal, and the high-sounding federal charges of “bank fraud” were effectively emasculated to common

165 Ibid., para. 141.
166 Ibid., para. 143-144.
fraud, creating a significant change of circumstances. In *U.S.A. v. Gillingham* (2000), the British Columbia Court of Appeal directed the Minister to consider whether American authorities had brought inappropriate pressure to bear on Canadian authorities to persuade them to initiate extradition proceedings.

The Minister cannot be reminded too often that where questionable procedures have been used to extradite persons accused of serious crimes to face indeterminate sentences for political acts, it is too late to try to intervene years after the fact. Officials in the United States, especially the FBI, have all too often used the ends to justify the means. An indication of how alleged violent activists may become "lost" in the system is provided in the notorious case of Leonard Peltier, where the FBI frankly admitted that they hoodwinked the Supreme Court of British Columbia and the then Minister of Justice by providing affidavit evidence that the FBI knew was false. Several websites have been set up in defence of Peltier in the wake of FBI admissions in 1989 that the affidavit evidence used against him to secure his extradition for the murder of two FBI agents was fraudulent. One of the witnesses who swore an affidavit against him that was used at his extradition trial later testified under oath that she was coerced by the FBI into claiming falsely that she was his girlfriend and saw him shoot the two agents. In fact, she said, she did not know him, had never seen him, and was 80 miles away at the time of the shooting. Peltier has remained in custody for 27 years with no prospect of

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parole on the horizon, his most recent application for parole, heard on 4 May 1998, having been denied.\textsuperscript{172}

This type of case raises yet more questions. To what extent does deception taint extradition proceedings? To what degree and extent are the representations made by United States authorities likely to be governed by the misplaced notion that the end justifies the means? Given evidence that misrepresentation and other abuses of process are relatively common among eager American prosecutors, is the low standard of proof required for surrender under the \textit{Extradition Act} adequate, considering that the accused may spend years in prison estranged from family and friends, will be subjected to the vagaries of prison politics, and will receive inadequate legal representation owing to the fact that he is rendered penniless from the expense of fighting the initial extradition?

The Minister's surrender order names the individual being surrendered and the country to which he is to be conveyed; directs the Canadian custodian to transfer the person to a specified authorized custodian in the requesting country; sets out any assurances or conditions which have been agreed upon between the extradition partners; fixes date for the surrender; and fixes the conditions of a temporary surrender, including the date by which the person subjected to temporary surrender must be returned to Canada.\textsuperscript{173} Most importantly, the Minister's surrender order must describe either 1) the offence alleged, 2) the offence for which committal was ordered, or 3) "the conduct for which the person is to be surrendered."\textsuperscript{174} As Krivel \textit{et al.} have pointed out, "the option chosen by the Minister for describing the offence in

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\textsuperscript{172} \url{http://www.lpsg-co.org/index.html} \\
\textsuperscript{173} Section 58 and 60. \textbf{Section 61} pertains to persons who escape lawful custody and allows the custodian "to arrest them in fresh pursuit." \textbf{Section 62} fixes the timelines for surrender, and s. 63 fixes the place ("any place within or outside Canada that is agreed to"). \textbf{Section 64} specifies that persons doing time must complete their sentence before the extradition order is activated. \textbf{Section 65} provides that if a surrendered person still had time remaining on a sentence when surrendered, he must serve out his sentence when he returns to Canada. \\
\textsuperscript{174} Section 58(b). 
\end{flushright}
the order of surrender may have an impact on the way in which specialty is considered by the extradition partner.” 175 The first option would not violate the rule of specialty, because the surrender would be framed in terms of the foreign offence. The third option, describing the conduct, is likely not difficult to translate into parallel offences in the requesting country. However, the second option – framing the offence for which committal was ordered in Canadian terms – “may be problematic from the point of view of the application of the rule of specialty.” 176 This is because many offences in Canada mean something very different in other countries. 177

Where a person is being extradited to face more than one offence, the Minister has the discretion to order surrender for all of the offences even if not all of them meet the criteria of s. 3 – provided that at least one of the offences does meet those criteria, and provided that all of them relate to conduct that in Canada would have been punishable by law. 178 This provision is bound to invite Charter scrutiny as it is a rather transparent attempt to circumvent the rule of specialty. For example, a person could be extradited to face the main offence, plus lesser, included offences, or additional offences connected with conduct relating to a failure to appear. A person charged with dangerous driving, speeding and failing to appear would fit into this category. If subsequently the criminal dangerous driving charge was dropped and the non-criminal speeding charge pursued, the person would have been extradited for conduct that did not reach the standard of an extraditable offence.

Subsection 66(1) grants the Minister discretion to order the “temporary surrender” of someone serving a sentence in Canada “so that the extradition partner may prosecute the

175 Krivel, et al., supra, note 12, p. 403.
176 Ibid., p. 404.
177 See Stewart supra, notes 111, 168.
178 Section 59.
person.” However, the Minister “may not order temporary surrender under subsection (1) unless the extradition partner gives an assurance that the person will remain in custody while temporarily surrendered to the extradition partner.” The assurances from the extradition partner must specify that the person will be returned within 30 days of the trial or appeal for which he has been temporarily surrendered. The Minister has the discretion to ask for additional assurances that the person will be returned by a specified date or on demand.

On occasion appeal courts, while recognizing that a Minister’s decision falls within the parameters of executive discretion, have specifically asked the Minister and other authorities to reconsider their position. For example in *U.S.A. v. Huson* (2000), a case of grand larceny in the third degree emanating from New York, a unanimous panel of the British Columbia Court of Appeal made the observation that Huson was 74, had spent more than a year in custody in Canada, and had paid some $10,000 into court – more than enough to satisfy the terms of a plea bargain made years earlier by which he would have received probation upon making restitution for the offence. The court asked “the American or Canadian authorities to consider as a matter of discretion whether the public interest in either jurisdiction would be served by pursuing the matter further. I emphasize that that question is a matter of discretion for those authorities and not for this court.” Ryan J.A. specifically requested counsel for the United States (who was also counsel for the Attorney General and Minister of Justice), “if

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179 Subsection 66(3).
180 Paragraphs 66(3)(a) and (b).
181 Subsection 66(4). Subsection 66(5) specifies that there is no need to seek specific assurances if the assurances sought are already contained in an extradition agreement. Subsections 66(6)-(11) provide for details of conversion of a temporary surrender order to a final surrender order after conviction in the requesting country. Section 67 provides that an order of surrender in an extradition matter prevails over any prior warrant or other order of detention or judicial release. Section 68 provides that time served in the extradition partner’s jurisdiction after being temporarily surrendered will be considered time served on his sentence and duly credited, with full eligibility for remission as if the person had done the time in Canada.
183 Ibid., para. 19.
this matter is pursued and Mr. Huson is returned to the United States,” to put these matters before the trial court in New York.\textsuperscript{184} The Department of Justice lawyer neatly sidestepped the issue where the Minister of Justice was concerned by replying, “My lady, I will certainly ensure that a transcript of your ladyship’s comments are passed on to the American government and to the appropriate prosecutor in New York State.”\textsuperscript{185} The implication was that the Minister of Justice, having been exonerated in the exercise of discretion in his decision to extradite Huson, would not deviate from the path of extradition despite the court’s “observation” regarding Canada’s public interest.

4. Ministerial Discretion in Extradition to Canada

Part 3 of the Act (sections 77-83) governs extradition to Canada, which is entirely within the executive discretion of the Minister of Justice.\textsuperscript{186} Section 80, governing the Rule of Specialty, is ringed around with qualifications, perhaps in anticipation of such cases as Reyat

\textsuperscript{184} Ibid., para. 23.
\textsuperscript{185} Ibid., para. 24.
\textsuperscript{186} Extradition from another country for an offence over which Canada has jurisdiction may be initiated by the Minister of Justice at the request of a “competent authority” such as a provincial attorney general. “Competent authority” means the federal Attorney General in the case someone accused of specifically federal offences; the Attorney General of the province in the case of someone accused of ordinary criminal offences; the Solicitor General of Canada in the case of a convicted person sentenced to serve penitentiary time of two years or more; and the provincial minister responsible for corrections in the case of any other convicted person (s.77). When requested to do so by such an authority, the Minister of Justice also has the discretion to request the extradition partner for the person’s provisional arrest (s. 78). Section 81 allows an agent of the requested state to bring the extradited individual into Canada, hold him in custody, and if necessary pursue and arrest him if he escapes. Otherwise, Canadian law governing escape from lawful custody applies. Section 82 governs timelines for detention in custody – either a date specified in a detention order made by a judge, or in the case of surrender for trial, 45 days after the completion of trial. In the case of surrender for an appeal, the time is reduced to 30 days after completion of proceedings. An order for detention made by a judge in an extradition proceeding supersedes any other order for detention “in respect of anything that occurred before the person is transferred to Canada” (ss. 82(2), (3)). The person is to be returned to the requested state on completion of the proceedings in Canada for which he was temporarily surrendered “or on the expiry of the period set out in the order, whichever is sooner” (ss. 82(5)). This provision is also ringed around with exceptions. For example, under s. 82(4), any judge may vary the terms and conditions of a detention order, including “extend the duration of the detention”; and under s. 82(6) the person is not to be returned to the requested state before 30 days after conviction or acquittal unless the person or the competent authority declares that there will be no appeal.
in the B.C. Supreme Court. This muted version of the law of specialty does not allow for the exercise of individual rights where the requested country is prepared to allow Canada to proceed with collateral charges for which an individual was not extradited. The provision therefore constitutes a marked departure from the traditionally recognized rule of specialty developed over the centuries.

An interesting interplay of executive and judicial discretion is anticipated in s. 82(7) of the Act, which specifies, “The court of appeal may, on application, recommend that the Minister request another temporary surrender of a person who has been returned to the requested State or entity after trial, if the court of appeal is satisfied that the interests of justice require their presence for the appeal.” Such a recommendation is discretionary on the part of the court of appeal, and acting on it is discretionary on the part of the Minister.

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188 Section 81 allows an agent of the requested state to bring the extradited individual into Canada, hold him in custody, and if necessary pursue and arrest him if he escapes. Otherwise, Canadian law governing escape from lawful custody applies. Section 82 governs timelines for detention in custody — either a date specified in a detention order made by a judge, or in the case of surrender for trial, 45 days after the completion of trial. In the case of surrender for an appeal, the time is reduced to 30 days after completion of proceedings. An order for detention made by a judge in an extradition proceeding supersedes any other order for detention “in respect of anything that occurred before the person is transferred to Canada” (ss. 82(2), (3)). The person is to be returned to the requested state on completion of the proceedings in Canada for which he was temporarily surrendered “or on the expiry of the period set out in the order, whichever is sooner” (ss. 82(5)). This provision is also ringed around with exceptions. For example, under s. 82(4), any judge may vary the terms and conditions of a detention order, including “extend the duration of the detention”; and under s. 82(6) the person is not to be returned to the requested state before 30 days after conviction or acquittal unless the person or the competent authority declares that there will be no appeal.

189 The sentence of a person returned to Canada who has already been convicted and sentenced does not begin to run until the extradition is finalized. A warrant of committal issued under the Criminal Code in such a case must state that the person is to be committed to custody “to serve the sentence or disposition immediately on their final extradition to Canada.” The sentencing judge has the discretion to order that any portion of the sentence remaining at the time of their final surrender be served concurrently with time being served in the requested state. Subsections 83(2), (3).
5. Transitional Provisions

Part 4 of the *Extradition Act* repeals the old *Extradition Act* and *Fugitive Offenders Act*, and deals with consequential and related amendments to other Acts, including most significantly the *Canada Evidence Act* and *Criminal Code*. These amendments reach far beyond the pale of extradition, but have a potential impact on the exercise of judicial discretion in extradition hearings. For example, s. 89 amends s. 46 of the *Canada Evidence Act* to allow testimony to “be given by means of technology that permits the virtual presence of the party or witness before the court” – in other words, video links. A similar amendment adds s. 714.1 to the *Criminal Code*: “A court may order that a witness in Canada give evidence by means of technology that permits the witness to testify elsewhere in Canada in the virtual presence of the parties and the court, if the court is of the opinion that it would be appropriate in all the circumstances.” Judicious use of such new technology may obviate many of the problems encountered in the past in terms of the sheer expense of transporting witnesses from across Canada to extradition hearings. Note, however, that the judicial discretion to admit evidence in this way does not extend to foreign jurisdictions. An amendment to allow the court discretion to allow the cross-examination of deponents in foreign countries, especially the United States, would be helpful in extradition cases. Currently, deponents of affidavit evidence acquired in foreign jurisdictions and included as part of the certified record are not subject to cross-examination.

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190 Section 89.
191 Section 95.
The Extradition Act, drafted as is all Federal legislation by the Department of Justice, goes a long way to granting more powers than ever before to the Minister of Justice, at the same time taking discretionary power away from the courts. The presumption of the legislation is that judicial deference should be accorded to the Minister on the basis of the presumed “expertise” of the Minister in extradition matters. Krivel et al. suggest that this is a codification of the position taken by the Supreme Court of Canada:

In reviewing the Minister’s decision and the process by which it was determined, the Supreme court has recognized that the Minister’s decision has political and international ramifications that fall within his or her expertise to determine. This political or legislative aspect to the making of the decision has been held to militate in favour of greater deference to the Minister’s decision regarding surrender and the recognition of the need for flexibility in the process involved. 193

If this is so, executive discretion has truly trumped judicial discretion, especially at the first three levels of the five-tier extradition process.

193 Krivel et al, supra, note 12, citing Idziak, supra, note 1, at 86-87, per Cory J.
CHAPTER SEVEN
EXTRADITION IN THE NEW MILLENNIUM

1. Terrorism: “The Canadian Connection”
   a) Before and After 9/11

   Upon her investiture as Chief Justice of Canada on 17 January 2000, Madame Justice
   Beverley McLachlin remarked on the uniqueness and the challenge of Canada and the United
   States sharing the world’s longest unprotected border. Her words reflected the concern of then
   United States President Bill Clinton that the millennium bombing plot had originated in
   Canada, which appeared to have become a “safe haven” for terrorists. McLachlin echoed the
   words of Supreme Court of British Columbia Justice Lyman Duff, who stated in Re Collins
   (No. 3) (1905): “You are dealing with an arrangement between two countries, having three or
   four thousand miles of common frontier, and affording unexampled opportunities for the
   escape of persons accused of crime from either country to the other.”¹ By January, 2002, that
   “arrangement” appeared compromised by the deployment of hundreds of National Guard
   troops, the trebling of border-patrol agents, including border guards and immigration and
   customs personnel, and by long delays at the border. On January 25, George W. Bush
   proposed more than $2 billion in additional spending to beef up border patrols along the 49th

¹ Re Collins (No. 3) (1905), 10 C.C.C. 80 (B.C.S.C.), at 105.
parallel, raising the total cost of border-control spending to close to $12 billion. “Border-patrol agents and inspectors will focus particularly on the northern border,” Bush said.²

Following the raids on New York and Washington, the FBI, CIA, RCMP and CSIS joined forces with other agencies around the world to investigate suspects and “people of interest” who may have had something to do with the attacks. Within a week, they had received 200,000 tips. By the end of the month, the list of suspected conspirators had grown to 300 and beyond; 500 had been detained for questioning. In the United States alone as of 19 November 2001, some 1,500 persons had been detained on suspicion of terrorist-related activities. By contrast, in Canada, only 20 had been arrested, according to Time— a few of them to face extradition to the United States. An estimated 800 of the detainees in the United States had experienced “prolonged detention,” held without charges and typically without access to their families or to legal counsel. Often they were moved from one detention centre to another without warning.³ However, there had been very few actual charges laid other than for immigration infractions, and by late December, only one of the detentions in the United States had resulted in charges connected to the events of 11 September.⁴ Speculation was rampant, including suggestions that families of the terrorists involved in the hijackings had already left the United States. It is possible that some fled to Canada.⁵ Once in a foreign


³ Ibid. p. 46. The U.S.A. Patriot Act compels detention of suspected terrorists until they are either deported or certified by the Secretary of State to be cleared of suspicion—a classic reversal of the principle of presumption of innocence.

⁴ On 11 December 2001, Zacarias Moussaoui was indicted on six counts of conspiracy by a federal grant jury in Virginia. His arrest preceded the 9/11 attacks. See Paul Koring, “Sept. 11 suspect indicted,” Globe and Mail, 12 December 2001 p. A1. By May, 2003, Moussaoui remained the only person arrested in the United States actually charged with conspiracy to commit the acts of terrorism on September 11, for which he faces the death penalty if found guilty.

Judicial and Executive Discretion in Extradition between Canada and the United States

jurisdiction, whether Canada or elsewhere, they would of course do everything in their power to disappear, possibly by blending in to the larger Arabic or Muslim community.

Within hours of the terrorist attacks on New York and Washington on 11 September 2001, Secretary of State Colin Powell told CNN that America’s borders were too porous. The following day The Globe and Mail and Associated Press reported (inaccurately) that Canada had been used as a staging area for the attacks. President George W. Bush declared war on terrorism, stating “We will make no distinction between the terrorists who committed these acts and those who harbour them.” A week later, he spoke to a joint session of Congress, saying: “Those who aren’t for us are against us.” Countries around the world, including Canada, scrambled to get onside, lest they be regarded as “those who harbour them.” At least one Canadian academic, Jutta Brunnee of the University of Toronto Faculty of Law, defined “harbouring” as “refusing to extradite.”

Canada had cause for concern. It was well known that terrorists, including the would-be “Millennium Bombers,” have used Canada as a staging ground for attacks on the United States. Peter L. Bergen has noted the significance of an alleged “Canadian Connection” to terrorism and al-Qaeda:

10 On 14 December 1999, Montreal resident Ahmed Ressam was arrested at Port Angeles with a trunkload full of explosives which he later admitted were to be used to be used in a terrorist attack on Los Angeles airport. On 12 December 2001, Samir Ait Mohamed, held in a Vancouver, B.C. lockup pending an extradition hearing, was indicted in Manhattan on a count of conspiring to commit acts of terrorism transcending international boundaries.
When Ahmed Ressam, the would-be bomber of Los Angeles International Airport, stepped off the ferry from Canada at Port Angeles, Washington, on a blustery day in December 1999, and was nabbed by alert Customs agents, U.S. investigators had little inkling that the arrest would prove a turning point in their understanding of al-Qaeda’s scope—of the networks that stretched across three continents and a dozen or so countries. They learned that al-Qaeda planned a New Year’s 2000 terrorism spectacular spanning the globe: not just an attack on LAX but on tourist sites in Jordan and a U.S. warship in Yemen. The plots were foiled by a combination of good police work and the plotters’ incompetence; and law enforcement officials would ultimately arrest affiliates of Al-Qaeda in England, Spain, Germany, Italy, and Syria. But against this success stood the sobering realization that now, on the brink of the new millennium, al-Qaeda had truly gone global.11

The Canadian connection to the Millennium Bomb Plot was well established by Ressam’s own testimony in American courts. Ressam testified that al-Qaeda-trained members of his cell did not arrive in Canada as expected, leaving him in the position of recruiting local talent in Montreal, including Mokhtar Haouari and Abdel Ghani Meskini. Haouari, a convicted fraud artist, lent Ressam U.S.$3,000 and managed to obtain a fake driver’s licence in Ressam’s name. In the summer of 2001, Haouari was acquitted by a New York jury of conspiring to commit terrorism, but in January 2002 faced additional charges of providing material support to terrorism and document fraud. This raises the question of how someone can legitimately be convicted of providing material support for terrorism when he has already been acquitted of the broader offence of conspiracy on the same facts.

Ressam testified that Haouari had no knowledge of the nature of the Millennium Plot, nor even of the target. When Meskini, who like Ressam is seeking a reduced sentence for his cooperation with the authorities, testified that in his opinion Haouari should have guessed that an attack was in the offing, Haouari was so upset that he knocked himself silly against a

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courtroom table in protest. That did not impress U.S. District Judge John Keenan, who found that Haouari “either knew or consciously avoided learning the details of Ressam’s plan to blow up the Los Angeles airport” — in other words, was a conspirator. He gave the Algerian native the maximum 24 years sentence for his involvement in the plot — an indication of just how seriously American courts consider anti-American plots hatched in Canada.12

On September 11, 2001 in Toronto, Canadian authorities arrested a Yemeni man, Nageeb Abdul Jabar Mahmed Al-Hadi, a Lufthansa Airlines contractor, whose Lufthansa flight from Germany to Chicago had been diverted to Pearson International Airport. His baggage had arrived in Chicago on an earlier flight, and FBI officials allegedly found in it three Yemeni passports made out to different names. Investigators also found two Lufthansa crew uniforms — which Al-Hadi had every right to possess — an identification card in his name, and a piece of paper with Arabic writing sewn into the pocket of a pair of pants — a common enough practice for travelers no matter what their native language. Based mainly on the three passports, on September 21 the United States Justice Department asked the Canadian Department of Justice to initiate extradition proceedings against Al-Hadi on a criminal complaint, brought before a federal court in Chicago, of possessing and attempting to use a passport obtained by making a false statement.13 He was detained at first in an immigration lockup, but within days was transferred to Metro West Detention Centre in Toronto, where he was kept in solitary confinement. When he appeared with an interpreter before the Ontario Superior Court on October 2, he tearfully denied any connection with terrorism:

“I’m not like those people that you think of. I wanted to explain my situation from beginning to the end…. I want to talk. I need help. There’s people in a sort of a cooking plot [sic]. There are people who are playing both sides, from this side and the other. I have a problem and if I don’t make it clear now I will be in more serious trouble.”

The American panic response led lawyers of Al-Hadi to argue at a detention hearing that the “very wide sweep” for suspects by the United States “has left too many people of Middle Eastern origin jailed in solitary confinement on mere suspicion of illegal acts.” Al-Hadi had by then spent six weeks in an isolation cell. After spending almost a year in a maximum security jail in Toronto, an Ontario Superior Court judge ordered his extradition to the United States to stand trial for passport fraud. A year after his arrest, he was “in the process of abandoning all appeals,” his lawyer, Deepak Paredkar told the Ottawa Citizen. Paredkar had negotiated with the United States Attorney’s office in Chicago for his client to plead guilty to the charges and receive a sentence of time served in jail in Canada. Deportation to Yemen would follow, despite the fact that Al-Hadi’s wife and children lived in the Detroit area at the time.

b) Lax Immigration Laws or Racial Profiling?

On 24 September 2001, President Bush met with Prime Minister Chretien to air his concerns about the perceived laxness of Canadian immigration laws. Within three weeks, according to one poll, 70 percent of Canadians urged the joint patrolling of the United States-Canada border. In November, Time magazine declared, “Canada’s open immigration policy has led some to suggest the place is a haven for al-Qaeda sympathizers who then cross the

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U.S. border.”¹⁸ Media accounts of four Arab-looking men crossing the border from Quebec into Maine and of alleged hijackers crossing the Bay of Fundy to Portland, Maine from Nova Scotia proved unfounded, despite the fact that the Canadian Security Intelligence Service (CSIS) and the RCMP followed the leads, conducting searches in Halifax. Chrétien quite correctly noted that the responsibility for guarding entry into America over the international border fell to the United States, not to Canada. At border crossings in North America, motorists are rarely if ever stopped by authorities in the country one is leaving.

Several alleged radical Islamists have been arrested in Canada, and others with obvious Canadian connections (including Canadian citizenship, or possession of Canadian passports) were included on FBI “wanted” lists updated periodically on the Internet, including “persons of interest” allegedly high in the al-Qaeda hierarchy. Three men arrested in Fort McMurray, Alberta, initially described as “of interest” in the 11 September attacks, were later prosecuted on Canadian Immigration Act violations without any reference to terrorism. A Syrian national who allegedly entered America illegally from Canada on September 8 was one of the first to be detained in the United States, although there was no allegation of complicity on his part in the attacks on the World Trade Centre three days later. A few have been caught in the American dragnet put in place immediately after the September 11 attacks. Most of those arrested in Canada were ultimately exonerated of complicity in the attacks, but some have paid a very high price for being in the wrong place at the wrong time.¹⁹

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In mid-October, Abdullah Ouzghar, 36, formerly of Montreal, an associate of Ahmed Ressam, was arrested in Hamilton, Ontario to face extradition to France as a co-conspirator in a terrorist network that procured false travel documents for Algerian Islamic extremists. Ouzghar was alleged not only to have praised the *jihad* against the United States, but also to have described it as a “war between the Prophet and the country that refuses to convert to Islam.” The French court had made several findings of fact: 1) Ouzghar and others helped prepare false passports; 2) photographs of terrorists were sent to Canada; 3) the photographs were combined with matching Canadian passport documents; 4) the documents and photographs were sent on to Brussels for final processing. Ouzghar was also accused by France of “participating from 1996 to 1998 in a terrorist organization based in the mining town of Roubaix, in northern France, as well as in Canada, Bosnia, Belgium and Italy.” The existence of a Canadian cell of the Roubaix-based gang was suspected after an electronic organizer was found on a body of a gang member containing Montreal telephone numbers. Ouzghar was eventually granted bail of $35,000 with an order that effectively put him under house arrest. Nordheimer J. of Ontario Superior Court found that the putative conviction of Ouzghar in France was based on the evidence of alleged group members who had cooperated with police, and Mr. Ouzghar had not received an invitation to defend himself even though French police knew his address in Hamilton.

Meanwhile, in Vancouver, British Columbia, Ali Adham Amhaz, 35, was arrested on an extradition warrant in which the United States alleged that he had supported Hezbollah.

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a Lebanese-based organization that it listed as a terrorist group. The North Carolina indictment accused the Lebanese-born Amhaz of helping his brother-in-law buy military equipment such as night-vision goggles, mine detectors and stun guns. According to the affidavit supporting the arrest warrant, he was also alleged to have provided materials to Hezbollah operatives “in order to assist Hezbollah’s engagement in and promotion of violent attacks to facilitate violent acts being undertaken abroad by other members of Hezbollah.”

The United States Attorney’s office in North Carolina claimed that Amhaz “has been considered a fugitive since the day he was indicted, and the U.S. government will certainly move ahead with extradition.”

Pending his extradition hearing, Amhaz was released on $50,000 bail with an order to report every day to a bail supervisor. Koenigsberg J. of the British Columbia Supreme Court justified her decision to set bail with an allusion to the “politically charged” atmosphere generated by the terrorist attacks of September 11. This atmosphere made her consideration of bail a “truly anxious” decision, she said, but she also had to weigh the fact that tapes of wiretaps collected by CSIS had been destroyed by the notoriously bungling spy agency for some unexplained reason. “The defence has raised these non-frivolous issues and I must consider them,” the judge stated. Nonetheless, she allowed an application by the Vancouver Sun to publicize the case, stating that the gist of the allegations had already been publicized in North Carolina, and therefore additional release of information from the extradition hearing

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24 Ha and Freeze, “Fugitive in terror case,” supra, note 20.
26 Ibid.
27 Ibid.
would not jeopardize the accused – despite the fact that he had exercised his statutory right to apply for a publication ban.²⁸

Through his lawyer, David St. Pierre, Amhaz admitted only to sending binoculars and photographic equipment to his family in Lebanon, a completely legal activity. St. Pierre gave some insight into the harassment accused Muslims experienced in jail even when their arrests were pursuant to "absolutely, incredibly insufficient" evidence: "As soon as the allegation is made that you’re even associated with a terrorist group, all of a sudden you are a murderous terrorist who is going to harm on any occasion any freedom-loving person in the community. Those allegations are completely ludicrous."²⁹

To add insult to injury, British Columbia Premier Gordon Campbell attacked Justice Koenigsberg’s decision to grant bail, saying “It was the wrong decision, it’s as simple as that. This is a time when we need to have the public recognizing that their safety and their security is our top priority.”³⁰ Former Appeal Court Justice Josiah Wood called Campbell’s remarks irresponsible.

“These are dangerous times and there is a special onus on public officials not to over-react when emotions are running high,” he said.

In such an atmosphere, Mr. Wood added, it is necessary to be even more vigilant about protecting the rights and freedoms of Canadians, including the right not to be denied reasonable bail without just cause.³¹

As St. Pierre remarked, the Premier’s comment “does nothing to engender respect for the constitutional separation of the judicial and executive branches of government.” Carman Overholt, president of the British Columbia Branch of the Canadian Bar Association, called

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²⁹ Mickelburg, supra, note 25.
the Premier’s comments “regrettable ... particularly at this sensitive time when rule of law is of such paramount importance.” Campbell responded by reiterating that his comments were appropriate, given “the world we’re living in today.”32 Campbell’s criticism of the judiciary and objective court process in deciding who should be freed on bail and who should remain behind bars33 inflamed the situation and could have brought the administration of justice into disrepute, especially had Canada chosen to prosecute provincially rather than extradite34 – as it now has a clear option to do under the recent amendments to s. 7 of the Criminal Code.

In the House of Commons, Canadian Alliance Deputy Leader Grant Hill leapt into the fray, declaring that Amhaz “is not the sort of fellow that I think we should have on bail in Canada.” He clearly accepted the American allegations against Amhaz as Gospel, despite the fact that his source was unchallenged affidavit material filed in support of a warrant for arrest pursuant to extradition, which unfortunately the FBI is notorious for falsifying.35 Hill’s ignorance of the notion of due process was staggering: “‘Listen to the stuff this guy provided,’” said Hill: “‘mine detection and blasting equipment, aircraft analysis software, stun guns, photographic equipment, global positioning equipment.’”36

A Globe and Mail editorial on 24 October called the remarks by Campbell and Hill “disturbing because they reveal how quickly authority figures will demand that the rule of law take a back seat to fear and unreason.” The editorial said Campbell and Hill were “sending an

32 Ibid.
unwelcome message that Canada's sovereignty is a frivolous thing when the Americans come calling, and that the rule of law is a luxury of bygone times. That panicky message must be resisted, along with the terrorists.”

The next day, T. Dafoe called on Canada to refuse American extradition requests if the United States sanctioned the torture of suspects. “A proposition this insane, debated seriously, is a chilling indication of panic,” he wrote. “The suggestion that terrorism suspects could suffer torture...strikes at fundamental notions of our decency as a society and commitment to principles of justice.”

Amhaz denied any involvement with the Hezbollah, and eventually the United States dropped its case against him.

It is quite possible that the events of 11 September were a factor in the Supreme Court of Canada refusing to intervene in the case of a refugee suspected of being a terrorist who faced deportation to Egypt. In an earlier hearing before 11 September, Mohamed Zeki Mahjoub was granted refugee status. His testimony in that deportation hearing was preferred over that of CSIS agents. In the earlier hearing, Mahjoub frankly admitted that he had worked for Osama bin Laden in Sudan in the 1980s, but denied being involved in Al Jihad, the crime for which he had been convicted in absentia in Egypt. After September 11, his earlier admission was enough for a Federal Court Judge to find as a fact that he was a threat to Canada’s national security, in effect reversing his refugee status. That conviction, his lawyer

claimed, could bring him the death penalty upon his return, should he be deported back to Egypt. They brought him the death penalty upon his return, should he be deported back to Egypt. The Supreme Court of Canada refused his application for leave to appeal.

In a similar case, Mahmoud Jaballah, principal of a Toronto Islamic private school, also faced a second attempt to have him named a national security threat. In 1999, Mr. Justice Cullen of the Federal Court had accepted the evidence of Jaballa and his character witnesses as more credible than the CSIS agents who testified against him – as the judge had found in *Mahjoub*. This time, Jaballah was accused by a CSIS agent in Federal Court of being “an integral member of the Al-Jihad organization (the Egyptian Islamic Jihad) that is inextricably linked with Osama bin Laden’s al-Qaeda network.” The unidentified operative claimed that CSIS had “ample information” to support the claim, but since this information was “classified,” it could not be shared with the Court. Although Jaballah had received a pre-removal risk assessment from the Minister of Citizenship and Immigration in August 2002 which allowed him to apply for refugee status, his refugee claim was unsuccessful.

On 7 November 2001, the RCMP issued a warrant for the arrest of Liban Hussein, then 31, of Ottawa, a Somali whose company, Barakaat North America Inc., is alleged to have funneled millions of dollars into al-Qaeda. Hussein turned himself in a week later, but said he would fight extradition to the United States. American authorities were attempting to extradite him for running a money-transfer service in Massachusetts without a state licence; however, there is no such charge in Canada, as would be required in an extradition proceeding under the principle of double criminality. Under that principle, the alleged conduct must be

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42 *Ibid*.
criminal in both the requesting and requested country. Money transfers known as *hawala,* which *barakaats* normally use in the course of business, were at that time not specifically illegal in Canada. *Hawala* is a type of banking resembling Western Union that uses agents to transfer funds orally rather than by wire service or internet. Despite the fact that the activity was not considered criminal in Canada, Canada’s Office of the Superintendent of Financial Institutions was quick to add Hussein’s company to the list of entities whose assets were frozen in response to the war on terrorism, following the lead of the United States Department of the Treasury. Months later, Hussein was released on bail after Ontario Superior Court Justice David McWilliam found there was “no evidence” that he was involved in terrorist acts or activities. Hussein’s lawyer, Michael Edelson, said Hussein had paid a “significant price” for simply being an Islamic banker. “He’s lost his business. He’s lost his job. He can’t find employment. It’s a nightmare of Kafka-esque proportions.”45 His assets remained frozen because of the American blacklisting.46 Eventually, on 3 June 2002, the Department of Justice issued a press release announcing that Canada had halted Hussein’s extradition process and that Hussein had been “de-listed.” However, that did not remedy is financial status.

Mr. Hussein was subject to an extradition request by the United States in relation to a money transferring offence. The Government of Canada has determined following an examination of all the circumstances of this case, that it would be inappropriate to proceed with the extradition.... Based on a full and thorough investigation of the information collected in relation to the extradition proceedings, the Government of Canada has concluded that there are no reasonable grounds to believe Mr. Hussein is connected to any terrorist activities.47

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The Department of Justice took pains to point out that its American counterpart "has been informed of the decision and has indicated that they do not object. They have also expressed ongoing confidence in the excellent relationship between Canada and the United States with respect to mutual legal assistance and extradition."

In Federal Court in Toronto, alleged al-Qaeda terrorist Hassan Almrei was not allowed to testify in camera as to why images discovered on his computer included an assortment of guns, a security badge, and the cockpit of a large passenger jet. Almrei had been granted refugee status in 2000, but in October, two cabinet ministers, Solicitor-General Lawrence MacAulay and Citizenship and Immigration Minister Elinor Caplan, certified that he was a security threat – without giving details as to how they could have found this when a judge had already found otherwise. CSIS seemed to rely on innuendo, saying that it "believes Mr. Almrei is linked to Mr. Bin Laden’s armed holy war and a forgery ring ‘with international connections that produces false documents.’" CSIS also pointed to his alleged association with Nabil Al-Marabh, a former Toronto copy-store clerk, who had been arrested in the United States on suspicion of links to al-Qaeda. Again there was no proof of wrongdoing in this chain of suspicion. Barbara Jackman argued in Federal Court that the more than 130 photographic images downloaded from Almrei’s personal computer by the authorities who had seized it were news items available to anyone on the Internet since September 11. She warned the authorities and the Court not to take the images out of context. Al-Marabh was eventually found guilty of a border-crossing violation by a Buffalo judge.

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48 Ibid.
50 Shannon Kari, “Almarabh Will Be sentenced, But Not as al-Qaida Terrorist: Former Toronto man who pleaded guilty to crossing border illegal will likely be deported to Syria,” Southam Newspapers (syndicated), 16 August 2002.
In three of the four cases of alleged terrorists appearing in court on one day – 19 November 2001 – lawyers made strong arguments that their clients were victims of "emotional and legal fallout from the deadly events of Sept. 11." American authorities formally asked Canada to hand over Nageeb Al-Hadi, the Lufthansa man who had been diverted to Pearson International Airport. He appeared before Trafford J. in Ontario Superior Court looking "gaunt and withdrawn...after more than 70 days behind bars." The charges that he was to face at his December 19 extradition hearing were not terrorism-related after all, even though he had been held in solitary confinement on that premise ever since his arrest. His lawyer, Gary Batasar, said Al-Hadi, was a victim of innuendo: "By virtue of the fact that he’s Arabic and alleged to have a false passport, he’s been hauled in and tarred and feathered with the rest of them." Batasar accused the United States of "deliberate foot-dragging in waiting until the end of the 60-day period to submit extradition paperwork."

Also on 19 November 2001, Samir Ait Mohamed, detained in Vancouver on an immigration warrant, was accused by United States authorities of being a terrorist conspirator who had been involved with Ressam in the plot to blow up Los Angeles International Airport on the eve of the new millennium. Four armed sheriffs stood guard in the Vancouver courtroom. A document signed by FBI special agent Frederick Humphries and filed by the United States government alleged that Ressam “solicited the help of Samir Ait Mohamed to obtain genuine Canadian passports from an individual working inside the passport agency” – apparently news to the RCMP and CSIS, which had a duty to be on top of such things.

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52 Ibid.
53 Ibid.
Al-Qaeda operatives have long been known to use Canadian passports. The ease with which fake identification cards and travel documents can be obtained was pointed out by the Vancouver Police in a raid on Photo Identification Card Systems Canada on Granville Street, one of the main access routes to the city centre. The proprietor, Mahmood Sommani, was alleged to have been using an airport security card identifying him as an “Aviation Control Supervisor” at Vancouver Airport. A website link associated with the business invited users to assume false identities:

Become ANYONE you want!...ANYONE...ANYTIME... ANYWHERE ... Travel in style.... No one will know the TRUTH but Yourself. Disappear completely and Start a New Life.  

On Tuesday, January 29, 2002, The FBI announced that the United States had identified and provided new photographs of six men, including two Canadians born in Tunisia, whom it considered were still actively targeting the United States from Al-Qaeda sleeper cells. Both Canadian suspects, formerly residents of Montreal, were described by American Attorney-General John Ashcroft as “extremely dangerous.” Both were traveling on Canadian passports. Ashcroft said that videotaped messages and a letter from Al Rauf bin al Habib bin Yousef al-Jiddi, dated after the September 11 attacks on New York and Washington, were found in Kabul in the ruins of the home of Osama bin Laden’s top military commander, Mohammad Atef, which was bombed in November, 2001. On the videotapes, five men, including al-Jiddi, hitherto unidentified, vowed to conduct martyrdom missions in the cause of al-Qaeda. In his letter, al-Jiddi specifically identified himself as being willing to conduct a suicide mission. He was therefore considered by the FBI a “key operative” in the al-Qaeda network. The second Canadian, Faker Boussora, al-Jiddi’s partner, was believed to be traveling with al-Jiddi. “We believe Boussora may also be involved in a martyrdom mission,” Ashcroft said. Boussora had come to Canada from France on a student visa in 1992, and had rented an apartment on Park Avenue in Montreal two blocks away from the apartment rented

by Abdelmajid Dahoumane, an alleged accomplice of Ahmed Ressam in the millennium bomb plot. Boussora was sponsored as a landed immigrant by a Canadian relative and was issued an immigrant visa in Detroit in 1995, at about the same time that al-Jiddi became a Canadian citizen.\textsuperscript{58} Both men were reported to have left Canada in November, 2001.\textsuperscript{59}

In September, 2002 United States authorities arrested Maher Arar, a Canadian citizen of Syrian birth, at John F. Kennedy International Airport as he waited to change planes \textit{en route} from Tunisia to Montreal. Instead of sending him on his way to Canada, they put him on a plane to Syria, alleging vague connections to al-Qaeda.

\begin{quote}
Canadian and U.S. government sources say Mr. Arar was the target of a joint Canada-U.S. security investigation long before his arrest in New York. One U.S. source said information from the RCMP resulted in Mr. Arar being placed on the watch list that is used to screen arriving passengers at U.S. ports of entry.

The U.S. ambassador to Canada, Paul Celucci, told a private gathering in Ottawa this spring that Canadian law-enforcement agencies didn’t want Mr. Arar returned to this country.

Speaking to the Ottawa branch of the Harvard Club, Mr. Cellucci said: “Mr. Arar is very well known to Canadian law enforcement. They understand our handling of the case. They wouldn’t be happy to see him come back to Canada.”\textsuperscript{60}
\end{quote}

U.S. Secretary of State Colin Powell called Arar’s treatment “extraordinary rendition,” perhaps another term for “disguised extradition.” \textit{Maclean’s} noted on 20 October 2003:

U.S. officials said they acted on information from the RCMP. But it’s since emerged that the U.S. pressured Syria to take Arar after Canada said it didn’t have grounds for an arrest….A Commons committee is trying to determine how a Canadian citizen can be spirited from New York to a cell in Syria.\textsuperscript{61}

\textsuperscript{60} Jeff Sallot, Tu Thanh Ha and Daniel LeBlanc, “Arar thanks Canadians, Ottawa rules out inquiry,” \textit{The Globe and Mail}, Tuesday, 7 October 2003, pp. 1, 4 at p. 4.
\textsuperscript{61} \textit{Maclean’s} 20 October 2003, p. 16.
Arar was imprisoned in Syria for more than a year without charges being laid, and claimed to have been tortured. He is suing the U.S. Government. Prime Minister Paul Martin has since ordered an inquiry into Canada’s role in the Arar affair.

On Christmas day, 2002, the authoritative Washington Post reported, “Al Qaeda ‘sleeper cells’ in Canada and the United States have communicated with each other as recently as this month, probably to plan terrorist attacks in the United States, Canadian intelligence experts said yesterday.” Mohammed Harkat, 34, a pizza delivery man, allegedly made the calls to “suspected al Qaeda members in the United States.” In the course of a few short paragraphs, the allegations against Harkat changed from his phoning “suspected” al Qaeda members to his being a member of al Qaeda who was in telephone contact “with other al Qaeda members”:

The Harkat case is the most recent example of a historically close intelligence relationship between the two countries that has become unprecedented in its intensity as Canada and the United States work to thwart a global terrorist network adept at crossing national borders.

It was not clear precisely what triggered the arrest of Harkat. The nature of the phone calls to the United States with other al Qaeda members is also not known. But Canadian officials believe Harkat is a ‘sleeper’ agent of al Qaeda.

The front page Washington Post news story continued:

...Neutralizing the potential terrorist threat in Canada remains a top priority, said U.S. government officials. With that in mind, the CIA has increased the number of case officers in Canada by an undisclosed number. The FBI has also increased its presence at the U.S. Embassy in Ottawa and elsewhere.

According to Canadian officials, the CIA and FBI have swamped Canadian intelligence and law enforcement authorities with requests to conduct surveillance and investigations into suspected terrorists on Canadian soil. Both U.S. agencies believe the threats are directed at the United States....

In the most aggressive and unusual case to date, Canada agreed to hand over to U.S. authorities without judicial proceeding a Canadian arrested this year in Oman, a top Canadian intelligence official confirmed. Mohammed Mansour Jabarah, a

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native of Kuwait, is accused of organizing a plot to blow up the U.S. and Israeli embassies in Singapore....

In an equally unusual move, Canadian intelligence officers this year testified in an American court case against members of a suspected Hezbollah cell operating in Canada but who were arrested in North Carolina.

In a Nov. 7 speech, Ward Elcock, director of the Canadian Security Intelligence Service, Canada’s domestic spy agency, said it was investigating 50 suspected terrorist organizations and “300 individual targets.”

Other CSIS declarations regarding perceived terrorist incursions into Canada have received front page play. “CSIS FEARS ISLAMIC JIHAD COMING,” the National Post declared in its headline on 22 October 2003, quoting a CSIS document marked “For Police and Security Officials’ Use Only” obtained under the Access to Information Act.

The Islamic Jihad has long collected and laundered money in Canada to finance Palestinian violence, but the report suggests there are concerns that, under pressure in the United States, the group might go the next step and try to build a network north of the border.

... Islamic Jihad built a North American support network that, until recently, was based in Florida, where university professor Ramadan Shallah ran a front organization called the World and Islamic Studies Institute (WISE).

Sami al-Arian, another Florida professor involved in WISE, was arrested this year. Court documents filed by U.S. investigators at the time alleged than an unnamed Canadian-based Islamic Jihad operative moved thousands of dollars from accounts here to fund the PIJ.

The Islamic Jihad is one of 31 terrorist groups outlawed by Cabinet order. Critics argue the Liberal government is not doing enough to stop terrorists from using Canada as base for supporting worldwide violence.

Much of the fuss in the North American press stems from its own propensity to exaggerate the actions of government officials. However, it is clear that persons of Arab and Islamic background have been targeted by both Canadian and American officials simply because of their ethnic background. Although racial profiling has exposed a number of immigration infractions, this is not in itself evidence of lax immigration laws, nor can

63 Ibid.
65 Choudhry, supra, note 19, pp. 371-375.
Canada’s immigration laws be blamed for incursions of terrorists into the United States. As Audrey Macklin has noted, there is no correlation between Canada’s refugee policy and the alleged terrorists who have emerged to date:

Like a deranged man who compulsively confesses to crimes he did not commit, a coterie of Canadian media commentators and right-wing politicians have tripped over each other in the rush to blame Canada’s alleged lax refugee policies for September 11 in particular and global terrorism in general. Despite the dearth of evidence in support of this allegation, two cases are repeatedly cited as illustrative of the failings of Canadian refugee policy. The first concerns Ahmed Ressam…. Ressam had made a refugee claim in Canada a few years earlier.

So too had Nabil al-Marabh, a Syrian national born in Kuwait who is presently detained in the US on suspicion of links to Al-Qaeda. In fact, both Ressam’s and al-Marabh’s refugee claims were rejected.66

Ressam was not deported after his failed application for refugee status simply because deportations to Algeria had been suspended by Canada at the time because of human rights violations there. Al-Marabh initially entered Canada from the United States in the 1990s and re-entered the United States in 1995, living and working in Massachusetts before returning to Canada to make a refugee claim.

In July 2000, al-Marabh was caught trying to enter the US illegally from Canada. At the time, he was wanted in Massachusetts for violation of a probation order arising out of a conviction for stabbing his roommate. He was also under suspicion by US intelligence for security related reasons. Yet US border officials were ignorant of his chequered history in the US when he was caught at the border, and simply turned Al-Marabh back over to Canada.67

Recruited to join al Qaeda in Montreal, Ressam traveled to Afghanistan on a false Canadian passport in the name of Benni Noris to receive his terrorist training. However, “in neither case was the refugee determination system a weak link. Both men’s refugee claims were rejected.”

67 Ibid.
Macklin pointed out that about half of Canada’s refugee claimants enter Canada from the United States.\(^{68}\)

2. Anti-Terrorism Legislation and the Political Offence Exemption

After the Kamikaze attacks on the World Trade Centre on 11 September 2001, countries that had not already done so scrambled to put anti-terrorism legislation in place. The United States and Britain had already done so a year before, updating even earlier terrorist legislation.\(^{69}\) America’s *U.S.A. Patriot Act* (officially the *Uniting and Strengthening America By Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act*).

\(^{68}\) *Ibid.* p. 389. The alleged “Canadian connection” to terrorist activity was not limited to North America. On January 16, 2002, the ringleader of an al-Qaeda cell in Singapore (who stood accused of plotting to blow up a busload of American soldiers, several embassies, and a ship) was found to be carrying a Canadian passport in the name of Jabarah Mohd Mansur. Robert Russo, “Police say al-Qaeda boss had Canadian passport,” *Globe and Mail*, 17 January 2002, p. A11. This came on the heels of a revelation by the Wall Street Journal, obtained from hacking into the personal computer ostensibly operated by members of bin Laden’s inner circle, that al-Qaeda operatives, including Abu Bakr al-Albani, were attempting to infiltrate embassies and consulates in Canada and gather intelligence about American soldiers in night-clubs near the Canadian border. “The agent appears to have planned to start his mission from inside Canada because the document outlines code phrases he would use, such as ‘I visited my teacher’ meaning he had managed to enter the United States,” the *Journal* noted. Quoted in Tu Thanh Ha, “Al-Qaeda’s Canadian schemes revealed,” *Globe and Mail*, 17 January 2002, p. A1 at p. A12. On 3 July 2002, Saudi border guards shot Abdulrahman Mansour Jabarah, 24, of St. Catherines, Ontario in a firefight at the Jordanian border. The FBI and CIA identified Jabarah as “an al-Qaeda suspect,” the older brother of Mohammed “Sammy” Jabarah, also Canadian, who is currently in United States custody after admitting involvement in al-Qaeda plots in Southeast Asia. “Al-Qaeda Seeks Canadian Operatives,” *Time* online edition, Tuesday, 8 July 2003. The fact that the FBI has a free hand to investigate alleged terrorist connections far from home allows the U.S. to bypass complex extradition proceedings, especially where the “cooperating” country allows extradition without a treaty — and without any clear idea of the allegations against the men. For example, on Christmas Eve, 2002, CBC reported from Lahore, Pakistan: “A Canadian man arrested last week in Pakistan and accused of being an al-Qaeda operative won’t be sent to the United States until a court hears details of the charges against him. A lawyer representing Usman Khawaja, and two U.S. citizens... convinced a court in Lahore the men shouldn’t be sent out of the country until prosecutors explain what the men are accused of. The three were among nine arrested last week in raids conducted by Pakistani police and the FBI. They remain in custody and are being questioned about their alleged links to al-Qaeda. Pakistan has extradited others suspected of terrorist activities without formal requests from Washington.” “Judge blocks extradition of terror suspects,” CBC News, Tuesday, 24 December 2002. CBC identified the nine men as “from the same family and of Pakistani origin.” They included U.S. citizen Dr. Javed Ahmad, his two sons, two brothers (one of whom was Canadian), three nephews (one of whom was Canadian), and an uncle. “Canadians among alleged al-Qaeda members arrested,” CBC News, Thursday, 19 December 2002.

\(^{69}\) Kent Roach, “The New Terrorism Offences and the Criminal Law,” in *The Security of Freedom*, supra, note 9, p. 161. Britain, for example, passed its first *Prevention of Terrorism Act* in 1974. It was replaced by the *Terrorism Act* in 2000, and later updated following 9/11. America’s *U.S.A. Patriot Act* (officially the *Uniting and Strengthening America By Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act*), drafted in response to 9/11, came perilously close to suspending civil liberties, and does so for suspected terrorists or suspected members of terrorist groups identified in the anti-terrorism legislation. Sections 401-405 specifically triple the number of “northern border personnel,” including border patrols and customs and
By Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act), drafted in response to 9/11, came perilously close to suspending civil liberties, and does so for suspected terrorists or suspected members of terrorist groups identified in the anti-terrorism legislation. Sections 401-405 specifically triple the number of “northern border personnel,” including border patrols and customs and immigration officials. Section 1029 purports to extend American extraterritorial jurisdiction. Section 412 mandates the detention of suspected terrorists and limits their rights to habeas corpus and judicial review. Using some 30 staff lawyers within the Department of Justice, Canada quickly drafted its own anti-terrorist legislation in the form of Bill C-36, which was so far-reaching that even conventional student protests or First Nations protest could have fallen under its umbrella.70

In his comparative analysis of Bill C-36 to similar legislation of Britain and the United States, Kent Roach noted that “both British and American anti-terrorism legislations more precisely enumerate the acts of assistance or participation in a terrorist activity that is prohibited.”71 Tied in with Bill C-35 (A bill to amend the Foreign Missions and International Organizations Act), and C-42, “The Public Safety Act,” nobody in Canada could be sure that it was “safe” to do anything in the way of public protest.

In announcing details of the proposed Anti-Terrorism Act, Minister of Justice and Attorney General for Canada Anne McLellan stated in a news release, “The horrific events of September 11 remind us that we must continue to work with other nations to confront terrorism and ensure the full force of Canadian law is brought to bear against those who

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support, plan and carry out acts of terror – we will cut off their money, find them and punish them.” The broad objectives of Canada’s Anti-Terrorism Plan, of which Bill C-36 was a significant part, were 1) to stop terrorists from entering Canada and protect Canadians from terrorist acts; 2) to develop tools to identify, prosecute, convict and punish terrorists; 3) to prevent the Canada-United States border “from being held hostage by terrorists,” thereby avoiding any impact this might have on the Canadian economy; and 4) to “work with the international community to bring terrorists to justice.” The fourth objective in particular would have included extradition. Martha Shaffer noted, “Internationally, Bill C-36 attempts to show the U.S. and other western nations that Canada will not be the weak link in an international effort to stop global terrorism (the war against terror) and will not allow Canada to become a ‘haven’ for terrorist activities.” But the anti-terrorist legislation eventually incorporated into the *Criminal Code of Canada* had a far broader application.

At a hearing of the Justice and Human Rights Committee on 5 November 2001, the lawyer for the Canadian Islamic Congress, Rocco Galati, complained of Bill C-36,

> “The Muslim and Arab communities will be directly affected. You just have to witness the approximately 800 illegal detentions in this country currently going on in the correctional centres before you even have Bill C-36, where Muslims and Arabs have been directed not to be able to phone their lawyers, see their lawyers, phone their families, see their family as of September 11. That’s going on right now. I see it in the jails every day.

> “This bill is, in my humble submission, obscene in the net it casts. You might as well have deleted the constitution from our landscape. This bill is so overbroad, it catches socio-economic and political offenses. It creates them: strikes, work stoppages, boycotts, protests, association, assembly, and free speech.”

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74 Martha Shaffer, “Effectiveness of Anti-Terrorism Legislation: Does Bill C-36 Give Us What We Need?” in *The Security of Freedom, supra*, note 9, p. 196.
75 Particularly section 2 (“terrorism offence,” “terrorist activity,” and “terrorist group”), subsections 7(3.73-3.75), and sections 83.01-83.33.
Other organizations, including the Canadian Bar Association, the Canadian Civil Liberties Association, the Canadian Human Rights Commission, Privacy and Information Commissioners, and even the Citizens Oversight Committee for CSIS objected that Bill C-36 was a direct risk to Canadian civil liberties and would criminalize political dissent.\textsuperscript{77}

However, some police chiefs were ecstatic over the powers Bill C-36 promised to provide them. There was double irony to the remarks made with fanatic zeal at the International Police Chiefs Convention by Julian Fantino, Chief of the Metropolitan Toronto Police, who used the image evoked by the old saw, “If you cannot bring Mohammed to the mountain, bring the mountain to Mohammed”:

“If we have to move mountains and politicians, then we’ll move mountains and politicians and convince them the greater public good has to prevail. Let there be no doubt that we’ll hold other people accountable for their lack of enthusiasm for what lies ahead. Tell not only the citizenry, but elected officials, that they too will be held accountable if they do not go along with what the Chiefs of Police are demanding.”\textsuperscript{78}

Part II.1 of the amended \textit{Criminal Code} is dedicated to terrorism, and s. 83.01 defines it not only in terms of the multinational conventions to which Canada is signatory, but also as “an act or omission, in or outside Canada” committed “for a political, religious or ideological purpose…with the intention of intimidating the public” that harms or endangers a person or interferes with an essential service. The definition includes counselling, conspiracy, attempts, threats, and being an accessory after the fact.\textsuperscript{79} “Terrorist activity” includes offences listed under ten specified multilateral agreements to which Canada is a signatory.\textsuperscript{80}

\textsuperscript{77} \textit{The Globe and Mail}, Saturday 27 October 2001.
\textsuperscript{78} Cited in the \textit{Marxist-Leninist Daily}, No. 194 (30 October 2001).
\textsuperscript{79} \textit{Criminal Code}, s. 83.01(1)(b), s.v. “terrorist activity.”
\textsuperscript{80} Section 83.01(1) (“terrorist activity”) (a).
Under s. 46(2) of the Extradition Act, the political offence exemption excludes "conduct that constitutes an offence mentioned in a multilateral extradition agreement for which Canada, as a party, is obliged to extradite the person or submit the matter to its appropriate authority for prosecution." Other specified offences that are deemed not to constitute an offence of a political character are murder, manslaughter, "inflicting serious bodily harm," sexual assault, kidnapping, abduction, hostage-taking, extortion, reckless use of explosives or other devices or substances, and any attempt or conspiracy to engage in such conduct. Combined with the new anti-terrorist legislation, the Extradition Act removes any practical possibility of claiming the political offence exemption, as Krivel, Beveridge and Hayward noted:

The Act and the international agreements contain many exemptions specifying what may not be considered to be a political offence or offence of a political character, with the result that there is little or no room left for an offence to fall outside extradition on this basis. Virtually all crimes of violence have been excluded from being considered political offences. As well, the proliferation of international tribunals and creation of international criminal courts has weakened the justification for exempting politically motivated crimes.

Therefore persons in Canada accused in the United States of terrorism, or conspiring to commit acts of terrorism, or allegedly financing a terrorist group are unlikely to be able to rely on the traditional political offence exemption from extradition.

The Solicitor General of Canada may receive secret evidence from foreign jurisdictions for use in proceedings against persons suspected of terrorist activity without disclosing the information to the accused or his counsel, although if the information is to be

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81 Section 46(2).
82 Section 46(2)(a)-(f).
used in court, it must be vetted by a judge to determine whether disclosure “would injure
national security or endanger the safety of any person.”\footnote{Section 83.06(1), (3).}

Once a “security certificate” is issued against an individual suspected of plotting
terrorist acts, it is next to impossible for the person to exonerate himself. For example, Adil
Charkaoui was arrested in May, 2003 to face allegations that he was “an Al-Qaeda agent who
tried to assimilate himself into the country’s culture, waiting to plan a terrorist attack.”\footnote{Michelle Shephard, “Montreal man a ‘dormant agent’: CSIS,” \textit{Toronto Star} 28 May 2003, p. 1.}
Declassified documents linked him to Ressam and the Canadian cell that conspired to blow up
Los Angeles International Airport. Full disclosure of the documents, said CSIS, would
jeopardize national security. All that was alleged publicly was that Charkaoui was in Pakistan
studying “tourism” at the same time that Ressam and Moussaoui were studying terrorism at an
al-Qaeda camp. “Charkaoui is said to have told CSIS agents he hoped one day to open a
karate school. The court document notes Ziad Jarrah, a Sept. 11 hijacker, was a follower of
karate and that other Al Qaeda members trained in martial arts.”\footnote{Ibid.} Talk about guilt by
association!

In the summer of 2003, 21 students mostly of Pakistani origin were arrested under the
provisions of the \textit{Anti-Terrorism Act} and identified in the press as alleged al Qaeda operatives
whom CSIS had been watching for some time. The first 19 students were arrested by an anti-
terrorism task force on 14 August 2003. The number 19 reverberated throughout North
America, since 19 hijackers were directly involved in the attacks on New York and
Washington on 9/11. The Canadian Broadcasting Corporation reported:
RCMP investigators are looking into claims the men may have experimented with explosives in their apartment kitchens and were seeking information on the construction of prominent American and Canadian buildings, including the CN Tower. Federal government lawyers released transcripts of 16 decisions at Immigration Review Board Hearings giving the reasons the men were detained after their arrests.

"I guess the easiest way of putting it is there is a suggestion they might in fact be perhaps a sleeper cell for al-Qaeda," said Terry McKay, the lawyer representing the Minister of Citizenship and Immigration.

The government lawyers' claims are based on fragmentary information. They are still looking for more evidence. However, under new immigration laws, such unproven allegations are enough to persuade judges to detain the men.\(^87\)

The fragmentary information included allegations of an overflight of the Pickering nuclear power plant by Anwar-Ur-Rehman Mohammed, a native of India, in the course of his training for his pilot's licence. The flight plan was filed by the school and was considered a standard and convenient route for training pilots. Two of Mohammed's alleged acquaintances, both Pakistani, were stopped by Durham Regional Police during a late-night stroll past the front gates of the same power plant; they said they were going to the beach.\(^88\) Another suspect visited the CN Tower and had the temerity to inquire how the massive structure was put together. In every case there was not a shred of evidence of wrongdoing or of terrorist activity, but under the new anti-terrorism legislation the anti-terrorism task force were not required to give the sources of their suspicion. The courts generally went along with the task force, but one or two adjudicators challenged the precepts of the legislation, stating that there was no evidence to justify detaining at least two of the men.\(^89\) Eventually, all allegations of terrorism were dismissed, the only outstanding warrants being for alleged visa infractions.

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\(^{89}\) "Suspects held as security threat say they're being illegally detained," CBC News, Friday 5 September 2003.
3. Alleged Terrorists: To Extradite or Prosecute?

In the current international political climate since 11 September 2001, Canada has a major policy choice: should alleged terrorists be extradited to the foreign country that was the target of their terrorist acts, or prosecuted under the Canadian Criminal Code? Germany and Spain opted to prosecute rather than extradite al-Qaeda members Mounir el Motassadeq and Mohammed Belfatmi, both of whom are alleged to have been directly involved in the attacks on New York and Washington. However, Canada’s ministers of justice have a long history of complying with American extradition requests.

In *U.S.A. v. Burns* (2001), the Supreme Court of Canada indicated that “in exceptional circumstances” (which remained undefined by the court), surrender without assurances that the death penalty would not be sought may still be appropriate and permissible. Is involvement with acts of mass murder and terrorism such an “exceptional circumstance”? Does the Ng case in particular, which involved multiple serial murders, remain a precedent for such “exceptional circumstances”? If not, what is the likelihood that the United States will agree to give assurances that it will not seek the death penalty in such cases? Is Canada in a position to prosecute and punish alleged terrorists thought to have been connected, however remotely, with the 9/11 attacks?

It is not enough for Canada to seek assurances that the death penalty will not be sought if the accused are turned over to the United States. Arguably, the very underpinnings of due process have been compromised by current United States practice and procedure, including

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91 151 C.C.C. (3d) 97 at 151, 155.

prolonged isolation and "interrogation" for months of persons delivered up by extradition. For example, Ramzi Binalshibh was delivered up to the American authorities by Pakistan in September 2002 and held in an undisclosed location outside the United States, presumably at an American base in Afghanistan.\(^93\) However, he had still not been brought before a court, military or otherwise, by November 2003.

Then there are the Taliban prisoners held for months, and sometimes for years, at Guantánamo Bay while being brainwashed of anti-American notions, the United States justifying their detention by saying that they were "enemy combatants" – not strictly prisoners of war to which the Geneva Convention would apply. Since they are not held on American soil, the United States argues that none of the protections that apply to American citizens and resident aliens apply to them, including the bringing of motions (to what court would they be brought?) or the application of American federal laws governing pre-trial procedures. Rather, the United States brought such suspects before a "military commission." The United States Court of Appeals for the Fourth Circuit ruled in the case of Louisiana-born Yaser Esam Hamdi, who was found among the Taliban detainees at Guantánamo Bay, that Hamdi could be held indefinitely without a lawyer or any other procedural rights since he was an "enemy combatant."\(^94\) It is the American position that enemy combatants can be detained without charge until the cessation of hostilities, and so Hamdi and the prisoners at Gauntánamo Bay can be held without due process as long as the rag-tag remnants of al-Qaeda and Taliban


forces continue to fire upon Americans in Afghanistan. The only reason Hamdi had standing before a federal court was that, by birth, he was an United States citizen.

In a press release dated 1 November 2002, Amnesty International demanded the release of 625 detainees from 42 countries then detained at Guantánamo Bay in connection with the conflict in Afghanistan.

“It is time to end the unacceptable legal limbo in which these prisoners are kept – a condition in which they are denied ‘prisoner of war’ status while at the same time are not allowed to enjoy the rights recognized to criminal suspects under US law,” Amnesty International said....

Amnesty International is also concerned by reports that suspected members of al-Qa’ida arrested by US officials in Afghanistan or elsewhere have been transported for questioning to third countries where they might be at risk of human rights violations. These countries include Egypt, where suspected members of Islamic opposition groups are frequently tortured during incommunicado detention.

“No one should be sent to another country to be interrogated if there are substantial grounds for believing that they would be at risk of torture or other cruel, inhuman or degrading treatment,” Amnesty International said....

Amnesty International’s requests for access to the detention facility have so far been ignored by the US government.

On 19 May 2003, the Supreme Court of the United States refused to hear an application brought on behalf of the detainees.

Wherever prosecution is an alternative to extradition, the Minister and the Attorney General should give serious consideration to the option instead of merely paying it lip-service.

In this respect, the German High Court set a good example in prosecuting Mounir el Motassadeq, a 28-year old Moroccan electrical engineering student alleged to belong to the same terrorist cell as Mohammed Atta and the other perpetrators of the 9/11 attacks.

Motassadeq received the maximum 15-year sentence from the five-judge panel in Hamburg for being an accessory to 3,066 murders in New York and Washington. Judge Albrecht Menz

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95 Dorf, supra, note 94, at p. 3.
found as a fact that as a founding member of the cell, Motassadeq was “a cog that kept the machinery going.... He knew and approved the key elements of the planned attacks.”

Abdelghani Mzoudi, arrested in Germany in October, 2002, also faced charges in Germany of supporting al-Qaeda. Spain, too, has resisted extraditing suspected al-Qaeda operatives to the United States, including Imad Eddin Barakat Yarkas, who is in Spanish custody accused of complicity in the 9/11 hijackings.

Although U.S. Attorney General John Ashcroft praised the conviction and sentencing of el Motassadeq, claiming that it was “the result of extensive cooperation between the governments of Germany and the United States,” the United States refused to produce as a witness another member of the cell held in American custody, Ramzi Binalshibh, despite repeated requests by the defence. This refusal subsequently became one of Motassadeq’s main grounds of appeal. Binalshibh, believed by American authorities to have been the Hamburg cell’s primary contact with al-Qaeda, was arrested in Pakistan in September, 2002, along with four other suspects, including Abu Zubaida, one of bin Laden’s closest associates. In what was termed by Pakistan an “extradition,” the five were handed over to U.S. authorities for interrogation in “a secret location” outside Pakistan, most likely in Afghanistan.

On 12 February 2003, United States District Judge Leonie Brinkema, hearing the case of Zacarias Moussaoui, the suspected “twentieth terrorist” in the 9/11 plot, ordered that Moussaoui’s trial be postponed until the 4th U.S. Circuit Court of Appeals could consider

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100 “15 years for 9/11 conspirator,” supra, note 97, p. 2.
whether Moussaoui should have access to Binalshibh, “a suspected al-Qaida mastermind” whom American authorities have also identified as being the “twentieth terrorist.” Moussaoui’s defence team seemed to believe that Binalshibh knew enough about the operation on September 11 to be able to “clear” Moussaoui of direct involvement in the attacks.

On 1 March 2003, at Rawalpindi, Pakistan, on the outskirts of Islamabad, FBI and Pakistani authorities arrested Khalid Shaikh Mohammed, the head of military operations for al-Qaeda and the alleged mastermind of the 9/11 attacks. Like Binalshibh, he was handed over to American authorities by Pakistan and taken to a United-States-controlled military base in Afghanistan to be interrogated by American agents. For days after his arrest he refused to talk to interrogators beyond reciting verses from the Qur’an. However, according USA Today, “documents found in his midst have set off a frenzied manhunt to track other suspected terrorists in the United States and abroad,” and within a week he had disclosed that he had had a recent meeting with Osama bin Laden in Pakistan not far from Tora Bora. Within a month he had allegedly identified a number of individuals in the al-Qaeda chain of command.

How long Mohammed, Binalshibh, Zubaida, and the other alleged al-Qaeda members will be held without trial – and what sentence they will eventually receive at the hands of the United States if ultimately convicted – is open to speculation and probably to negotiation, depending on how “cooperative” the captives are in naming names and locations of their compereers still at large. In particular, Zubaida had allegedly disclosed such information.

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104 “‘Appropriate pressure’ being put on al Qaeda leader,” CNN.com/WORLD, 2 March 2003, p. 1.
naming many alleged terrorists, including Mohamed Harkat, the Ottawa pizza delivery man whom Zubaida identified as leading one of several al-Qaeda sleeper cells in Canada.\footnote{Dana Priest and DeNeen Brown, "‘Sleeper’ terrorist cells focus of Canada-U.S. cooperation,” The Vancouver Sun, 26 December 2002, p. A2.}

While persons with alleged al-Qaeda connections were held for months by United States authorities without appearing in court, Harkat received a court appearance in Ottawa within days of his arrest. However, since the evidence against Harkat had been generated entirely by American authorities, including wiretaps of suspected al-Qaeda operatives in the United States with whom Harkat had allegedly been in telephone contact, it seemed likely that the United States would want to have some say in the disposition of the case, possibly through extradition. Ample precedent could be found to extradite him, including the line of cases following Cotroni.\footnote{U.S.A. v. Cotroni, [1989] 1 S.C.R. 1469, 48 C.C.C. (3d) 193 (S.C.C); U.S.A. v. Reumayr, [2003] B.C.C.A. 357, para. 23.}

The monitoring of terrorist cells in Canada has been conducted by American agencies such as the FBI and CIA, in conjunction with CSIS, but as Wesley Wark has noted, Canadian law enforcement and security agencies “don’t have the personnel to cope with the material the CIA and intelligence community is processing in the U.S.”\footnote{Priest and Brown, supra, note 106, p. A2.}

...Neutralizing the potential terrorist threat in Canada remains a top priority, said U.S. officials. With that in mind, the CIA has increased the number of officers in Canada by an undisclosed number. The FBI also increased its presence at the U.S. embassy in Ottawa and elsewhere.

According to Canadian officials, the CIA and FBI have swamped Canadian authorities with requests to conduct surveillance and investigations into suspected terrorists on Canadian soil. Both U.S. agencies believe the threats are directed at the U.S.\footnote{Ibid.}
Canada has coped with the terrorist threat by "judicial changes aimed at streamlining the arrest and deportation of suspected terrorists."\textsuperscript{110} These judicial changes include streamlining the extradition process to countries such as the United States where evidence has been found.

To compound the ethical questions of sending accused terrorists into such a hostile environment as the United States now represents (where alleged terrorists are concerned), it seems likely that anyone actually linked to the 9/11 attacks, if returned to the United States, will face the death penalty. Indeed, the United States government has said that it will seek the death penalty for Moussaoui, who was arrested in Minnesota in August, 2001 – a month before the raids on New York and Washington.\textsuperscript{111} Moussaoui drew the suspicion of a flying club instructor when he expressed interest in learning to fly a jumbo jet but suggested to his instructors that they skip over the technicalities of how to land.\textsuperscript{112}

The central question for Canada’s Minister of Justice is whether treatment of suspected terrorists and al-Qaeda sympathizers at the hands of the United States Government is grounds for suspending American extradition requests for alleged terrorists, and for proceeding instead with prosecution under the criminal laws of Canada. The \textit{Criminal Code} now provides for prosecution of Canadian citizens charged with terrorist acts and, with the consent of the Attorney General of Canada, non-citizens.\textsuperscript{113} Therefore, from the point of view of counsel representing persons wanted for extradition for alleged terrorist activity in the United States, the most promising way of avoiding extradition is to argue the climate of uncertainty that exists in the United States, exemplified by long-term incarceration without

\textsuperscript{110} Ibid.
\textsuperscript{111} Margasak, \textit{supra}, note 103, p. 2.
\textsuperscript{112} Seymour Hersh, "The Twentieth Man: Has the Justice Department mishandled the case against Zacharias Moussaoui?" \textit{The New Yorker}, 30 September 2002.
\textsuperscript{113} Section 7(7).
charges being laid,\textsuperscript{114} abuse of process,\textsuperscript{115} irregularities in documentation,\textsuperscript{116} or the vagueness of alleged conduct as to whether it meets a standard of extraditable criminality.\textsuperscript{117}

A terrorist offence allegedly committed outside Canada is deemed to have been committed within the country if the alleged perpetrator is Canadian, a permanent resident in Canada, or a stateless Canadian resident. For persons accused of conspiring to commit terrorist acts from within Canada, argument can be made to the Minister that prosecution should be conducted in Canada rather than extraditing them to the United States.\textsuperscript{118} Canada's Minister of Justice has the obligation to consider, in consultation with the appropriate provincial attorneys-general, whether prosecution of alleged terrorists, or persons accused of aiding, abetting, or funding terrorists groups, should be tried in Canada. However, this does not invite the Minister to engage in manipulation with the attorneys-general where the Cotroni factors would indicate that domestic prosecution is viable.

In \textit{U.S.A. v. Reumayr} (2003), where a Canadian citizen and resident of Canada, while in Canada, was alleged to have been in possession of explosive materials preparatory to an attempt to blow up the Trans-Alaska Pipeline,\textsuperscript{119} the RCMP, who had been listening in on Reumayr's conversation with an informant in a Surrey, B.C. hotel room, arrested Reumayr and charged him with six counts under the \textit{Criminal Code}. A criminal complaint was also sworn out against Reumayr in New Mexico “arising out of the same conduct underlying the

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  \item \textsuperscript{114} \textit{Canada (Minister of Justice) v. Pacificador} (2002), (1 August 2002), Docket C32995 (Ont. C.A.).
  \item \textsuperscript{118} Subsection 7(3.75). Any such offence is also deemed to have been committed in Canada if the victim is a Canadian citizen; or if the alleged crime was "committed against a Canadian government or public facility located outside Canada"; or was "committed with intent to compel the Government of Canada or of a province to do or refrain from doing any act."
  \item \textsuperscript{119} \textit{U.S.A. v. Reumayr}, note 107, para. 15.
\end{itemize}
Neither the Minister nor the Court applied the various factors in *Cotroni*, relying instead on vague, third-hand information that the Attorney General of British Columbia had "considered" it. Yet the Attorney General expressed a willingness to continue with the prosecution if the extradition was not perfected, indicating that, all things being equal, prosecution was a viable alternative. Both the Minister and the Court completely ignored the political climate of the United States, which since 9/11 was bound to regard preparation to attack American interests such as a pipeline, on the eve of the new millennium, as an act of terrorism. The United States is likely to seek punishment accordingly – and Reumayr argued that he faced an aggregate 90 years in jail. "As he is 52 years old," said Mackenzie J.A., paraphrasing the appellant’s argument, "he will likely die in prison."

Clearly the Attorney General made his decision not to prosecute Reumayr in deference to the expressed wishes of the Minister. By failing to follow *Cotroni*, both the Minister and the Court of Appeal put not only Alfred Reumayr but also the principle of reasoned choice implied in the principle “extradite or prosecute” into jeopardy. New Mexico hardly had a more reasonable claim than Canada to advance the prosecution, when almost all of the evidence arose in Canada, and the alleged conduct, as characterized by Mackenzie J.A.,
Judicial and Executive Discretion in Extradition between Canada and the United States

amounted merely to “preparation to an attempt.” Audrey Macklin commented on the related issue of “prosecution or deportation”:

If prosecution is arguably a more coherent response than deportation, important questions arise regarding the relative merits of national versus international prosecution.... If we understand our national and/or international quest for security as predicated on concerns and entitlements that derive from our common humanity, we are compelled to acknowledge that those who stand accused of perpetrating heinous crimes against our collective security must be judged according to norms and processes that also derive from our common humanity.

This humanitarian approach is a consideration not dissimilar from the determining principle governing the Supreme Court of Canada in Burns.

4. Executive Discretion to Refuse Extradition

Given the current climate, the likelihood of full international cooperation in extradition matters has never been greater. The prevailing attitude internationally was reflected by Jutta Brunée when she remarked, “to be sure, harbouring, or refusing to extradite, terrorists is offensive and arguably illegal.” This is not good news for those accused unfairly or for those facing interminable procedural delay, abuse of process, and harsh sentences in foreign jurisdictions, for in Canada the courts and the Minister of Justice alike have abysmal records for sacrificing individual rights at the altar of “international obligations” in misguided attempts to appear tough on crime and cooperative with international allies.

If Canada were to change its current policy and consider prosecuting alleged terrorists (and other similar cases, such as Reumayr) in accordance with the new provisions of the Criminal Code rather than extraditing them, the 1991 amendment to the Treaty giving priority

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124 Ibid., para. 39.
125 Macklin, supra, note 11, p. 398.
126 Brunée, supra, note 9, p. 345; Shaffer, supra, note 74 at 196.
127 Ibid., p. 341.
to the nationality of the victim over that of the perpetrator remains an obstacle. Under these circumstances, the Minister of Justice would be more likely to rely on s. 44(1)(a) of the Act, which mandates refusal of surrender where surrender would be “unjust or oppressive having regard to all the relevant circumstances.” As LaForest J. said in Schmidt, by way of introduction of his “shock the conscience” test,

I have no doubt either that in some circumstances the manner in which the foreign State will deal with the fugitive on surrender, whether that course of conduct is justifiable or not under the law of that country, may be such that it would violate the principles of fundamental justice to surrender an accused under those circumstances.

The Supreme Court elaborated in U.S.A. v. Burns (2001):

...An extradition that violates the principles of fundamental justice will always shock the conscience. The important inquiry is to determine what constitutes the applicable principles of fundamental justice in the extradition context.

The “shocks the conscience” language signals the possibility that even though the rights of the fugitive are to be considered in the context of other applicable principles of fundamental justice, which are normally of sufficient importance to uphold the extradition, a particular treatment or punishment may sufficiently violate our sense of fundamental justice as to tilt the balance against extradition.

If Burns is any indication, the Supreme Court of Canada may well intervene to stop extradition of alleged terrorists to the United States, should the Court determine that surrender to face abuse of process and interminable pre-trial incarceration would be “unjust and oppressive.”

The standard that should have been applied by the Minister and which was applied by the Supreme Court of Canada in Burns was whether the treatment or punishment awaiting the accused upon surrender or eventual conviction “sufficiently shocks the conscience” of Canadians. That is what LaForest J. originally stated in Schmidt (1987) when speculating about a hypothetical situation where “the criminal procedures or penalties in a foreign country

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129 Re Schmidt v. The Queen (1987), 33 C.C.C. (3d) 193 at 214 (S.C.C.), per LaForest J.
sufficiently shocks the conscience as to make a decision to surrender a fugitive for trial there one that breaches the principles of fundamental justice enshrined in s. 7."\(^{131}\) In *Kindler* (1991), the majority of the Supreme Court of Canada elaborated:

> In determining whether ... 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.\(^{132}\)

The court in *Kindler* set out various factors for courts of appeal to consider when conducting a judicial review of an extradition matter:

> 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 requested 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.\(^{133}\)

Following *Kindler* and *Burns*, in *Pacificador* (2002), Sharpe J.A. for a unanimous panel of the Ontario Court of Appeal held that, “Applying that standard to the facts of this case, I have concluded that taken as 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 in the Philippines ‘shocks the conscience.’”\(^{134}\)

The balance between executive and judicial discretion in extradition has been adjusted slightly by a proactive court led by a comparative newcomer, Arbour J., who as former Chief


\(^{133}\) *Ibid.*

\(^{134}\) *Canada (Minister of Justice) v. Pacificador* (1 August 2002)(on appeal from the order of Dambrot J. dated 19 October 1999, dismissing an application to quash a warrant of surrender), at 13, para. 47.
Prosecutor of the International Criminal Tribunal for Yugoslavia was better equipped than most judges to assess the nuances of international values and the danger of the imposition of untenable political posturing on individuals caught up in the extradition process. In *U.S.A. v. Shulman* (2001), heard together with *U.S.A. v. Cobb* (2001) and *U.S.A. v. Tsioubris* (2001), Arbour J. looked behind procedures in the United States and assessed them in terms of impact on judicial proceedings in Canada. In doing so, she encouraged courts to take a more proactive stance in ensuring that individuals are not made to face situations that would be "unjust or oppressive." These related cases, considered alongside *Burns*, give a strong message to the Minister of Justice that if he does not use his considerable statutory discretion to thwart abuse of process, the courts will exercise it for him.

The appellants, all Canadian citizens, were alleged to have defrauded American residents in a telemarketing scheme involving the sale of gemstones. Charges were laid against 25 individuals and eight corporations indicted by a federal grand jury in Pennsylvania on 19 July 1994 with 51 substantive counts of mail and wire fraud, and one count of conspiracy to commit mail and wire fraud, the American prosecutors alleging that between 1989 and 1993 some 67 Americans were defrauded of $22 million worth of gemstones. On 22 May 1995, in the course of sentencing a co-accused, Caldwell J. stated, "I am attempting to treat everyone who comes in here, especially those who cooperated, in an evenhanded fashion...."
"The sentence that I'm imposing I think takes into account your cooperation and certainly you're entitled to have that recognized. *I want you to believe me that as to those people who don't come in and cooperate and if we get them extradited and they're found guilty, as far as I'm concerned they're going to get the absolute maximum jail sentence that the law permits me to give.*"¹⁴¹

Later, in a television interview aired in Canada, the prosecutor in the case implicitly warned the appellants that should they delay the American proceedings by insisting on their rights to extradition and subsequently be found guilty, they would be incarcerated in a place where each would become "the boyfriend of a very bad man." Arbour J. held that such threats and promises made by the judge and prosecutor, even though made in Pennsylvania, tainted the extradition proceedings in Canada, triggering a remedy under common law and s. 7 Charter protections against abuse of process.

Since September 11, the Supreme Court of Canada has placed abstract concerns of "security of the community" over the individual right from protection against torture or possible death. As the Court ruled in the case of *Canada v. Ahani*:

"In the end, it would be a Pyrrhic victory if terrorism were defeated at the cost of sacrificing our commitment to [democratic] values. Torture has as its end the denial of a person's humanity... It may once have made sense to suggest that terrorism in one country did not necessarily implicate other countries. But after the year 2001, that approach is no longer valid....Terrorism itself is a worldwide phenomenon."¹⁴²

The Court affirmed the discretionary decision of the Minister of Citizenship and Immigration in the case of Mansour Ahani, whom it ordered sent back to Iran. However, it granted a new hearing in the case of Manickavasagam Suresh of Sri Lanka, a refugee claimant who as a former Tamil Tiger fundraiser feared torture or execution if returned home. In Canada, he was accused of being linked to a terrorist group. The Minister of Citizenship and Immigration did

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¹⁴¹ *U.S.A. v. Cobb, ibid.*, at para. 7, emphasis that of Arbour J.
not inform Suresh of the case that had to be met, and Suresh was not allowed to respond in
to the case presented by the Minister or to challenge the information she relied upon in
making her decision to deport Suresh on the grounds that his presence in Canada constituted a
danger to national security. The Supreme Court of Canada held that his original hearing by
the Refugee and Immigration Review Board, whose decision was upheld by the Federal Court
of Appeal, was procedurally flawed and referred the case back to the Minister of Citizenship
and Immigration for further review in accordance with procedural fairness, including the right
of Suresh to present evidence and make submissions on why his continued presence in Canada
would not be detrimental to the country, on whether he risked torture on his return, and on the
value of the assurances of Sri Lanka that it did not use torture. The Minister (in that case
the Minister of Citizenship and Immigration) must use her executive discretion in a fair and
open manner, rather than being secretive and arbitrary.

5. Redeeming the Role of the Judiciary

Ministers of Justice in the past, including Ann MacLellan, Allan Rock and Martin
Cauchon, have not shown much backbone in extradition matters, generally caving in to
American requests. Whether Irwin Cotler, the new Minister of Justice in Paul Martin’s
cabinet, will resist such pressures remains to be seen. He has a fine reputation as a defence
lawyer in which he advanced the legal rights of his clients. However, armed with a new
Extradition Act that gives the Minister almost total discretion in extradition matters, recent
changes to the Criminal Code thanks to Bill C-36 that undercuts any notion of protecting
fugitives for a “crime of political character,” and a headstrong administration within the

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143 Suresh v. Canada (Minister of Citizenship and Immigration) (2002), 2002 SCC 1, File No. 27790 (11 January
Department of Justice, the new Minister will in all likelihood be tempted bow to the will of the United States, using the old saw that Canada’s “international obligations” are paramount.

In the wake of the terrorist attacks on the World Trade Center and Pentagon, the western world faces an ideological war where the evidence of complicity and conspiracy is as nebulous as the target. Individuals might easily be lost in a machinery of reprisal, or might be found guilty by association rather than by proof of a prima facie case against them. From the standpoint of persons facing extradition, there could not have been a worse time for justices of the superior courts in Canada to have lost their discretionary power to weigh and assess the evidence, or to be just and fair to individuals who may be facing treatment or punishment more heinous than the conduct that led to allegations of criminal conduct in the first place.144

A nation in a state of war tends to sideline civil liberties and take shortcuts. Under the new resolve of the American and Canadian governments to combat terrorism wherever it hides, the notion of “crimes of a political character” may for inappropriate political reason lose all semblance of a legitimate exemption from extradition. The last chance an individual has of being protected from a vindictive American prosecutorial system that demands the extradition of suspects may well be the Canadian courts – especially if the Minister of Justice is not prepared properly and diligently to exercise the full panoply of executive discretion contemplated under the Act and Treaty.

Typically, Charter rights are not applied to extradition hearings except with respect to matters that transpire in Canada, and even then are considered to be within the executive discretion of the Minister of Justice rather than the courts. Instead of giving a liberal, broad and expansive interpretation to the Charter, judges and Ministers of Justice alike have

typically denied Charter rights to those who face serious jeopardy in a foreign system in which they are bound to be regarded as fugitive aliens. The judicial and executive authorities have long held that their primary duty as part of the extradition machinery is to a “liberal” interpretation of international treaties, an interpretation favoring the signatory states rather than individual rights.\(^{145}\)

It is necessary for Parliament to revisit and amend the *Extradition Act* to unfetter the discretion of the courts to allow them to listen to the evidence of alibi and excuse and the various statutory defences that, by virtue of the existence of the *Extradition Act*, which purports to be a “code,” have become questions of law. The Supreme Court of Canada pointed the way in *Burns*, where the Court appeared to chide extradition judges for relying on the “shocks the conscience” test of *Schmidt* to thwart Charter remedy: “The words were not intended to signal an abdication by judges of their constitutional responsibilities in matters involving fundamental principles of justice.”\(^{146}\) The Court followed through in *Cobb*, *Tsioubris*, and *Shulman*, by holding that where an accused faces intimidation tactics or other abuses of process, both the s. 7 Charter rights of the accused and common law protections against abuse of process were triggered.

The extradition judge did not need to await a ministerial decision in the circumstances, as the breach of the principles of fundamental justice was directly and inextricably tied to the committal hearing. In my view, the extradition judge had the jurisdiction to control the integrity of the proceedings before him, and to grant a remedy, both at common law and under the *Charter*, for abuse of process. He was also correct in concluding as he did that this was one of the clearest of cases where to proceed further with the extradition hearing would violate “those fundamental principles of justice which underlie the community’s sense of fair play and decency.”\(^{147}\)


Arbour J. handed the reins for determining this kind of question to the extradition judge rather than the Minister. That was a huge step back from the brink. It was a step subsequently endorsed by the British Columbia Supreme Court in a number of cases in which abuses of process were detected by the extradition judge, including *U.S.A. v. Licht* (2002), *U.S.A. v. Artes-Roy* (2003), and *United Kingdom v. Tarantino* (2003). In refusing to commit Tarantino because his Section 7 Charter rights had been abused, Stromberg-Stein J. remarked,

> A requesting party must appreciate that, as a party to proceedings in a Canadian court, it is subject to the application of rules and remedies that serve to control the conduct of the parties who turn to the court of assistance, and that litigants are protected from unfair, abusive proceedings through the doctrine of abuse of process that bars litigants from abusing the process of the courts.

There is a need in extradition proceedings for the courts to be protective of their jurisdiction over Charter rights in just this way. Parliament clearly gave superior court judges the power to give remedies under the Charter under the 1991 amendments to the old Act when it abolished habeas corpus as a means of review.

Although under the *Extradition Act* superior court judges do not have the discretion to decide the ultimate fate of persons appearing before them in extradition hearings, they retain the power to state clear judicial opinions on the matter for consideration not only of the Minister but also of the reviewing court. It is not enough for a judge to insert hints or remarks to the Minister in his or her reasons for judgment. All too often in the past, such remarks,

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151 Ibid., para. 52.
152 *U.S.A. v. Cheema* (30 September 2003), Vancouver CC980093 (B.C.S.C.), para. 4, 5, 12, where Bennett J. found "an evidentiary basis to permit an inquiry into the lawfulness of the conduct of the Montreal Drug Section, as well as the conduct of the RCMP in Pakistan" and the U.S. Drug Enforcement Agency, in a sting similar to that in *U.S.A. v. Licht*. 
being "obiter," have been almost disparagingly dismissed, causing great hardship for those extradited without just cause. \(^{153}\)

Since subtle – and sometimes broad – hints from the bench have routinely been ignored by the Minister of Justice, it behoves the courts to be forthright in their statement of judicial opinion by routine use of judicial reports. Section 38 of the *Extradition Act* states that the judge shall transmit to the Minister, besides an order of committal and a copy of the evidence, "any report that the judge thinks fit."\(^{154}\) This, along with the related process of preparing a record for use by the Minister, is the best example of a measure of judicial discretion being crafted into the legislation. However, most judges have been reluctant to prepare such reports, and nothing in the legislation compels the Minister to read them, or to act upon them. Such reports should become a standard tool, submitted to the Minister as a matter of course, providing the judge’s clearly stated opinion as to the ultimate justice or injustice of the situation faced by a person who has appeared before him in an extradition hearing. They should not be dismissed or ignored by the Minister, but should be considered by the Minister in the course of providing his reasons for extradition.

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\(^{154}\) *Extradition Act*, paragraph 38(1)(c).
CHAPTER EIGHT

CONCLUSION

Historically, tensions have always existed between the judicial and executive branches of government in the exercise of judicial and executive discretion in extradition matters. President Adams rued the day he followed the advice of his devious Secretary of State, Timothy Pickering, by inappropriately intervening in the judicial hearing of Jonathan Robbins, recommending that Judge Bee find that the sailor should be handed over to the British for summary trial. Catron J. of the U.S. Supreme Court later wrote of the Robbins case:

A great majority of the people of this country were opposed to the doctrine that the President could arrest, imprison, and surrender a fugitive, and thereby execute the treaty himself; and they were still more opposed to an assumption that he could order the courts of justice to execute his mandate, as this would destroy the independence of the judiciary, in case of extradition..... Public opinion had settled down to a firm resolve, long before the treaty of 1842 was made, that so dangerous an engine of oppression as secret proceedings before the executive, and the issuing of secret warrants of arrest, founded on them, and long imprisonments inflicted under such warrants, and then, an extradition without an unbiased hearing before an independent judiciary, were highly dangerous to liberty, and ought never to be allowed in this country.1

How prescient, yet (given the implementation of the U.S.A. Patriot Act2) how naïve!

By the beginning of the 20th Century, the American model of extradition, adopted by Canada in precedent after precedent,3 had become a legal template for much of the civilized world. The United States was respected not only for its record of returning extradited persons

1 In re Kaine, 55 U.S. (14 How) 103, 112-113 (1852).
2 The massive U.S.A. Patriot Act, cobbled together following the terrorists attacks of September 11, 2001, was passed by the 107th Congress on 25 October 2001 (H.R. 3162), and became law on 31 October 2001.
3 See Chapter Two, supra.
to the nations requesting them but also for the protection of the individual rights of those who faced extradition. The American courts became adept at balancing those rights and obligations. In 1874, the leading British authority on extradition, Sir Edward Clarke, was able to concede that the United States was entitled to “the first place in a history of the modern law and practice of extradition....

In the matter of extradition, the American law was, until 1870, better than that of any country in the world; and the decisions of the American judges are the best existing expositions of the duty of extradition, in its relations at once to the judicial rights of nations and the general interests of the civilized world.4

However, the history of extradition in North America in the past century is a cautionary tale, if only because of historical developments at the beginning of the 21st Century. The attempted millennium bombing and the attacks on New York and Washington of 11 September 2001 led to passage of anti-terrorist legislation that eradicated the central safeguards and protections that for a century and a half had made American extradition procedures among the most fair and just in the world. America’s allies, including Britain and Canada, were quick to ride the roller-coaster of public policy to pass similar anti-terrorist legislation as a seeming knee-jerk response to President George W. Bush’s undeclared but expensive campaigns against terror.5

As Anne LaForest implied in her 2002 article on evidence in extradition hearings,6 Canada’s Extradition Act already leaned towards full cooperation with requests for extradition. Announcing that Canada’s new Extradition Act had received royal assent on 17 June 1999, then-Minister of Justice Anne McLennan stated: “Our message is clear – Canada will not be

5 In November, 2001, Canada introduced controversial anti-terrorism legislation in the form of Bill 36, which substantially amended the Criminal Code and other related legislation. See Chapter Seven, supra.
a safe haven for fugitives from justice.” However, successive Ministers of Justice have been slow to recognize those occasions when abuses of process occur. Various American police forces and the FBI have a reputation for taking such short cuts as tampering with evidence, relying on suborned statements of co-accused proffered in exchange for promises of clemency, inventing false affidavit evidence and obtaining false testimony through threats and promises, and even entering Canada illegally and breaking Canadian law by dealing in drugs and setting up a “sting” operation not approved by Canadian police. Nor have all prosecutors and judges been objective, as the Supreme Court of Canada found in the cases of Cobb, Tsioubris, and Shulman after a United States assistant district attorney said publicly on a Canadian television network that any accused who procrastinated by insisting on the right to an extradition hearing would upon conviction spend a long time in jail, where he would “become the boyfriend of a very bad man.” The judge in the same Pennsylvania proceeding suggested that such procrastinators would receive the harshest sentence he could mete out

7 “New Extradition Act Comes into Force,” Department of Justice news release, dateline Ottawa, June 17, 1999. Bill C-40 received first reading on 5 May 1998, was passed by the House of Commons on 1 December 1998, and received royal assent on 17 June 1999.


10 *U.S.A. v. Peltier*, 585 F. 2d 314, 335 (8th Cir. 1978), *cert* denied 440 U.S. 945 (1979), where the FBI allegedly used threats and promises to obtain an incriminating affidavit from a mentally challenged person who did not know Peltier and was not present at the scene of the crime: Kirk Makin, “Extradition based on false evidence, Peltier inquiry says,” *Globe and Mail* (Monday, 11 December 2000), p. A1. Although the affidavit was deemed sufficient to obtain the extradition of Leonard Peltier, at trial the putative witness was immediately dropped from the witness list. See John J. Privatera, “Toward a Remedy of International Extradition by Fraud: The Case of Leonard Peltier,” 22 Yale Law and Policy Rev. 49 at 50 (1983).


under the law. The Supreme Court of Canada held that such pre-emptive threats by judges and prosecutors constituted abuse of process, and in the cases of *Cobb*, *Shulman*, and *Tsioubris* directed the Minister of Justice not to surrender the accused.\(^{14}\)

Such intervention by the courts in Canada has been rare indeed. Over the past century, and especially in the last decade of the 20\(^{th}\) Century, the Supreme Court of Canada, reflecting the will of successive Ministers of Justice, showed an unwillingness to refuse surrender in extradition cases. The various courts of appeal followed the lead of the Supreme Court of Canada, and in turn superior court judges severely limited themselves in the exercise of judicial discretion, nursing the notion first espoused by Gerard Vincent LaForest J. of the Supreme Court of Canada that their role was at best "a modest one."\(^{15}\) Many of LaForest's ideas, set out initially in his book *Extradition to and from Canada* (1961)\(^{16}\) and more indelibly in a series of extradition cases beginning with *Re Schmidt and the Queen* (1987),\(^{17}\) became codified in the *Extradition Act*. Since then, the unwillingness of superior court judges to use their inherent judicial discretion has been reinforced by their own narrow interpretations of the provisions in the *Extradition Act* governing their legislated role.\(^{18}\) Although the Act assigns

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\(^{14}\) *Ibid.* On occasion, courts in the United States have taken the same attitude towards Canadian extradition requests, where they seemed unreasonable on their face. See the remarks of Stewart J. in *U.S.A. v. Pitawanakwat*, unpublished (15 November 2000), 00-M-489-ST (U.S. Dist. Ct. for the District of Oregon), at 27. Pitawanakwat was convicted of discharging a rifle at a police helicopter during the stand-off at Gutfstafsen Lake, British Columbia between Canadian law enforcement officials (the RCMP had elicited the assistance of the Canadian Armed Forces) and the Ts'peten Defenders, a group of First Nations protesters who claimed that part of a farmer's property was sacred ground where traditional sun dances had been held. James Pitawanakwat was serving the last few days of his parole when he left Canada for the United States. Canada's request for his extradition was refused on the grounds that the offence for which he was convicted was of a political character. See Chapter 3, supra.

\(^{15}\) *Argentina (Republic) v. Mellino* (1987), 33 C.C.C. (3d) 334 (S.C.C.), at 349, per LaForest, J.


\(^{18}\) Sections 24-39.
the responsibility for conduct of extradition hearings to justices of provincial and territorial
superior court judges, who retain all their inherent powers as judges of constitutionally
recognized courts, the legislation appears to leave them hardly anything to determine except
procedural concerns surrounding the hearing itself.

Under the “principle of non-inquiry,” both the Minister and the courts are required to
trust the judicial systems of any country with which Canada has a treaty. There is a
remarkable irony in the assertion of LaForest J. in U.S.A. v. Schmidt that when judicial or
executive authorities are contemplating extraditing an alleged offender to a foreign jurisdiction
with which Canada has a treaty, the requesting country “must be trusted with the trial of
offences” [sic]. 19 This statement implies that Canada must trust the discretion of foreign
judges. However, under the scheme imposed by the current Extradition Act, Canada appears
not even to trust her own superior court judges, confining them largely to “rubber stamping”
functions. 20 Despite lip-service to the powers of extradition judges to effect constitutional
remedies, 21 under the current Act the real judicial power in extradition matters now resides
with the Minister of Justice. 22 The Act deliberately limits the decision-making powers of the
judiciary, and attempts to codify extradition to such a degree that there is no judicial discretion
to exercise, at least at the initial pre-hearing and hearing levels.

The International Assistance Group of the Department of Justice screens extradition
requests for adequacy of documentation and authentication before the Minister of Justice
issues an “authority to proceed” to the “Attorney General” (who in effect is himself, for both

19 Re Schmidt and the Queen, supra, note 17 at 289, per LaForest J. (Dickson C.J.C., Beetz, McIntyre and LeDain
20 Sections 24, 29.
21 Section 25.
22 Sections 40-48.
portfolios have been held by the same person for decades). The authority to proceed, which in the extradition hearing is reviewed by the extradition judge along with the certified record, is supposedly an assurance that the foreign law and charges have already been vetted by the Minister’s staff. However, in practice virtually every request is authorized by the Minister and his staff in short order, without much deliberation or “screening.” Rather, the Minister relies on the good faith of the requesting nation:

The assurance of reliability comes, not by passing the information through a Canadian evidentiary screen, but by the certification of the judicial or prosecuting authority in the requesting state — a state in which Canada has signified confidence as to the fair operation of its judicial system by entering into an extradition agreement with it.

Unfortunately, at times the certification process has been manifestly unreliable, as in *United Kingdom v. Tarantino* (2003), where a British prosecutor certified as part of the record the postulated evidence of one man who had died some 21 months previously, another man who had absconded, and a third man whose evidence she did not know would be available.

Despite these deficiencies, said Stromberg-Stein J. of the Supreme Court of British Columbia, it is the position of the Crown that there is no evidence to suggest that the certification of the current record of the case is in any way improper, fraudulent, or otherwise unreliable. It submits the certification meets the requirements of the *Extradition Act* and is admissible at the extradition committal hearing.

She did not agree, finding not only that the certifying official had not been diligent in the first place, but also that there was “evidence of a failure to act diligently to correct the situation.”

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23 Section 15.
24 Sections 24, 32.
The evidence supplied by the requesting country as part of the record is usually read by the parties rather than "heard," since it is in affidavit form; nor are the deponents of such affidavits challengeable by cross-examination, unless the evidence originated in Canada. Therefore any appeal of the judgment of the extradition hearing judge will be limited to the narrowest of grounds, such as the ground that the judge failed to consider the Charter rights of the individual. "Charter rights" in this context have been narrowly construed by the courts so that they apply not to the situation faced by the accused in the requesting nation, but only to situations having effect (or affecting them) within Canada\(^29\) -- specifically, "s. 7 only guarantees that the person sought for extradition has a fair hearing."\(^30\) Consideration of almost all other excuses, defences, exemptions and assurances is now the responsibility or prerogative of the Minister of Justice rather than the judiciary.\(^31\)

A person facing extradition never does receive a true "hearing." Since an extradition "hearing" is conducted as if it were a preliminary inquiry,\(^32\) the individual is not "heard" but simply "hears" a summary of the sworn affidavit evidence that is part of the record against him. Although the court is required to invite and to allow the accused to testify, the extradition judge is also obliged to warn the accused that anything uttered will be recorded and may be used against him in future proceedings. Persons in this situation would be foolhardy to testify, since they would subject themselves to cross-examination. Furthermore, as in a preliminary inquiry, anything inculpatory that they might say will indeed be used to bolster the case against them, while anything exculpatory will be ignored: their testimony, however


\(^{30}\) *United Kingdom v. Tarantino* (2003), supra, note 25, para. 49.

\(^{31}\) Sections 40-48.

\(^{32}\) Section 24.
exculpatory, cannot possibly rebut a "prima facie" case, if one is made out. This is a very different process from that anticipated in the Canada-United States Extradition Treaty, where the onus is on the individual to "prove" certain defences, such as the political offence exemption. Under the new Act, the person being extradited must "prove" these defences to the satisfaction of the Minister of Justice, the very person who is bent on extraditing him!

The justification for the failure of extradition judges to exercise judicial discretion to hear arguments by an accused that he or she should not be extradited derives from sections 24 and 29 which state that extradition hearings are concerned only with whether there is enough evidence to warrant putting the case before a jury – specifically, whether "there is evidence admissible under this Act of conduct that, had it occurred in Canada, would justify committal for trial in Canada on the offence set out in the authority to proceed." The British Columbia Court of Appeal went so far as to say that the judge's task was merely to assess whether there was "any" evidence that could be used to convict. Thus the chances of an accused person not being committed for extradition at the "hearing" stage are remote.

Nor is the individual "heard" at the Ministerial level, even though representations from the person sought for extradition are theoretically first given weight at this stage of the proceeding. Lawyers not used to extradition process tend to put too much stock in the ineffectual hearing process and not enough stock in the application to the Minister, where (with the exception of allegations of abuse of process affecting the hearing) all defences and excuses must be raised in the first instance if the extradition is eventually to be blocked.

Representations are made on behalf of the person by his legal counsel to the Minister, who

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33 *U.S.A. v. Wagner*, supra, note 8, at 70, alluding to the judgment of Oppal, J. sitting an extradition judge in the Supreme Court of British Columbia.
34 Paragraph 29(1)(a).
35 *U.S.A. v. Wagner*, supra, note 8 (B.C.C.A.) at 75-76, per Ryan J.A.
vets it through the International Assistance Group – a branch of the Department of Justice which, like the Minister himself, is dedicated to greasing the wheels of extradition. The Minister is obliged to consider all the information supplied by counsel. However, to what extent do the representations of counsel on paper constitute “proof” or “evidence” that can be applied in the way the statute anticipates? How can affidavit evidence adduced at this stage rebut the affidavit evidence already adduced as part of an authenticated record? All too often in the past, the Minister has justified decisions to surrender by simply pointing to the fact that a superior court judge has examined the authenticated record, has found no legal errors on its face, has determined that the person is legally extraditable, and has already committed the person for surrender.

When the individual reaches the appropriate court of appeal, again he is not “heard,” the representations of counsel on either side relying once again on the authenticated record, including the affidavits. The courts of appeal, including the Supreme Court of Canada, consistently state that deference must be given to the opinions of the Minister of Justice except in the most blatant cases of miscarriage of justice. Failure to obey the principles of procedural fairness or natural justice, including failure to hear the other side, do not in themselves appear to be a bar to surrender. The courts of appeal, ironically creatures of statute rather than of the Constitution, have been assigned specific duties as the court of first instance in judicial review of the extradition process. The Act distinguishes between appeal from the committal decision

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of an extradition judge,\textsuperscript{38} and judicial review of the Minister's surrender order.\textsuperscript{39} Given the limited role of the extradition judge, few grounds of appeal will exist, and it is likely that most successful appeals of extradition judges' decisions to order committal for surrender (as opposed to judicial review of the Minister's decision to surrender) will have been generated by the Attorney General to challenge those rare cases where an extradition judge refuses to issue an order of committal to await surrender. On the other hand, the applications for judicial review of the Minister's order of surrender will be initiated by persons who have already been ordered surrendered. Since by the time of the judicial review the individuals have already "failed" the first three steps of the statutory extradition proceedings, they enter the court of appeal judicial review process already thoroughly compromised.

In Canada, Chief Justice John Beverley Robinson lived barely long enough to rue the day he determined that sometime slave John Anderson should be sent back to Missouri, possibly to face a lynch mob for having killed a white planter. Even then, Attorney General John A. Macdonald had delusions of his own grandeur as a member of the executive: he believed, erroneously, that he had the power to hand over Anderson without any consultation with the judiciary whatsoever. A more balanced view, but one which was framed by American law and the earlier unpopular decision of Robinson, C.J., was that of Lyman Duff J., whose analysis in \textit{Re Collins} (1905) in the British Columbia Supreme Court set standards for extradition law that eventually became incorporated into the current Canadian \textit{Extradition Act}.

However, the single most influential voice in Canadian extradition law was that of Gerard Vincent LaForest, whose early scholarship and later persuasiveness as a justice on the

\textsuperscript{38} Sections 49-55.

\textsuperscript{39} Section 57.
Supreme Court of Canada presented a narrow vision that has informed most decisions that were made in the last decade of the twentieth century. As former counsel with the Department of Justice, LaForest regarded extradition as a largely administrative procedure. He saw the need to give the Minister of Justice more discretionary power than ever before, and in to turn reduce the judicial discretion exercised by superior court judges. This narrow vision is now reflected in the current Act. As LaForest’s daughter and co-author has proclaimed, barely disguising her dismay: “The reality is that Canada has gone further than virtually any other country in facilitating extradition. It has done so in the absence of strong empirical support for the view that such an incursion on the liberty of the fugitive was needed.”

The tilt in the balance from judicial to executive discretion gives so much discretionary power to the Minister that it will have a boomerang effect, for with discretionary power comes responsibility to exercise it reasonably. Recent developments in the United States and Canada, including drafting of anti-terrorism legislation arising from the horrors of the terrorist attack on America and reprisal attacks on Afghanistan as a harbourer of terrorists and on Iraq for allegedly possessing “weapons of mass destruction” and the codification of extradition procedures in the new Act compel both the Minister and the courts to exercise their discretion more often, more carefully, and more fairly than they have used it in the past in considering whether to order surrender for extradition from Canada to the United States. If justice is to be done and is to be seen to be done in extradition law and process in Canada, both the courts and the Minister of Justice must have the courage to challenge the bona fides of foreign criminal process so that they do not simply add to the burgeoning number of accused awaiting interrogation in American holding tanks. Following the example of Germany and Spain,

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40 Anne Warner LaForest (2002), supra, note 6, p. 140.
Canadian authorities will consider prosecution under domestic law as a real alternative to extradition wherever the objectivity and impartiality of the United States (or any other requesting nation) is in doubt. Seeking assurances that the death penalty will not be sought is no longer enough: now the Minister and the courts must also determine that domestic prosecution is not a viable alternative, or that abuses of process of human rights will not occur. In accordance with the time-honoured principle of extradition law, aut dedere aut judicare, a measured and reasonable response to American requests for extradition will see the Minister of Justice coordinate rather than deliberately thwart the prosecution of such persons under Canadian law. The alternative – extraditing them to face uncertain conditions, including months of incarceration and interrogation without due process or the possibility of trial – is simply unacceptable to Canadians.
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