

**COMPETING IMPERATIVES:
INDIVIDUAL RIGHTS AND INTERNATIONAL OBLIGATIONS
IN EXTRADITION FROM CANADA TO THE U.S.A.**

by

GARY BOTTING

**B.A., Trent University, 1968
M.A., Memorial University of Newfoundland, 1970
Ph.D., University of Alberta, 1975
M.F.A., University of Alberta, 1982
LL.B., University of Calgary, 1990**

**A THESIS SUBMITTED IN PARTIAL FULFILMENT OF
THE REQUIREMENTS FOR THE DEGREE OF**

MASTER OF LAWS

in

THE FACULTY OF GRADUATE STUDIES

(Faculty of Law)

We accept this thesis as conforming to the required standard

THE UNIVERSITY OF BRITISH COLUMBIA

September 1999

© Gary Botting, 1999

In presenting this thesis in partial fulfilment of the requirements for an advanced degree at the University of British Columbia, I agree that the Library shall make it freely available for reference and study. I further agree that permission for extensive copying of this thesis for scholarly purposes may be granted by the head of my faculty or department or by his or her representatives. It is understood that copying or publication of this thesis for financial gain shall not be allowed without my written permission.

Faculty of Law
The University of British Columbia
Vancouver, Canada

8 August 1999

COMPETING IMPERATIVES: INDIVIDUAL RIGHTS AND INTERNATIONAL OBLIGATIONS IN EXTRADITION FROM CANADA TO THE U.S.A.

ABSTRACT

Contemporary developments in extradition law culminating in the new *Extradition Act* mirror equally intriguing historical developments in Canada-U.S. extradition law and practice. This thesis examines the process by which each country approached extradition and treaty negotiation, historically and politically, treaty by treaty. It notes the ways in which extradition limped along in times when there was no treaty. It examines the historical background of, and the substantial body of law arising from, the three main treaties that have dealt with extradition between the United States and what is now Canada – the Jay Treaty (1794), the Ashburton-Webster Treaty (1842), and the current Canada-U.S. Treaty (1971). It analyses the legislation which establishes the procedure to be used in extradition cases in Canada, including the new *Extradition Act*, which received royal assent on 17 June 1999. It looks at the ways in which treaties and legislation have been applied by the courts and by the executive branch of successive governments. It explores and analyses the positions that the courts in Canada have taken with respect to the conflict between individual rights and international obligations. It examines the new Act in the context of relevant case law with a view to anticipating the ways in which it is likely to impact on Canada's extradition policy in the future. Finally, it suggests that in order to preserve individual rights and protections over perceived international obligations, the judiciary will have to take or be granted powers of discretion that are equal to or greater than those enjoyed by the Minister of Justice.

TABLE OF CONTENTS

Abstract	ii
List of Figures	vi
Preface	vii
CHAPTER ONE Introduction and Methodology	1
1. Extradition from Canada to the U.S.A.	1
2. Definition of Extradition	4
3. The "Double Criminality" Principle	10
4. Literature	17
5. Methodology	28
6. Chapter Synopsis	30
CHAPTER TWO To the Jay Treaty (1794): The Development of U.S. and British Foreign Policy	37
1. U.S. Treaty Negotiations During the War of Independence	37
a) John Jay and Thomas Jefferson, Negotiators	37
b) Treaties with France	39
c) The Negotiators and Extradition	40
2. U.S. Relations with Britain after Independence	41
a) The Treaty of Paris	41
b) Treaty Powers in the U.S. Constitution	43
c) British Espionage	44
3. The U.S. Assertion of Independence	46
a) Washington's Cabinet	46
b) Canada As a Haven for United Empire Loyalists	46
c) The U.S. As a Haven for Fugitives	47
4. Honouring International Commitments	49
a) Treaty Commitments vs. Extradition	49
b) Neutrality	50
5. The Jay Treaty (1794)	51
a) "Hamilton's Treaty"	51
b) Article 27	52
c) "Murder and Forgery"	54
6. Aftermath of the Treaty	57
CHAPTER THREE Misplaced "Obligations" and Displaced Rights: The Extradition of Jonathan Robbins (1799)	60
1. The Extradition of Jonathan Robbins, a.k.a. Thomas Nash	60
a) Suppression of the Case	60
b) The Crime	62
c) Presidential Intervention	65
2. The Congressional Debate	67
a) Jefferson's Campaign	67
b) John Marshall Speaks Out	69
3. The Response to Marshall's Speech	74
a) Critical Response	74
b) Presidential Response	77

CHAPTER FOUR	Between Treaties (1807-1942): The Persistence of	
	International "Obligations" over Individual Rights	79
1.	The War of 1812	79
a)	"A National Injury"	79
b)	The War That Was Won Before It Was Begun	81
c)	The Rising Star: Lt. John Beverley Robinson	82
d)	The Treaty of Ghent	84
2.	Extradition Cases without Treaty or Statute	85
a)	<i>Re Washburn</i> (1819)	85
b)	<i>Re Fisher</i> (1827)	89
c)	<i>Holmes v. Jennison</i> (1840)	91
3.	A <i>Fugitive Offender Act</i> for Upper Canada	93
a)	The <i>Habeas Corpus Act</i>	93
b)	Governor vs. Assembly in Upper Canada	94
c)	The Many Hats of John Beverley Robinson	95
d)	The "Fugitive [Slave] Offenders Act"	97
CHAPTER FIVE	The Ashburton-Webster Treaty (1842),	
	Confederacy, and Confederation	102
	The Ashburton-Webster Treaty (1842)	102
a)	The Devil and Daniel Webster	102
b)	Article "X"	104
2.	Enabling Legislation	106
3.	"The Whole of the Law"	107
4.	<i>Anderson's Case</i> (1860, 1861)	109
a)	The Crime	109
b)	Prime Minister <i>cum</i> Attorney-General John A. Macdonald	111
c)	Chief Justice Robinson's Decision	114
d)	Onwards (and Downwards) to the Court of Common Pleas	117
e)	The Critical Response to Robinson's Decision in <i>Anderson</i>	118
5.	Fallout from the Civil War	120
a)	The <i>Chesapeake Case</i>	121
b)	<i>Re Burley</i>	124
c)	The St. Albans Raiders	125
CHAPTER SIX	Legislators vs. The Courts: Post-Confederation	
	Extradition Policy	128
1.	The Canadian <i>Extradition Act</i>	128
2.	Amending the Treaty	132
3.	Procedural Wrangling in the Courts	134
a)	Late 19 th Century Wrangles	134
b)	Early 20 th Century Wrangles	135
c)	<i>Re. Gaynor and Greene</i>	136
4.	<i>Re Collins - (1, 2, 3)</i>	140
a)	No. 1	140
b)	Fool for a Lawyer	143
c)	Lyman Duff's <i>Coup de Grace</i>	147

CHAPTER SEVEN	Current Extradition Process: Treaty, Statute and Case Law	151
1.	The Current Extradition Treaty	151
a)	Extraditable Offences	151
b)	Mandatory Exceptions	154
c)	Discretionary Exceptions	156
d)	Applicable Law and Rules of Evidence	159
e)	Arrest and Transit.	161
2.	The <i>Extradition Act</i>	165
a)	Principles	165
b)	From Request to Arrest	168
c)	The Hearing	169
d)	Submissions, Appeal and Judicial Review	176
CHAPTER EIGHT	The Limitation of Judicial Discretion in Extradition Hearings	181
1.	The "Preliminary Inquiry" Test	181
2.	<i>U.S.A. v. Sheppard</i>	184
3.	Lowering the Standard of Evidence: <i>U.S.A. v. Wagner</i>	186
4.	Impact of the New Act	195
5.	Act of Commission: <i>U.S.A. v. Stewart</i>	199
6.	Act of Omission: <i>U.S.A. v. Schrang</i>	203
7.	The "Blue Carrot" Case	209
CHAPTER NINE	The Sidelining of <i>Charter</i> Rights and Protections	214
1.	Legal Rights: <i>Schmidt v. The Queen</i> (et cetera)	214
2.	Mobility Rights: <i>U.S.A. v. Cotroni</i> (et alia)	221
3.	Death Penalty Assurances and the <i>Charter</i>	228
4.	<i>Gwynne v. Canada (Minister of Justice)</i>	236
CHAPTER TEN	Balance of Power: The Minister of Justice vs. The Courts	252
1.	The Loss of [the Presumption of] Innocence	252
2.	The Presumption of Fairness	255
3.	Increased Ministerial Discretion	258
4.	Redeeming the Role of the Judiciary	260
	Canada-U.S. Extradition: A Select Bibliography	267

LIST OF FIGURES

Figure 1	Caricature of John Jay and William Cobbett, from the collection of the Historical Society of Pennsylvania . . .	59
-----------------	--	-----------

PREFACE

This project is the culmination of a decade of working with the very real human beings who are the pith and substance of some of the extradition "cases" described in the later chapters of this thesis. Concern for the individual rights of persons living in Canada but accused of crimes in alien jurisdictions arose from my own experience as a law student and later as a practitioner whose focus in part was on extradition law. Although it is not considered usual practice to delve into personal experience in a thesis of this nature, there is no question that my experience in the field impacted on my research methodology and focus. A brief reference to the key cases in which I was involved will elucidate the methodology that has been adopted in this thesis, particularly since most literature on extradition has been written by government practitioners rather than by defence lawyers in private practice.

As a law student, in 1988 I assisted a Calgary practitioner, Michael Green, with the refugee claim of "Bubba" Pursley, an itinerant furniture mover from Texas who had the words "Aryan Warrior" tattooed crudely on his arm, a by-product of incarceration in an Oregon prison. Pursley claimed that he had been beaten severely in a cemetery by federal agents in Texas before he managed to flee that part of the country, using bad cheques drawn on a Texas bank to make his way north to Canada. A Texas-wide warrant for his arrest had been issued by the district attorney in Texas, who wanted Pursley back to face charges on the bad cheques.

Canadian immigration authorities wanted Pursley out of the country. But neither Texas nor Canada wanted to become embroiled in the convolutions of formal extradition proceedings. Since Pursley was a convicted felon who had entered the country and was working without a ministerial permit, the principles of *refoulement* would normally apply by which immigration authorities could simply take Pursley to the closest border and hand him over to U.S. authorities. However, Pursley made a refugee claim on the strength of his alleged treatment at the hands of the U.S. federal agents. Elements of the far right, alerted to his plight by the press, sprung for bail. They treated his case as a *cause celebre*; the media followed his every move.

Eventually the Immigration and Refugee Board determined that there was no credible basis for Pursley's claim. Rather than sending him back to Texas, which would have amounted to a disguised extradition, Canadian immigration officials simply escorted him to the Montana border, where he was allowed to walk across unhampered.¹ Pursley stayed in Montana for several months, but eventually returned to Canada and once again sought asylum. This time he was arrested at the border and transported to Calgary in custody, where he remained until another refugee hearing was arranged. Since nothing untoward had happened to him while he was in Montana except some vague claims that he had been watched day and night, this second refugee claim, not surprisingly, was also rejected. An attempt to go before the Alberta Court of Queen's Bench on an action of *habeas corpus* was rejected by the chambers judge on the erroneous basis that only a

¹ Arrangements of *refoulement* such as this usually entail taking an individual to the closest port of entry. Since Pursley was wanted by the authorities only in Texas, Texan authorities would then have to use the elaborate internal U.S. interstate rendition procedures to obtain the fugitive's return from Montana, if they wanted to go to that expense.

member of the Law Society of Alberta already called to the Bar could bring such an application before the Court of Queen's Bench.

In the Federal Court Trial Division, Muldoon J. rejected an argument to stay Pursley's imminent deportation despite the fact that immigration officials had asserted that this time Pursley was scheduled to be flown directly to Dallas, Texas into the waiting arms of Texas police, who had been informed of Pursley's imminent return. This plan, it was argued, amounted to disguised extradition and was therefore an abuse of process. Texas clearly was not concerned enough with the charges of passing bad cheques to pursue either extradition from Canada or interstate rendition from Montana when it could have done so; so why should Canada assist in the return of Pursley specifically to Texas? Surely if Pursley was returned to Montana again, a cost-effective measure, rendition became an internal U.S. matter?

Immigration and Justice Department officials pointed out that that was the process used the first time, and it had not worked: Pursley had not got the message. Ergo, Canada Immigration officials had the right to put Pursley on any flight with a direct destination to the U.S. There happened to be a direct flight from Calgary to Dallas, Texas, and Pursley would be on it.

Predictably enough, when Pursley stepped off the plane at Dallas, the police were waiting for him at the airport. He was arrested, tried, convicted, and eventually received a two year sentence, protesting all the way that his "extradition" had been illegal.

This first foray into immigration and refugee law, with the potential of extradition in the background, led directly to my representing in 1989 the first twelve Chinese graduate students in Canada to claim refugee status in the wake of the purging of

COMPETING IMPERATIVES

Tienanmen Square of student protesters. All of the students represented had been outspoken in protesting the actions of the Chinese military in crushing student activity in Beijing. All were granted refugee status. Thereupon, an even greater challenge arose in trying to unite my Chinese clients with their families, in particular arranging for the "visit" of a six-year-old girl who was the only daughter of two of my clients who had been at the centre of protests in Calgary. Her grandfather brought her from Beijing to Vancouver, where she was instantly granted refugee status on the strength of her parents' successful claim.

My involvement in those cases led to my being selected in the spring of 1990 for an advanced criminal law practicum with Calgary practitioner Don McLeod, counsel for Charles Ng, to help research the law regarding capital punishment in California, where Ng faced charges of first degree murder in connection with alleged serial killings of some 17 women. The facts of that case were horrific enough, but the issue remained that Canada had consistently rejected the death penalty as a punishment for murder and had crafted Article 6 into the treaty with the U.S., by which Canada reserved the right not to return a fugitive accused of a capital crime to the U.S. without first obtaining assurances that the death penalty would not be administered. Article 6, with its underlying principle that the death penalty was fundamentally unacceptable to Canadians, had not been tested in the courts. Over a period of three years, McLeod pulled out every legal stop imaginable to force the courts to look at the question. Finally the Ng reference reached the Supreme Court of Canada at about the same time as the *Kindler* case, far more innocuous on its facts but involving a fugitive who had escaped lawful custody after conviction on a charge of capital murder. The two decisions, *Ng* and *Kindler*, came down

virtually simultaneously, and are often treated as a single threshold case where the return of fugitives to America to face the death penalty is concerned.

This experience in immigration, refugee and extradition law as a law student proved helpful to me while articling for Doug Christie, a sole practitioner based in Victoria, B.C., at a time when several of his higher profile cases were wending their way through the judicial systems of four provinces towards the Supreme Court of Canada. I assisted Christie with the *Malcolm Ross* case in New Brunswick, the *Keegstra* appeal in Alberta, and the *Zundel*, *John Ross Taylor* and *Imre Finta* cases in Ontario, this last a convoluted trial involving volumes of commission evidence taken in Europe over a period of months.

Finta had been a gendarme in charge of a railway station in Hungary which the Nazis had used as a clearing house for Jews bound for concentration camps. Finta's alleged complicity was confined to gathering valuables from Jews as they arrived at the station, in the context of warning them that if the Nazis found such valuables in their possession, it would be the worst for them. The Ontario Court of Appeal held that under these circumstances, a war crime had not been made out. Finta was acquitted of war crimes and allowed to remain in Canada.

Since being called to the bar in British Columbia in 1991, a substantial portion of my practice has been concerned with opposing the extradition of putative fugitives to the United States. Several of these cases have had an impact on later decisions. The cases included *U.S.A. v. Gervasoni*, involving a New Jersey man charged with the murder of his girlfriend in Florida. Gervasoni had taken on a new identity in Canada, where he lived for years before being recognized on an broadcast of *America's Most Wanted*. Gervasoni

has kept me informed of all the permutations of his trial and appeal of his conviction for the murder of his girlfriend; his case is still under review in Florida.

A second case, *U.S.A. v. Wagner, a.k.a. Peters*, concerned a Canadian Indian from the Tseycum Band on Vancouver Island, who on strong alibi evidence was demonstrably at home in Canada at the time of an alleged abduction and robbery in Redmond, Washington. He was extradited anyway. His mother, Mary Wagner, never lost faith in her son through hearing after hearing, trial after trial, appeal after appeal. David served four years in jail, the victim of overzealous police officers in the U.S. and a defective Canadian extradition system reluctant to screen out blatant injustices. He was eventually acquitted of all the charges he faced in the U.S., but this is small comfort for the pain and anguish he was put through by being surrendered to the U.S. authorities in the first place when it was demonstrated that he was in Canada at the time one set of alleged crimes was perpetrated in Redmond, Washington, and had punched in for work on the night shift at a computer factory on the other occasion. His initial conviction was on the basis of tainted evidence, including a button and an envelope allegedly "planted" by the police.

A third case, *U.S.A. v. Stewart*, concerned a former bank vice-president who was alleged to have committed extortion and bank fraud in Sacramento, California before moving to Canada with his Canadian-born wife and children to take up work as a planning official in Victoria. Ron and Alexandra Stewart and their family showed indefatigable energy in fighting extradition year after year on allegations that had originated from persons who had indulged in fraud against the Sacramento Savings Bank, pled guilty when discovered, and cut a deal with the police in which they received minor sentences provided they could implicate Mr. Stewart as the instigator of the fraud.

Stephen Schrang and his wife Diane also kept me posted as they were put through unnecessary humiliation, including incarceration of Diane in different jurisdictions in the U.S., where authorities kept one step ahead of multiple applications for *habeas corpus*. Diane was arrested by Canada Immigration officials at Nitinat Lake on Vancouver Island at a time when she and her husband were awaiting the outcome of Stephen's application for leave to appeal to the Supreme Court of Canada. In what can only be called a disguised extradition, she was unceremoniously turned over to a U.S. Marshall on the deck of an Anacortes ferry docked in Sidney, B.C. Her alleged crime? She had failed to answer a summons to attend a grand jury hearing in connection with allegations of fraud and environmental offences against her husband. Her transfer by Canada Immigration officials to the U.S. Marshall had been accomplished without any formal extradition application or hearing. After a week in Olympia, Washington, officials avoided a writ of *habeas corpus* by transporting her to San Diego, where she was housed in a holding camp designed for illegal Mexican immigrants. After two weeks, just as a second *habeas corpus* application was being processed, she was moved to Oklahoma for two weeks, still held in a special immigration jail. When a third *habeas corpus* application was processed in Oklahoma, she was moved again. It took well over six weeks before she arrived in St. Louis, where, succumbing to pressure from the court, she pled guilty as charged in exchange for time served. Meanwhile, the Shrangs' two Canadian-born sons remained in Canada, living with their father at the homes of various friends, cast in the role of true "fugitives." Predictably, the Supreme Court of Canada refused leave to appeal, and Mr. Schrang was eventually surrendered by the Minister. Escorted by relatives, his sons returned to St. Louis to be with their mother, who by then had been released. °

These cases were concerned with a huge range of issues that were dealt with by successive Ministers of Justice and panels of the British Columbia Court of Appeal. They naturally sharpened my interest in Canada-U.S. extradition, especially where the conflict between imperatives seems most evident: where individual rights appear to go head to head with Canada's much touted "international obligations." That conflict is the subject of this thesis.

I am indebted to the two members of my committee, thesis supervisor Peter Burns Q.C., and second reader Michael Jackson Q.C., who with their wonderfully divergent teaching styles have both been an inspiration. Professor Burns taught International Criminal Law at one of the most exciting times in history – when war crimes, crimes against humanity, torture and extradition issues occurring from day to day informed each seminar, from the convoluted extradition proceedings of the House of Lords in London in the case of Pinochet Ugarte (the former Chilean head of state accused by Spain of murder by torture), to the horrific revelations of torture and serial murder at the trial of Charles Ng (who had been languishing in a California jail for seven years since his extradition from Canada). Professor Jackson set an example for graduate students with his own prodigious writing in the areas of penal policy and First Nations justice. Thanks also to Professor Joel Bakan and Associate Dean Karin Mickelson, who kept LL.M. candidates on track and put us through the paces of post-post-post-modernism. The leadership skills of Betsy Symons, M.A. have also been of inestimable assistance in my insane endeavor to complete this thesis in time for convocation in this millennium.

Gary Botting
University of British Columbia
9/9/1999

**COMPETING IMPERATIVES:
INDIVIDUAL RIGHTS AND INTERNATIONAL OBLIGATIONS
IN EXTRADITION FROM CANADA TO THE U.S.A.**

CHAPTER ONE

INTRODUCTION AND METHODOLOGY

1. Extradition from Canada to the U.S.A.

“Our message is clear – Canada will not be a safe haven for fugitives from justice.” So stated Anne McLellan, Minister of Justice and Attorney General of Canada, in announcing on 17 June 1999 that the new *Extradition Act*, Bill C-40, had received royal assent.¹ Her position echoed, but was diametrically opposed to, that taken by American Secretary of State Thomas Jefferson in a letter to George Washington two centuries ago: “The laws of the United States, like those of England, receive every fugitive; and no authority has been given to our executives to deliver them up.”² Contemporary developments in extradition law culminating in the new Act mirror equally intriguing historical developments in Canada-U.S. extradition law and practice. The convoluted path from the position of Jefferson in 1791 to the position of Anne McLellan in 1999 is the subject of this thesis.

¹ “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. Hereinafter “the Act.”

² Jefferson, *Works* (ed. 1854), ii. 290; cited in A.B. Keith, ed. *Wheaton's International Law*, 6th ed., vol. 1 (London: Stevens and Son, 1929), p. 214; and in *Holmes v. Jennison* (1840), 14 Peters 538 at 548-549.

Law makers and law breakers alike have had their impact on extradition law. In particular, politicians and jurists on both sides of the border have directly shaped – and were shaped by – extradition process and policy: presidents and premiers, governors-general and attorneys-general, chief justices and chief negotiators, ministers of justice and secretaries of state. This thesis examines the process by which the United States of America and Canada, initially as a cluster of colonies of Great Britain and later as a Dominion, approached extradition and treaty negotiation, historically and politically, treaty by treaty. It notes the ways in which extradition limped along in times when there was no treaty. In particular, it examines the historical background of, and the substantial body of law arising from, the three main treaties that have dealt with extradition between the United States and what is now Canada – the *Treaty of Amity, Commerce and Navigation*, commonly called the Jay Treaty, signed at London on 19 November 1794,³ the *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*, commonly known as the Ashburton-Webster Treaty,⁴ and the current *Extradition Treaty between Canada and the United States of America*, commonly called the Canada-U.S.

³ Signed by plenipotentiary and envoy extraordinary Chief Justice John Jay for the U.S., and Principal Secretary for Foreign Affairs William Wyndham Baron Grenville for Great Britain. Ratifications advised by the U.S. Senate with amendment 24 June 1795; ratified by President George Washington with ratifications exchanged 28 October 1795; proclaimed 29 February 1796. See John Leslie, *The Treaty of Amity, Commerce and Navigation, 1794-1796: The Jay Treaty* (Ottawa: Treaties and Historical Research Centre, 1979), pp. 1-2, 7.

⁴ Also known in the U.S. as the “Webster-Ashburton Treaty,” and in Great Britain as simply the “Ashburton Treaty.” Signed at Washington on 9 August 1842 by British ambassador to the U.S., Alexander Baring Baron Ashburton for Great Britain, and Secretary of State Daniel Webster for the U.S.; ratifications exchanged at London on 13 October 1842.

Extradition Treaty.⁵ It analyses the legislation which establishes the procedure to be used in extradition cases in Canada, including the new *Extradition Act*.⁶

The thesis looks at the ways in which treaties and legislation have been applied by the courts and by the executive branch of successive governments. It explores and analyses the positions that the courts in Canada have taken with respect to the conflict between individual rights and international obligations, examining the new Act in the context of relevant case law with a view to anticipating the ways in which it is likely to impact on Canada's extradition policy.

The United States of America and Canada share the world's longest undefended border, and it is not too surprising that fugitives from justice should be able to slip across it almost at will. This undeniable geographical fact was described as early as 1905 by Lyman Duff J., then a justice in the Supreme Court of British Columbia:

...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.⁷

A deliberate, narrow geolegal focus on Canada-U.S. extradition facilitates analysis of the assumptions underlying extradition between two similar common law legal systems. It avoids the distraction of complicating factors that would necessarily arise in situations where extradition is to lands that do not honour the governing principles of western democracy. By focusing on the Canada-U.S. extradition experience in the context of both its background history and contemporary development, it should be possible to ascertain

⁵ Signed at Washington on 3 December 1971 by Minister of External Affairs Mitchell Sharp for Canada and Secretary of State William S. Rogers for the U.S. Ratifications exchanged 22 March 1976. Hereinafter "the Treaty."

⁶ *Supra*, note 1.

⁷ *Re Collins (No. 3)* (1905), 10 C.C.C. 80 (B.C.S.C.), at 105.

whether the assumptions underlying the extradition process are correct, and whether the process itself is fundamentally just and fair. We should more easily be able to determine whether the decisions made by the courts and successive Ministers of Justice accord with Canadian values, ideals, standards of justice and principles of law reflected in the treaties concluded between the two nations, in legislation adopted by Parliament, in the principles of common law developed by the courts to interpret extradition treaties and statutes, and in the *Canadian Bill of Rights* (1960), and *Canadian Charter of Rights and Freedoms*.⁸

Unfortunately, Canada has often forsaken the rights and interests of individuals in order to placate the demands of requesting states to bring alleged offenders to justice. *Charter* and other rights available to ordinary offenders in Canada have consistently and often unfairly been denied to persons accused or suspected of involvement in an extradition crime, despite their obviously vulnerable position, in favour of a supposedly “higher” interest – Canada’s “international obligations.”⁹ This thesis argues for the assertion of the individual rights of alleged offenders caught up in the extradition process.

2. Definition of “Extradition”

Extradition is the formal process by which one country demands of another the return of an accused or convicted person to face justice for conduct that constitutes a crime listed or described in a specific treaty that is punishable in both jurisdictions by a specified maximum sentence, usually one year.¹⁰ The process of extradition is not

⁸ The *Canadian Bill of Rights*, S.C. 1960 c. 44 is a federal statute, at most “quasi-constitutional”; but the *Charter* is Part 1 of *Constitution Act, 1982*, R.S.C. 1985, Appendix II, No. 44; en. *Canada Act 1982* (U.K.), c. 11 A, Constitution Amendment Proclamation, 1983, SI/84-102, Schedule B. Hereinafter “*Charter*.”

⁹ See in particular *Gwynne v. Canada (Minister of Justice)* (1998), 103 B.C.A.C. 1, 169 W.A.C. 1, per Goldie J.A. at 5, 7; leave to appeal to S.C.C. refused at (1998), 227 N.R. 298.

¹⁰ The Treaty, Article 2, as amended by Protocol on 11 January 1988.

arbitrary in that it is carried out pursuant to a treaty, international convention or other bilateral or multilateral agreement,¹¹ supported by domestic statute, in Canada by the *Extradition Act* (1999), and in the U.S.A. by United States Code, Title 18, c. 209 – *Extradition*. Neither of these statutes defines the word “extradition,” which derives from French diplomatic language.¹² Canada is a signatory to more than 40 extradition treaties,¹³ and is also signatory to a dozen international conventions that concern themselves in part with the extradition process.¹⁴ It is these treaties and conventions that define Canada’s “international obligations.”

“Extradition” was first used as a legal term in English by Thomas DeQuincey in 1839.¹⁵ It became a term of art in America in 1848,¹⁶ and was used in a dispatch between British treaty negotiator Abbott Lawrence and U.S. Secretary of State Daniel Webster in 1852 containing a “proposition...to conclude an extradition treaty with the United

¹¹ *Extradition Act* (1999) s. 2 (“extradition agreement;” formerly, “extradition arrangement”).

¹² “The word was imported into English from French, where it was first used officially in a *décret* dated 19 February 1791. The word did not appear in a treaty to which France was a party until 1828.” Ivan Anthony Shearer, *Extradition in International Law* (Manchester: University of Manchester Press, 1971) at 12.

¹³ *Canadian Encyclopedic Digest*, “Extradition,” February 1999 Release-1 (Toronto: Thompson Canada Ltd., 1999), p. 35.

¹⁴ *Convention on the Prevention and Punishment of the Crime of Genocide*, C.T.S. 1949/27; *International Convention for the Suppression of the White Slave Trade*, C.T.S. 1951/323; *Convention on Offences and Certain Other Acts Committed on Board Aircraft* (Tokyo Convention, 1963), C.T.S. 1970/5; *Convention for the Suppression of Unlawful Seizure of Aircraft* (Hague Convention, 1970), C.T.S. 1972/23; *Single Convention on Narcotic Drugs*, C.T.S. 1964/302 as amended by Protocol, C.T.S. 1976/48; *U.N. Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents*, C.T.S. 1977/43; *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, C.T.S. 1987/36; *Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation* (Montreal Convention, 1971), 1973/6 as amended by Protocol 24 February 1988; *Convention on Psychotropic Substances*, U.N.T.S. 1019/175; *U.N. Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances*, 125 *Canada Gazette* Part I, No. 1 (5 January 1991) p. 60.

¹⁵ “If the law of extradition should remain unchanged....” *Casuistry*, in *Works*, VIII, 308. No one could best DeQuincey in translating a high-sounding turn of phrase in an international context into pragmatic usage. After all, he rendered Samuel Johnson’s best couplet from *Vanity of Human Wishes* (“Let observation with extensive view / Survey mankind, from China to Peru”) thus: “Let observation with extensive observation observe mankind extensively” – a sound principle of international law! *Works*, X, 72.

¹⁶ Act of Congress, c. 167, 9 Stat. 302 (12 August 1848).

States.”¹⁷ In 1857, the term was used sardonically in *Fraser's Magazine* to refer to Italy's request to England to return Genoese revolutionary Giuseppe Mazzini to Piedmont for trial for planning several insurrections – “a demand for (we must use a foreign and un-English word to express an un-English thing) the extradition of Mazzini.”¹⁸ Finally it gained acceptance as a term of art in Great Britain with passage of the imperial *Extradition Act* of 1870.¹⁹

The concept of extradition predated the English term by millennia. An Egyptian grammar translated in 1875 referred to “the extradition clause of the Treaty between Rameses II and the king of Cheta,”²⁰ possibly the Hittite prince Hattusili III, who concluded a treaty with Rameses in about 1280 B.C.²¹ in which

provision was made for the return of the criminals of one party who fled and were found in the territory of another. ...In that treaty the Egyptian and the Hittite prince expressly agreed that a person surrendered pursuant to the treaty might not be subjected to such severe punishments as mutilation and the destruction of his house and family.²²

Even 3,000 years ago, the fair treatment of persons extradited from one nation to another was a major concern.

The *Oxford English Dictionary* defines extradition as “The action of giving up (a person) to the authorities of a foreign state; *esp.* the delivery of a fugitive criminal to the authorities of the state in which the crime was committed.”²³ The extradition process

¹⁷ *Oxford English Dictionary* (hereafter “*O.E.D.*”)(Oxford: Oxford University Press, 1933), p. 940 *s.v.* “Extradition.”

¹⁸ LVI, 161.

¹⁹ *An Act for amending the Law relating to the Extradition of Criminals*, 33-4 Vict. c. 52.

²⁰ *O.E.D.*, *supra*, note 17.

²¹ 1258 B.C., according to *Encyclopedia Britannica*, 5th ed., *s.v.* “Ramses II.”

²² Shearer, *supra*, note 12, p. 5.

²³ *Supra*, note 17.

applies to nationals of the requesting²⁴ or requested state,²⁵ although not necessarily equally so; in *U.S.A. v. Burns*, for example, the B.C. Court of Appeal found "that the Minister erred in law when he ... gave little or no weight to the applicants' [Canadian] citizenship."²⁶ The process clearly applies to visitors thought to have abused their welcome by committing a crime during their visit,²⁷ and even to visitors to countries not directly connected to the alleged crimes.²⁸

Section 5 of the Canadian *Extradition Act* expressly states: "A person may be extradited ... whether or not the conduct on which the extradition partner bases its request occurred in the territory over which it has jurisdiction." This represents a shift in Canadian practice, for in the past the alleged crime must have been actually perpetrated in

²⁴ *Idziak v. Canada (Minister of Justice)* (1992), 77 C.C.C. (3d) 65, [1992] 3 S.C.R. 631 (S.C.C.); *U.S.A. v. Stewart*; *Stewart v. Canada (Minister of Justice)* (1997), 120 C.C.C. (3d) 78 (B.C.C.A.); *Gervasoni v. Canada (Minister of Justice)* (1996), 119 W.A.C. 141, 72 B.C.A.C. 141 (B.C.C.A.), at 142, 144.

²⁵ *U.S.A. v. Burns* (1997), 116 C.C.C. (3d) 524, 8 C.R.(5th) 393 (B.C.C.A.); *U.S.A. v. Witney* (23 March 1995), unpublished Minister's Reasons supplied by Witney's counsel, Robert Moore-Stewart; *U.S.A. v. Wagner* (1995), 104 C.C.C.(3d) 66 (B.C.C.A.), leave to appeal to S.C.C. refused [1996] 2 S.C.R. xi at 68-69; *Born-with-a-Tooth v. U.S.A.*, [1987] 2 C.N.L.R. 16 (Alta. C.A.). Some nations such as Israel and Greece forbid the extradition of nationals from their soil. Canada has such a provision in Article III of her treaty with Mexico. See *United States of Mexico v. Hurley* (1997), 116 C.C.C. (3d) 414 (Ont. C.A.) at 422. Note that, for consistency and ease of reference, all references to variations of "*United States of America*" appearing in citations (including "*État-unis*," "*United States*," "*Government of the United States*," and "*United States, Government of*") are abbreviated in this thesis to "*U.S.A.*"

²⁶ *U.S.A. v. Burns*, *supra*, note 25, at 530. See Castel and Williams, "The Extradition of Canadian Citizens and Sections 1 and 6(1) of the *Canadian Charter of Rights and Freedoms*" (1987) 25 Can. Y.B. Int. L. 263. Article 6 of the Treaty states: "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."

²⁷ *U.S.A. v. Witney*, *supra*, note 25 (Witney and a friend were visiting the U.S. when they committed a robbery. They were convicted and served a substantial amount of their sentence before absconding and returning to Canada).

²⁸ In *R. v. Bow Street Metropolitan Stipendiary Magistrate, ex p. Pinochet Ugarte (No. 3)*, [1999] 2 All E.R. 97, [1999] 2 W.L.R. 825 (H.L.) (hereinafter "*Ex parte Pinochet*"), Spain attempted to extradite from the U.K. a former head of state of a third country, Chile, an unofficial visitor, for *inter alia* alleged international crimes including torture and conspiracy to torture, as well as murder. The House of Lords remitted the matter to the Home Secretary for "reconsideration" after most of the counts were dropped.

the requesting country,²⁹ even though the accused need not necessarily have entered the requesting country for the extradition crime to be deemed to have been committed there.³⁰ In *U.S.A. v. Cotroni*, the two accused, both Canadian citizens, were wanted for conspiracy to import and distribute heroin in the United States. The U.S. successfully applied for extradition of Mr. Cotroni to face trial notwithstanding the fact that “all his actions relating to the alleged conspiracy took place while he was in Canada.” The Supreme Court of Canada noted that most of the evidence and all of the witnesses were located in the U.S., and Canada had shown no interest in prosecuting the accused.³¹

While the new Act ensures that an extradition hearing will take place even where the conduct complained of by the extradition partner occurred somewhere else, under s. 47(e), the Minister has the final say as to whether the extradition is actually completed:

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

(e) none of the conduct on which the extradition partner bases its request occurred in the territory over which the extradition partner has jurisdiction.

In fact, under the new Act, the Minister of Justice has been granted substantially more discretion than previously, at the expense of the discretion of the court – a major concern, since successive ministers have been most reluctant to exercise their discretion, as we shall see, and arguably do not have the mechanism in place to make the kinds of

²⁹ *U.S.A. v. Novick* (1960), 128 C.C.C. 319 (Que. S.C.) at 328-329.

³⁰ *U.S.A. v. Cotroni* ((1989), 48 C.C.C. (3d) 193, [1989] 1 S.C.R. 1469, at 1488, 1494. The test is that the relevant evidence must be located in a requesting state that has a “real and substantial connection” to the crime, including, presumably, an interest in prosecuting the offence. See Alberto Costi, “Le Refus d’extrader dans les affaires ‘Zein’ et ‘Cotroni’: decision deraisonnable ou violation des obligations internationales du Canada?” (1986) 20 R.J.T. 485.

³¹ *Ibid.* at 1477, 1509. Canada clearly had that option, in the circumstances of a crime being perpetrated in part in both countries, but chose not to exercise it: *R. v. Knapp* (1987), 3 W.C.B. (2d) 369 (B.C. Co. Ct.). The famous maxim of Grotius, “Punish or Extradite,” comes to mind. See M. Cherif Bassiouni and Edward

determination required to test the authenticity of the claims of individuals facing extradition.

The parameters of extradition can best be defined by what it is not. Extradition is often confused with rendition, which is the rendering up or surrender of an offender from one state to another within a superseding jurisdictional umbrella; for example, from one state to another within the U.S. (“interstate rendition”) or within the British Commonwealth (“Commonwealth rendition”). Extradition and rendition are both triggered by a request from a state seeking the return of an alleged offender, but nothing precludes a nation from refusing admission to “undesirable” aliens and returning them from whence they came (“*refoulement*”). Aliens may be deemed to be undesirable by virtue of a criminal record, suspected involvement in criminal enterprises, or for some other reason such as ill health or indigence. There may also be concern about possible espionage, subversion against democratic government and a welter of other quasi-political reasons listed in Part 3 of the *Immigration Act*,³² “Exclusion and Removal.”³³

Section 27 of the *Immigration Act* has mechanisms for ejecting an undesirable alien from the country where he has not obeyed the law of the land. This occasionally happens even to permanent residents of long standing who have lived in Canada virtually all their lives, from as young as age 5, in cases where, as adults, they have been convicted of criminal offences in Canada and in the interim have failed to take out Canadian

M. Wise, *Aut Dedere aut Judicare: the Duty to Extradite or Prosecute in International Law* (Norwell: Klewer Academic Publishers, 1995).

³² *Immigration Act*, 1976-77, c. 52, as amended.

³³ *Ibid.*, s. 19.

citizenship.³⁴ This provision even extends to refugees convicted of serious criminal offences after their arrival in Canada but before they receive citizenship.³⁵

Deportation proceedings have on occasion been used in an attempt to effect what has been called by the courts “disguised extradition,” where the evidence is not strong enough to support formal extradition proceedings, but the authorities of both countries collude to achieve the same result through the immigration process. Such an abuse of process would result in the quashing of any order to deport, since the discretionary deportation powers provided by the *Immigration Act* are superseded by the special procedures outlined in the *Extradition Act*.³⁶

3. The “Double Criminality” Principle

To be an extradition crime, the alleged conduct must obey the “double criminality” principle;³⁷ that is, the conduct must constitute a crime under the domestic law of both the requesting and requested countries, the “extradition partners.”³⁸ The “general principle” of extradition as defined in s. 3 of the *Extradition Act* includes the proviso that, besides being an offence punishable by the extradition partner by imprisonment of two years or more, “the conduct of the person, had it occurred in

³⁴ *Chiarelli v. Canada (Min. of Employment and Immigration)* (1992), 16 Imm. L., R. (2d) 1, [1992] 1 S.C.R. 711 (S.C.C.); *Canepa v. Canada (Min. of Employment and Immigration)* (1992), [1992] 3 F.C. 270 (C.A.).

³⁵ Section 6(1) of the *Charter* guarantees citizens – but not permanent residents – the right to remain in Canada.

³⁶ *Kindler v. MacDonald*, [1985] 1 F.C. 676, 47 C.R. (3d) 225 (T.D.), reversed on other grounds [1987] 3 F.C. 34, 41 D./L.R. (4th) 78 (C.A.); *Bembenek v. Canada (Minister of Employment and Immigration)* (1991), 69 C.C.C. (3d) 34, 15 Imm. L. R. (2d) 229 (Ont. Ct. (Gen. Div.)).

³⁷ *Ex Parte Pinochet*, *supra*, note 28, per Lord Browne-Wilkinson and Lord Hope of Craighead; *U.S.A. v. Schrang* (1997), 114 C.C.C. (3d) 553 (B.C.C.A.); *Re McVey*, *U.S.A. v. McVey* (1992), 77 C.C.C. 1, [1992] 3 S.C.R. 475 (S.C.C.) [B.C.], at 519; *U.S.A. v. Soffitt*, [1993] B.C.W.L.D. 2732 (B.C.C.A.).

³⁸ *Extradition Act*, s. 2 (“extradition partner.”).

Canada, would have constituted an offence that is punishable in Canada” by an equivalent penalty. Note that the penalty specified in the Act is twice that specified in the Treaty, but provisions in the Act are subject to the Treaty by the exercise of s. 3(1)(a) and 3(1)(b)(ii). Subsection 3(3), a new provision, allows extradition only if the residual sentence to be served in the requesting country is more than six months.

Formerly, it was required that the alleged crime had to be an “extradition crime” listed in the extradition treaty between Canada and the requesting country or in a schedule appended either to the treaty or the Act or both.³⁹ In *Washington (State) v. Johnson*,⁴⁰ Wilson J. cited LaForest’s *Extradition to and from Canada*⁴¹ in support of the notion that

- (1) the act charged must have been committed within the jurisdiction of the demanding state;
- (2) it must be a crime in the demanding state;
- (3) it must also be a crime in the requested state; and
- (4) it must be listed in an extradition treaty between the two states under some name or description by which it is known in each state.⁴²

Where Canada-U.S. extradition is concerned, clauses 1 and 4 of LaForest’s list are no longer accurate. Now, the sole determining factor is whether the alleged conduct is supportive of a criminal offence in the requested country punishable by a year or more (in the Canada-U.S. Treaty) or two years or more (in the Act).

A succinct description of the function of double criminality is given by I.A.

Shearer in *Extradition in International Law*:⁴³

³⁹ *U.S.A. v. Smith* (1984), 15 C.C.C. (3d) 16; affirmed 16 C.C.C. (3d) 10 (Ont. H.C.); *Re McVey*, *supra*, note 32, at (S.C.R.) 519, 527-528, 536-537; *Canada v. Barrientos*, [1997] 1 S.C.R. 531; *U.S.A. v. Dynar* (1995), 25 O.R. (3d) 559 (C.A.), reversed on other grounds (1997), 115 C.C.C. (3d) 481 (S.C.C.) (money laundering).

⁴⁰ (1988), 40 C.C.C. (3d) 546 (S.C.C.).

⁴¹ 2nd ed. (Aurora: Canada Law Book, 1977), p. 42; see also 1st ed. (New Orleans: Hauser, 1961), p. 31; 3rd ed. (Aurora: Canada Law Book, 1991), p. 49.

⁴² *Washington (State) v. Johnson*, *supra*, note 40 at 553.

⁴³ *Supra*, note 12, pp. 137-138..

...The double criminality rule serves the most important function of ensuring that a person's liberty is not restricted as a consequence of offences not recognized as criminal by the requested State. The social conscience of a State is also not embarrassed by an obligation to extradite a person who would not, according to its own standards, be guilty of acts deserving punishment.

The Supreme Court of Canada first addressed the issue of double criminality in *Cotroni v. Attorney-General of Canada* in 1974,⁴⁴ in which Spence J., speaking for the entire court, implied that the underlying "essence" of the crime rather than the way a crime is labelled or categorized, is the most important factor:

I am of the opinion that it matters not whether the particular indictment, had it been laid in Canada, would have been laid under the provisions of the *Criminal Code* or the *Narcotic Control Act* or in fact any other statute. The test is what is the essence of the crime charged.⁴⁵

Expanding on this approach to double criminality, Wilson J. for the majority in *Washington (State) v. Johnson*⁴⁶ set out the principle that the "criminality" should be conduct-based. In that case, Johnson, a Canadian, had entered into an agreement with a Washington couple to purchase a Lowrey Organ subject to his being satisfied with it after a 30-day trial period. At the end of the 30 days, he did not return the organ, did not pay for it, and was not to be found. The couple pressed charges.

Johnson was arrested in Seattle and charged with theft in the second degree. Hoping for a quick disposition (Canadian style), he pled guilty. To his surprise, he was sentenced to the maximum of 5 years in jail. A few months later, he escaped custody and returned to Canada.

⁴⁴ (1974), 18 C.C.C. (2d) 513, [1976] 1 S.C.R. 219 (S.C.C.) Not to be confused with *U.S.A. v. Cotroni* (1989), 48 C.C.C. (3d) 193, [1989] 1 S.C.R. 1469 (S.C.C.), in which, 15 years later, similar issues were raised on similar facts (whether conspiracy to import narcotics is a criminal offence that meets the test of double criminality),

⁴⁵ *Cotroni* (1974), *supra*, note 44 at S.C.R. 222.

⁴⁶ *Supra*, note 40, at 327.

One of the major questions considered by the Court was whether the crime with which he had been charged and convicted corresponded with the crime of theft in Canada. To make this determination, Wilson J. looked at the foreign law, as much as she was able:

...There are two methods by which double criminality could be established....First, it could be established that Washington law required fraudulent intent for a conviction of the offence charged. This could be done either by showing that the text of the offence includes a requirement of fraudulent intent or by calling expert witnesses to testify that while fraudulent intent is not a requirement apparent on the face of the Washington statute, it is nevertheless required by the law of Washington. If either of these be shown, then evidence of a conviction under Washington law would constitute evidence that the fugitive's conduct would have amounted to theft under Canadian law. In this case, however, the text of the foreign law provided by the requesting state pursuant to Article 9(2) of the Treaty did not show that the Washington law required fraudulent intent. Neither was any expert evidence called on this issue.

The second method of showing that the double criminality requirement had been met would be to establish that the particular facts underlying the Washington charge would, if replicated in Canada, constitute an offence under either s. 283(1) or s. 290(1) of the *Criminal Code*. This was not done either.⁴⁷

The Washington offence of theft did not require an element of fraud that is clearly required in Canadian law. Furthermore, the extradition judge had erred when he concluded that the court could "infer" fraudulent intent by the fact that the organ had not been returned. Johnson might simply have forgotten to bring the organ back, or perhaps didn't have the means to do so.⁴⁸ Since the State had not met the double criminality test – had not even proved that Johnson had been convicted – Johnson was discharged.

In contrast to Wilson J.'s decision in *Johnson*, LaForest J. held in *U.S.A. v. Lepine* that even though the hearing under the *Extradition Act* requires dual criminality, the extradition judge is not required to – or even entitled to – consider the validity of foreign

⁴⁷ *Ibid.*, at 345-346.

⁴⁸ *Ibid.*, at 346.

law,⁴⁹ for it is presumed that the authorities making the extradition application are familiar enough with the domestic law of their own country to know whether the conduct constitutes a crime there, and that they would not bring a frivolous application if the conduct did not constitute a crime. However, as Wilson J. demonstrated, in practice some judges do look at the foreign law,⁵⁰ and have found it helpful in determining whether the allegations meet the test of double criminality.

In *U.S.A. v. Stewart*, for example, Hall J.A. discovered that “extortion” under the federal law of the United States bore no resemblance to Canadian “extortion” since it lacked the objective element of threat. He could not have made this determination without considering the foreign law.⁵¹ The assumption that it was not necessary to examine the character of the foreign law seemed to work an obvious injustice in later proceedings in *Stewart*, however, on the two residual charges of “bank fraud” that the former bank official faced in the U.S. There is no corresponding charge in Canada; however, for the conduct alleged, Stewart would have been liable to face prosecution for simple fraud. Since the only amount of the fraud specified was under \$5,000, and fraud under \$5,000 is a “hybrid” offence, it was open to the Court to find that, had Stewart been prosecuted in Canada, he would only face the summary conviction maximum sentence of 6 months. As an indictable offence, he faced a maximum of two years. However, under

⁴⁹ *U.S.A. v. Lepine* (1994), 87 C.C.C. (3d) 385, [1994] 1 S.C.R. 286 (S.C.C.), at 297. See Michael C. Blanchflower, “Interpretation and Application of Extradition Crime in the Extradition Act” (1992) 34Crim L.Q. 158, at 171-174, which is quoted with approval by LaForest J. in *McVey*, *supra*, note 32 at 512-513.

⁵⁰ See, for example, *Re Collins (No. 3)*, *supra* note 7.

⁵¹ *U.S.A. v. Stewart*, *supra*, note 24. (1997), 120 C.C.C. (3d) 78 (B.C.C.A.).

the specialized U.S. federal bank fraud laws, for the same conduct, Stewart faced a maximum sentence of 30 years plus a million dollar fine!⁵²

This type of sentencing disparity is bound to result when the only relevant issue before the extradition judge, with respect to determining whether the conduct constitutes an extradition crime, is whether it meets the test of criminality in Canada punishable by one year in prison. In *U.S.A. v. Manno*, Manno was charged in the U.S. with being involved in a "continuing criminal enterprise." The court looked not at whether there was a similar charge in Canada (there isn't), but whether the criminal activity implied in the American charge violated Canadian law (it did).⁵³ By contrast, in the related case of *U.S.A. v. Tavormina*, the Quebec Court of Appeal ruled that Tavormina (who was co-accused with Manno) was properly discharged on an extradition application from the U.S. based on a charge of conspiracy to import cocaine, even though the evidence disclosed at the extradition hearing was enough to establish a *prima facie* case against the accused for conspiracy to possess cocaine for the purposes of trafficking. The extradition judge had ruled, correctly, that although the double criminality rule is based on the conduct of the "fugitive" falling under the criminal law of both countries, the "conduct" that must be considered by the extradition court is that arising from the foreign allegations. For the Court, Proulx J.A. held:

I do not believe that the double criminality rule permits an extradition judge to base his decision on evidence of certain conduct and to order the fugitive committed for surrender in the foreign state when this evidence has nothing to do with the conduct charged in the accusation for which his extradition is sought.

⁵² *Stewart v. Canada (Minister of Justice)* (1998), 131 C.C.C. (3d) 423 (B.C.C.A.).

⁵³ *U.S.A. v. Manno* (1996), 112 C.C.C. (3d) 544 (Que. C.A.) at 555, 560. See also *Doyer v. Canada (Minister of Justice)* (16 May 1995) Montreal 500-10-000215-945 (Que. C.A.); *Doyer v. Centre de prevention de Montreal*, [1991] R.L. 214 (Que. C.A.); *U.S.A. v. Doyer*, [1993] 4 S.C.R. 497, 85 C.C.C. (3d) 192.

In other words, although specific facts can, on occasion, indirectly support other charges, one must keep in mind that they must be analyzed having regard to the conduct alleged in the accusation. The link or connection of relevance is essential....

It is necessary therefore to make a distinction between the facts which generate the conduct charged in the accusation and the circumstances surrounding the commission of the act charged.⁵⁴

Judges are not the only officials in the extradition process who are governed by the “double criminality” principle. Under s. 15, the Minister may seek an order for committal if “satisfied that the conditions set out in paragraph 3(1)(a) and subsection 3(3) are met.” Under paragraph 15(3)(c), the “authority to proceed” issued from the Minister to the Attorney General must name “the offence or offences under Canadian law that correspond to the alleged conduct of the person or the conduct in respect of which the person was convicted, as long as one of the offences would be punishable in accordance with paragraph 3(1)(b).”

The relevant law to be applied in any given case is the law in force in Canada at the time of the offence, as reflected in the applicable treaty.⁵⁵ The *Extradition Act* and the various treaties ideally go hand in glove, as is inferred from the “general principle” of s. 3, which states, “A person may be extradited from Canada in accordance with the Act and a relevant extradition agreement....”⁵⁶ Where there is an inconsistency, the Treaty must prevail.⁵⁷ The fact that a treaty or convention has not come into force at the time of the

⁵⁴ *U.S.A. v. Tavormina* (1996), 112 C.C.C. (3d) 563 (Que. C.A.), at 569-570.

⁵⁵ *Re McVey*, *supra*, note 32, at (C.C.C.) 39, 43.

⁵⁶ In the *Extradition Act*, ss. 3(1)(a), 3(1)(b)(ii) and 3(3) and ss 6 and 59 are all “subject to a relevant extradition agreement.” In turn, s. 12 authorizes provisional arrest if the offence is “punishable in accordance with paragraph 3(1)(a).”

⁵⁷ See *Re McVey*, *supra*, note 37, at (C.C.C.) 12.

alleged crime,⁵⁸ or that the appropriate activating international protocol has not yet been signed, does not prevent extradition.⁵⁹

4. Literature

Except for practical annotated guides such as *Martin's Related Criminal Statutes*⁶⁰ and the *Canadian Encyclopedic Digest*,⁶¹ little has been written on the Canadian extradition experience from the vantage point of the legal practitioner representing individuals facing extradition.⁶² Early Canadian judgments relied on Sir G. Edward Clarke's *A Treatise upon the Law of Extradition*⁶³ (the classic British text on the

⁵⁸ *Extradition Act*, s. 6: "Subject to a relevant extradition agreement, extradition may be granted under this Act whether the conduct or conviction in respect of which the extradition is requested occurred before or after this Act or the relevant extradition agreement or specific agreement came into force."

⁵⁹ *Brisson v. U.S.A.* (1994), 61 Que. A.C. 198. In *U.S.A. v. Allard* (1987), 33 C.C.C. (3d) 501, [1987] 1 S.C.R. 564 (S.C.C.), the Supreme Court of Canada rejected the argument of the alleged hijacker of an airplane that no extraditable crime had been committed since at the time of the alleged hijacking, Canada had not yet signed the 24 February 1988 protocol amending the *Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation*.

In the United Kingdom, the issue whether the treaty or the enabling legislation takes precedence in determining whether an extradition crime has been perpetrated was definitively resolved in the same way by the House of Lords in *Ex Parte Pinochet, supra*, note 28, a decision released on 24 March 1999. Pinochet, the former head of state of Chile, faced allegations from Spain that amounted to 32 criminal charges under the law of the U.K., including torture, conspiracy to torture, conspiracy to take hostages, murder, conspiracy to murder, and attempted murder, alleged to have occurred between 1 January 1972 and 1 January 1990. Spain alleged that some of the crimes had been committed on its territory. The issues before the court were 1) whether any extradition crimes obeying the double criminality rule were alleged, and 2) if so, whether Pinochet, as former head of state of Chile, was immune from prosecution. The entire Court agreed that the conduct alleged amounted to an extradition crime as of 29 September 1988, the date that the enabling legislation for the Torture Convention came into force, rather than 8 December 1988, the date the Torture Convention was signed by the U.K. (Chile had signed the Convention on 30 October 1988). Lord Millett took a more expansive view than the rest of the Court: that Pinochet was answerable for all offences alleged to have occurred in Spain and all allegations of torture or conspiracy to torture "wherever or whenever carried out." The question of the effective date of personal immunity for Pinochet was more problematic, but not of great consequence to us here.

⁶⁰ Edward L. Greenspan and Marc Rosenberg, eds., *Martin's Related Criminal Statutes 1998-99* (Aurora: Canada Law Books, 1998), pp. 436-501.

⁶¹ Anne Warner LaForest *et al.* "Extradition," *Canadian Encyclopedia Digest* (Toronto: Carswell, 1999).

⁶² See Michael C. Blanchflower, "Examination of the Law of the Requesting State in Extradition Proceedings," (1992) 34 *Crim.L.Q.* 277; and "Interpretation and Application of Extradition Crime in the Extradition Act," (1992) 34 *Crim.L.Q.* 158; and Sharon A Williams, "Extradition to a State that Imposes the Death Penalty" (1990) 28 *Can. Y.B. Int. L.* 117. Other case commentaries and academic articles, mostly American, are listed in the bibliography.

⁶³ 4th ed. (London: Stevens & Haynes, 1903).

subject),⁶⁴ and earlier British books,⁶⁵ while American prosecutors enjoyed the advantage of John Bassett Moore's *A Treatise on Extradition and Interstate Rendition*,⁶⁶ a well-formulated analysis written by the pre-eminent civil servant responsible for the process in America, initially published with the cooperation of the U.S. government. Moore was free to draw on government statistics that he himself had earlier published in an official report while still in the government's employ,⁶⁷ and was able to quantify extraditions to and from the U.S. for various extraditable crimes, down to the last case.

When it came to Canada, however, Moore was painfully short on data, apparently lumping together the statistics for Canada and Great Britain. The U.K. had been the *bona fide* representative of Canada to the U.S., where extradition was concerned, since the passage of the short-lived Jay Treaty of 1794⁶⁸ almost a century prior to the publication of Moore's book.⁶⁹ Suffice to say that in 1905, *Moore on Extradition* was recognized by Lyman Duff J., then of the Supreme Court of British Columbia, as "the leading American text-book on the subject"⁷⁰ to the extent that he followed Moore rather than a conflicting judgment by two judges of the Upper Canada Queen's Bench in *Re Anderson*.⁷¹

⁶⁴ See, for example, the remarks of Lampman, Co. J. in *Re Collins (No. 2)* (1905), 10 C.C.C. 73 at 79.

⁶⁵ Samuel Spear, *The Law of Extradition: International and Interstate* (1885, republished Littleton: Rothman & Co. 1983); Vattel, *Law of Nations* at 248; Woolsey, *International Law* at 185. See "Extradition Practice" at 9 C.C.C. 264.

⁶⁶ Cambridge, Mass.: Boston Press, 1891.

⁶⁷ *Extradition*, a Report (Washington: U.S. Government, 1889).

⁶⁸ The Jay Treaty, *supra*, note 3, which *inter alia* provided for the exchange of offenders between the U.S. and Britain, was apparently never used for this purpose, and expired in 1807, 12 years after exchange of ratifications. See Clarke, *supra*, note 63 at 92; and Harvard Research in International Law, "Extradition" (1935), 29 Am. J. Int. L. Supp. 15 at 41-42.

⁶⁹ The relevant text of the treaty *vis-a-vis* extradition is to be found in Moore, *supra*, note 66, Appendix A.

⁷⁰ *Re Collins (No. 3)*, *supra*, note 7, at 99 (S.C.B.C.).

⁷¹ *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.

Initial forays into the subject of extradition in Canada were curiously inept. *Canadian Criminal Cases* published a lexicon of extradition terms in 1905,⁷² but the alphabetical organization was not particularly helpful even as an index, as a review of the first few headings reveals:

Anderson's case
Appeals
Application of Extradition Act
Arrest of fugitive
Articles in possession of fugitive
Assault with intent to commit murder
Authentication of foreign documents

This fractured compendium remained the most ambitious academic treatise on the subject of Canadian extradition practice until 1960.

In the 1950s, Gerard Vincent LaForest worked in the Department of Justice in Ottawa, putting together a manuscript on extradition law. LaForest published the first edition of his text, *Extradition to and from Canada*,⁷³ which by his own admission was initially prepared for the Department of Justice,⁷⁴ through a press in New Orleans. A second edition, much expanded, was released in 1977. Later, LaForest distinguished 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, towing an unabashedly establishmentarian line.⁷⁵

⁷² "Extradition Practice," 9 C.C.C. 264.

⁷³ *Supra*, note 41.

⁷⁴ "Since the work was originally prepared for official purposes," G.V. LaForest wrote in the preface to the first edition, "I have refrained from criticizing the legislation." *Ibid.*, p. vii.

⁷⁵ *Schmidt v. The Queen*, [1987] 1 S.C.R. 500, 33 C.C.C.(3d) 193 (S.C.C.) [Ont.]; *Republic of Argentina v. Mellino* (1987) 33 C.C.C. (3d) 334; *U.S.A. v. Allard*, [1987] 1 S.C.R. 564, 33 C.C.C. (3d) 501; *Kindler v. Canada (Minister of Justice)* (1991), 67 C.C.C. (3d) 1 (S.C.C.) [Fed.]; *U.S.A. v. Cotroni*, [1989] 1 S.C.R. 1469, 48 C.C.C. (3d) 193 (S.C.C.) [Que.]; *Re McVey* (1992), 77 C.C.C. (3d) 1, [1992] 3 S.C.R. 475 (*sub nom* *McVey v. United States of America*); *Idziak v. Canada (Minister of Justice)* (1992), 77 C.C.C. 65, [1992] 3 S.C.R. 631; *U.S.A. v. Lepine*, [1994] 1 S.C.R. 286, 87 C.C.C. (3d) 385; *R. v. Harrer*, [1995] 3

Usually LaForest's decisions were endorsed by his compeers 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 decades it was the *only* book – on Canadian extradition law.⁷⁶

The subject of extradition in Canada up to 1991 was exhaustively examined in the third edition of *LaForest's Extradition to and from Canada*,⁷⁷ in which Anne Warner LaForest greatly expanded on the earlier work by her father. Still, even the current edition reflects an establishmentarian tone extolling, for example, the virtues of a "liberal interpretation" of the Treaty in favour of meeting Canada's "international obligations." The book focuses heavily on Mr. Justice LaForest's main judgments up to 1990 (it is, after all, "*LaForest's Extradition...*") referring most often to the 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 page⁷⁸), *Argentina v. Melino* appears on 37 pages, and *U.S.A. v. Allard* on 24 pages. The later case of *U.S.A. v. Cotroni* (1989) is referenced on 20 different pages of the text. Occasionally, LaForest even cites LaForest citing LaForest.⁷⁹ 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

S.C.R. 562, 101 C.C.C. (3d) 193; *U.S.A. v. Dynar* (1997), 115 C.C.C. (3d) 481. Citations of cases already referred to are repeated here for ease of reference.

⁷⁶ Notable exceptions are monographs of individual cases, and biographies of individuals subjected to the extradition process. See for example Patrick Brode, *The Odyssey of John Anderson* (Toronto: University of Toronto Press, 1989); and for less sophisticated readers William Teatero, *John Anderson, Fugitive Slave* (Kingston, Ont.: Treasure Island Books, 1986).

⁷⁷ (Aurora, Ont.: Canada Law Book), 1991.

⁷⁸ See p. 113, for example.

⁷⁹ See for example p. 106, when Anne LaForest quotes LaForest J.'s majority judgment in *Cotroni* citing LaForest's majority judgment in *Schmidt*.

Washington (State) v. Johnson (1988),⁸⁰ 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.,⁸¹ that courts should be prepared to examine foreign law in the course of extradition deliberations.

Just as interesting is LaForest J.'s response to the release of his daughter's upgrade of his book in *U.S.A. v. McVey* (1992),⁸² 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 law synoptically. In the course of the judgment, LaForest J. refers on at least 13 occasions to Anne LaForest's book, 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 U.S. with exporting high-tech electronic components to the U.S.S.R., in the process making false statements to U.S. Customs.

Given LaForest J.'s insistence that "liberal" treaty interpretation should inure to the benefit of the state rather than the individual, Anne LaForest's book is 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. Furthermore, considering that this is the text quoted again and again by various courts, especially the Supreme Court of Canada, as the primary accessible academic authority on

⁸⁰ 40 C.C.C. (3d) 546, [1988] 1 S.C.R. 327 (S.C.C.).

⁸¹ In *Re Collins* (No. 3), *supra*, note 7.

⁸² 77 C.C.C. (3d) 1, [1992] 3 S.C.R. 475.

the subject of extradition, the book has glaring inaccuracies, most of them repeated from the first edition, that should be addressed.

Possibly in an attempt to preserve the *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 following chapters, 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 U.S. was more closely allied to France than to Britain, with whom France was at war. Tensions between Britain and the U.S. ran high, because the U.S. 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 U.S. 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.” The last thing the successive governors of British North America would contemplate doing during this time is send an alleged fugitive offender back to the U.S. to stand trial. The same applied to America, which Thomas Jefferson had declared to be not only “home of the free” but “home of the fugitive.” 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 U.S. asking for any fugitive to be returned during this period, and for many years thereafter. The U.S. 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 U.S.⁸³

The single case in which the provisions of the Jay Treaty were used to transfer custody from America to Britain ended in catastrophe for both the alleged fugitive, Jonathan Robbins (he was hanged and gibbeted) and for the members of the American government who gave him up (Secretary of State Timothy Pickering was fired, and President John Adams lost his bid for re-election). This was huge news at the time, and the political fall-out is well documented, as we shall see in Chapter Three. After that, Jefferson came to power, still unutterably opposed to extradition and to cooperating with the British. He remained in power until after the Jay Treaty expired.

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.” As we shall see in Chapter Four, this too is a false statement. There is no

⁸³ Jefferson, *Works* (ed. 1854), ii. 290; cited in *Wheaton's International Law*, 6th ed., A. Berriedale Keith,

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),⁸⁴ 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.⁸⁵

There is only one documented case of Canada actually surrendering anyone to the U.S. prior to the signing of the Ashburton-Webster Treaty in 1842 – the case of a black slave, Nelson Hackett, who in 1841 (again on the advice of Chief Justice Robinson, this time to the newly installed Governor, Sir Charles Bagot) was sent back to Arkansas and slavery for “stealing” a horse, saddle, watch and coat to make his trip north. Bagot reported to the Colonial Secretary, Lord Stanley, that in his opinion “Hackett had taken items superfluous to his needs for escape.” Besides, Bagot wrote, he didn’t want to turn Canada into “an asylum for the worst characters provided only that they had been slaves before arriving here.”⁸⁶ 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.

LaForest goes on to say that “in 1819 one Daniel Washburn was extradited from the United States to Canada on a charge of theft.”⁸⁷ In fact, Washburn was not

ed. (London: Stevens and Sons, 1929), p. 214; and in *Holmes v. Jennison* (1840), 14 Peters 538 at 548-549.

⁸⁴ (1827), first reported in 1872 at Stu. K.B. 245.

⁸⁵ J.M. Leask, “Jesse Happy: A Fugitive Slave from Kentucky” (1962) 54 *Ontario History* 87, at 98.

⁸⁶ Brode, *supra*, note 76, at 19

⁸⁷ LaForest, *supra*, note 77, at 3.

surrendered. He was discharged by the court for lack of evidence.⁸⁸ LaForest continues, “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.” While Reid C.J. followed the *obiter dicta* of *Washburn* to conclude that the executive had the authority to send Fisher back, executive policy of Britain at the time, supported by the English Law Lords, precluded return of alleged fugitives to a requesting country. Although the pre-eminent British authority on extradition, Sir Edward Clarke, also assumed that Fisher had been returned, he wrote that, prior to the Ashburton-Webster Treaty of 1842,

There 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.⁸⁹

He went on to note that in a case originating in the Bahamas, the Attorney-General and Solicitor-General of England both advised the Lieut.-Governor that he had no right by the law of England to detain anyone in custody for breaking the laws of other nations.⁹⁰

Many texts on international criminal law treat extradition as a specific significant subject heading,⁹¹ and American and British scholarship on extradition law has been prolific. In 1935, Harvard University Faculty of Law, under the rubric of Harvard Research in International Law, published “Extradition,” a comprehensive and helpful

⁸⁸ *Re Washburn* (1819), 3 Wheeler’s Criminal Cases 473.

⁸⁹ Edward Clarke, *A Treatise upon the Law of Extradition* 2nd ed. (London: Stevens and Hanes, 1874) at 109.

⁹⁰ *Ibid.*, at 109-110.

⁹¹ See for example Michael Abbell, *International Judicial Assistance*, volumes 4 and 5 of which deal with International Extradition; Elizabeth Beyerly, *Public Information Law: A Guide to Information Sources* (London: Mansell, 1991); Geoff Gilbert, *Aspects of Extradition Law*, being volume 17 of *International Studies in Human Rights* (Norwell: Kluwer Academic Publishers, 1991).

supplement to the *American Journal of International Law*.⁹² Other texts on general extradition in the U.S. that have application to Canada, if only by extension, are Kavass and Sprudz, *Extradition Laws and Treaties*,⁹³ Biron and Chalmers, *The Law and Practice of Extradition*,⁹⁴ and Vredevelt et al., *International Extradition*.⁹⁵ Perhaps the most comprehensive American text is M. Cherif Bassiouni's *International Extradition: United States Law and Practice*,⁹⁶ which as the name implies focuses on American law to the exclusion of other experience, including Canadian law.

One U.S. press published a text on British extradition law,⁹⁷ but the British academic presses have published their own share of textbooks on extradition. In 1971, I.A. Shearer published *Extradition in International Law*,⁹⁸ which deftly applied general principles of extradition to the British, American and continental European experience, but paid little attention to Canada, citing a total of 16 cases, only one of which was dated after 1960. His chapter on the framework of extradition, including the "duty" to extradite, is particularly lucid. None of the more recent British textbooks on extradition, including Stanbrook and Stanbrook, *The Law and Practice of Extradition*,⁹⁹ Joyce M. Ferley, *Law and Procedure of Extradition*,¹⁰⁰ and Alun Jones, *Jones on Extradition*,¹⁰¹ deal with the specifics of Canadian law and practice, however.

⁹² *Supra*, note 68.

⁹³ (Buffalo: Hein, 1979).

⁹⁴ (Littleton: Rothman, 1981).

⁹⁵ (Washington: International Law Institute, 1995).

⁹⁶ 3rd ed. (Dobbs Ferry, NY: Oceana Publications, 1996).

⁹⁷ V.E. Hartley Booth, *British Extradition Law and Procedure* (Germantown, MD: Sijthoff & Noordhoff, 1981).

⁹⁸ *Supra*, note 12.

⁹⁹ (Chichester: Rose, 1980).

¹⁰⁰ (Crayford: Shaw & Sons, 1994).

¹⁰¹ (London: Sweet & Maxwell, 1995).

Of particular assistance in examining the pertinent history of Upper Canada at the time of early extradition cases were two books by Patrick Brode published by the Osgoode Society: *Sir John Beverley Robinson: Bone and Sinew of the Compact*,¹⁰² and *The Odyssey of John Anderson*.¹⁰³

Much of the legal scholarship on extradition law appearing in law journals has been concerned with *Charter* rights. Of these, the most helpful are J.G. Castel and Sharon A Williams, "The Extradition of Canadian Citizens and Sections 1 and 6(1) of the *Canadian Charter of Rights and Freedoms*";¹⁰⁴ James McCann, "United States v. Jamieson: the Role of the Canadian *Charter* in Canadian Extradition Law";¹⁰⁵ Paul Michell, "Domestic Rights and International Responsibilities: Extradition under the *Canadian Charter*";¹⁰⁶ Amanda Spencer, "Fugitive Rights: the Role of the *Charter* in Extradition Cases";¹⁰⁷ and Sharon Williams, "Extradition from Canada since the Charter of Rights."¹⁰⁸ The reluctance of Ministers of Justice to seek guarantees that the death penalty will not be imposed has generated nearly as many articles, the most helpful of which are Allan Manson's case commentary, "*Kindler* and the Courage to Deal with American Convictions";¹⁰⁹ John Pak, "Canadian Extradition and the Death Penalty: Seeking a Constitutional Assurance of Life";¹¹⁰ William A. Schabas, "*Kindler* and Ng:

¹⁰² (Toronto: University of Toronto Press, 1984).

¹⁰³ (Toronto: The Osgoode Society, 1989).

¹⁰⁴ (1987), 25 Can. Y.B.Int.L. 263-299.

¹⁰⁵ (1997), 30 Cornell Int. L. J. No. 1, 139.

¹⁰⁶ (1998) 23 Yale J. Int'l L. 141.

¹⁰⁷ (Winter 1993), 51 U.T. Fac. L. Rev. 54-79.

¹⁰⁸ In Jamie Cameron, ed. *The Charter's Impact on the Criminal Justice System* (Scarborough: Carswell, 1996), pp. 387-411.

¹⁰⁹ (Jan. 1992), 8 C.R. (4th) 68-81.

¹¹⁰ (Winter 1993), 26 Cornell Int. L.J. No. 1, 239.

Our Supreme Magistrates Take a Frightening Step into the Court of Public Opinion”;¹¹¹ Sharon Williams, “Extradition to a state that imposes the death penalty”;¹¹² and the U.N. Human Rights Committee review, “Extradition to the United States Even at Risk of Death Penalty and Death Row Phenomenon Not Considered to Violate the *CCPR*.”¹¹³

5. Methodology

The courts have ruled more or less consistently that “international obligations” compel the requested country to comply with the will of the alien nation on the scantiest of evidence – in fact on the basis of any evidence at all that may have put the person labelled “the fugitive” at the right place at the right time (from the point of view of the prosecution) or the wrong place at the wrong time (from the point of view of the accused).¹¹⁴ Cases of mistaken identity and other miscarriages of justice are bound to occur when there is no sanction against officials taking short-cuts, or tampering with the evidence, or making misrepresentations as to the facts or as to the true character of the alleged foreign offence. Nor are the long-term consequences for alleged offenders factored into the equation by Canadian courts or Ministers of Justice. The extradition practitioner soon receives a strong impression that his clients are being fed, systematically, to the wolves.

It was with this attitude, frankly, that I first approached the topic of extradition law with a view to writing this thesis. Having read most of the more recent judgments, I

¹¹¹ (Nov., 1991), 51 R. du B. 673-691.

¹¹² (1990) 28 Can. Y.B. Int. L. 117-168.

¹¹³ (30 Nov. 1993), 14 Human Rights L.J. No. 9-10, 307 (a case commentary on *Kindler*).

¹¹⁴ See Chapter Eight below, in particular the description of the case of *U.S.A. v. Wagner* (1995), *supra*, note 25.

had a fair idea where the problem lay. It was telling to me that in literally scores of extradition cases, lawyers have sought leave to appeal to the Supreme Court of Canada, only to be refused. That implies that dozens of top-flight lawyers are concerned about the standard of justice their clients are receiving at the hands of the courts of appeal. It implies that the Supreme Court of Canada has put a virtual moratorium on extradition cases, shutting its mind to all but the most obvious of cases. And even then, the Supreme Court of Canada has generally refused relief to the individual in favour of Canada's "international obligations." It has not helped that most of the Supreme Court of Canada's majority decisions on extradition in the past ten years were written by a single judge, the doyen of extradition matters and former employee of Justice Canada, G.V. LaForest.

This, then, was where I was coming from. I resolved to read all the cases I could, and the few books on the subject. My focus was to be in the last ten years of the millennium, since I was satisfied that Anne LaForest had covered the subject of extradition up to 1991 fairly extensively in *LaForest's Extradition to and from Canada*, an expansion of her father's early work.

But the more I delved, the more it became apparent that there was a major untold story, not just in the more recent cases, but in the history of extradition and treaty negotiation itself – a history that was to be found not in the case law or the textbooks on extradition, but in the writings and biographies of the great leaders of two nations who shaped destiny and the law – including the extradition law of North America. Accordingly, I set about to review and analyse the development of extradition law in Canada and the United States from colonial days to the present.

Accordingly, this thesis examines past and current treaties, old and new legislation, the positions that Canadian courts have taken historically, and in particular the decisions on extradition made by successive Ministers of Justice and appellate courts, including the Supreme Court of Canada. Generally, the first half of the thesis focuses on the development and history of extradition law and practice from its origins in the 18th Century to its refinement in the 19th Century. The second half focuses on the 20th Century, with particular attention to current extradition instruments such as the current Treaty and Act. It includes examination of the ways in which Canada has often forsaken the rights of individuals in order to placate the demands of the United States of America to bring alleged “fugitives” or convicted “felons” to face trial or incarceration – and sometimes the death penalty.

6. Chapter Synopsis

The tension between these competing imperatives in extradition matters is by no means a new phenomenon. In fact, the clash of individual rights and international obligations has been the subject of much debate in the courts and in political forums over the past two centuries. The permutations of this clash inform the structure of the thesis. The following chapter synopsis provides an overview.

Chapter 1 – Introduction and Methodology

Chapter 2 – Development of U. S. and British Foreign Policy up to the Jay Treaty (1794)

George Washington was not particularly enamored of extradition, and merely acquiesced in the efforts of Chief Justice John Jay to deal with the thorny subject in America’s first treaty with Britain. America’s first President took no steps to adopt the

Jay Treaty by introducing legislation in Congress, even though there is evidence to show that he knew he ought to do so in order to activate Article 27, which dealt with extradition. His Secretary of State, Thomas Jefferson, steadfastly opposed extradition – and any treaty with Britain – to the degree that he resigned his post when Washington ignored his advice and declared America's neutrality in the war between Britain and France. Following his return from Britain with the new Treaty, Chief Justice Jay was pilloried in the Jeffersonian press for having sold out to the British, to the point that, disgruntled, he too resigned.

Chapter 3 – Misplaced “Obligations” and Displaced Rights: the Extradition of Jonathan Robbins (1799)

Arguably, the high-profile extradition case of Jonathan Robbins, the only one ever brought under the Jay Treaty, was the undoing of the second President of the United States, John Adams. This chapter considers the case of Jonathan Robbins and its aftermath, including a stormy pre-election political debate in Congress that focused on the extradition issue. Robbins claimed to be an American sailor who had been impressed into the service of the British, and to have been merely a witness to a mutiny aboard the ship on which he was forced to serve. No evidence was led as to his actual involvement in the alleged mutiny, other than that he had served as a midshipman on the ship.

Eager to curry favour with the British, President Adams conveyed to an extradition judge through Secretary of State Timothy Pickering his desire to have Robbins, a.k.a. Thomas Nash, transferred to British custody. Awed by such a communication from the President of the United States of America, the local judge

complied with Adams' wishes without anything resembling due process. Once in the hands of the British, Robbins was unceremoniously hanged in chains and gibbeted.

The Jeffersonians in the House of Representatives brought sanctions against President Adams, and received a lot of coverage of the issue – especially in the pro-Jeffersonian press. Representative John Marshall, a Federalist, rose to the challenge of defending his inept President in the House over the extradition issue, in what is generally regarded as his best speech. Adams lost the ensuing election to Jefferson, but before he stepped down, Adams rewarded Marshall first with a cabinet post as Secretary of State, and a few months later with the position of Chief Justice of the U.S. Supreme Court, a post he retained for the next 35 years.

Chapter 4 – Between Treaties (1807-1842): The Persistence of International "Obligations" over Individual Rights

The Jay Treaty lapsed, and the War of 1812 came and went, creating its heroes on either side. Among them on the Canadian side was a humble law clerk, not yet called to the bar, who had volunteered for the militia. Lieutenant John Beverley Robinson, a United Empire Loyalist of Virginian stock, so impressed his general by his performance at the battles of Detroit and Queenston Heights that Robinson was appointed, on the spot, at 21 years of age, acting Attorney General of Upper Canada. Elected to the Assembly in 1820, Robinson continued to serve as Attorney-General until his appointment as Chief Justice of Upper Canada in 1829, a position he retained for 32 years. In the meantime, he also served as Speaker of the Assembly and President initially of the Executive Council and later of the Legislative Council. During that time, important legislation in the area of extradition was adopted, including in particular the Upper Canada *Fugitive Offenders Act*

(1833). As Chief Justice, Sir John Robinson was in the unique position of being able to enforce the laws that he helped make. But the only fugitives caught by the *Fugitive Offenders Act*, whether by coincidence or by design, were runaway slaves, at least one of whom – Nelson Hackett – was returned unceremoniously to the U.S. and to slavery.

Chapter 5 – The Ashburton-Webster Treaty (1842), Confederacy, and Confederation

In 1842, Britain and the U.S. concluded the Ashburton-Webster Treaty, which established an extradition process and purported to discourage the slave trade. But again the first major case caught by the Treaty was that of a runaway slave, this time a black man who had killed a white planter in the course of escaping from Missouri. Upper Canada Attorney-General John A. Macdonald reviewed the case and referred the matter to the Court of Queen's Bench, where Chief Justice Sir John Robinson presided. The Court held that the slave, John Anderson, should be surrendered to the U.S. on the charge of murder, despite the fact that upon being returned to Missouri he faced almost certain death. That decision caused a near riot, and invited the scorn of the press.

An election was brewing in Upper Canada, and the prime target of the press in the alleged mishandling of the Anderson case, initially, was John A. Macdonald, arch-rival of *Toronto Globe* editor George Brown. The controversy was deflected, however, when the British Court of Queen's Bench in London, England had the temerity to interfere in Canadian judicial process by ordering Anderson's release on a writ of *habeas corpus*. Macdonald arranged for the matter to be reheard before the Court of Common Pleas in Toronto, and Anderson was released on a technicality.

Never recovering from the bad press he had received, Robinson resigned as Chief Justice the following month. By then, the U.S. Civil War was raging, Union troops pitted against Confederates, some of whom sought refuge in Canada – and were in turn sought by the U.S. through the extradition process.

Chapter 6 – Legislators vs. the Courts: Post-Confederation Extradition Policy

At the beginning of the Twentieth Century, the courts wrestled with procedural issues, and in the process established a common law framework for interpreting both the Ashburton-Webster Treaty and the *Extradition Act*. Two important cases helped lay the framework for future legislation and procedure: *Re Gaynor and Greene* in Quebec, and *Re Collins* in British Columbia. Collins in particular became the benchmark for future extradition proceedings and standards of applying the law, the decision coming as it did from Lyman Duff, who within a year was to be appointed Chief Justice of the Supreme Court of Canada.

Chapter 7 – Current Extradition Process: Treaty, Statute and Case Law

The procedural wrangles in the first decade of the 20th Century laid the groundwork for future extradition law, including amendments to the Ashburton-Webster Treaty, the Canada-U.S. Extradition Treaty of 1971, and amendments to the Canadian *Extradition Act*, which stayed in force until 17 June 1999, when it was rescinded by the current Act. The current instruments are summarized and analysed in Chapter 7, with references to relevant case law, demonstrating that the Treaty takes precedence over the *Extradition Act* even though the Courts are governed by the Act.

Chapter 8 – The Limitation of Judicial Discretion in Extradition Hearings

Today, persons caught up in the extradition process have few of the protections and rights of other persons accused of crime in Canada. This is because of the belief among jurists, led by the late LaForest J. of the Supreme Court of Canada, that Canada should put its international obligations ahead of the rights and freedoms of the individual even when the individual is a Canadian citizen, and even where there are obvious irregularities in the procedure or on the face of the record. The Minister of Justice and the courts have made it clear that anyone living in Canada alleged by the U.S. to be a “fugitive” can be extradited, on “any” evidence, no matter how minuscule, even on the mere basis of similarity of name and countenance, even though the person has not set foot in the extraditing country, and even where the person can prove that he was in Canada at the time of the alleged crime being perpetrated in the U.S. Extradition proceedings, so easily brought by the requesting state, are horrendously expensive to defend, usually leaving an accused person penniless, so that the individual who takes a misstep or is believed by authorities to have broken the law faces lengthy and expensive extradition proceedings, followed by prosecution in an alien land without means to afford a defence.

Chapter 9 – The Sidelining of Charter Rights and Protections

Under the *Extradition Act*, a superior court judge is a court of competent jurisdiction for the purposes of determining applications under the *Charter*. Section 6 of the *Charter* guarantees Canadian citizens the right to remain in Canada. Extradition of Canadian citizens is obviously an infringement of this provision. Yet time and again the courts have held that the violation of s. 6 is justified as a “reasonable limit” under s. 1 of

the *Charter*. *Charter* protections, including legal rights under s. 7, remain the best hope for asserting individual rights over a misplaced trust in the fairness and political good will of the United States. This chapter will include an examination of these contemporary issues, including the very real threat of current extradition policy and process in Canada to individual rights and constitutional protections.

Chapter 10 – Balance of Power: The Minister of Justice v. the Courts

The concluding chapter will summarize the thesis and attempt to peer into the future of extradition law and practice in Canada in the new millennium. Since the test is whether there is *any* evidence that may be admissible in a court proceeding, rather than *sufficient* evidence to support a conviction, the chances of extradition suddenly impacting on unsuspecting Canadians is much greater than most Canadians realize. Current extradition practice potentially compromises the peace of mind and physical and economic security of Canadians who travel to the U.S.A. It is imperative that rights and protections be reasserted for persons facing extradition, that the powers of the Minister be curbed, and that the courts be given more discretion to determine whether extradition is justified.

CHAPTER TWO

TO THE JAY TREATY (1794): THE DEVELOPMENT OF U.S. AND BRITISH FOREIGN POLICY

1. U.S. Treaty Negotiation During the War of Independence

a) John Jay and Thomas Jefferson, Negotiators

The leading British 19th Century authority on extradition, Sir Edward Clarke, remarked that “For various reasons, the records of the Acts passed and the cases decided in the United States is 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.¹

In order to appreciate how this came about, it is necessary to examine the ways in which the initial framers of the law looked at extradition, and how the backdrop of international affairs affected decisions that would impact directly on the law at the time of, and for a century after, the Declaration of Independence.

As long as the principles of personal liberty and self-government were honoured, “there were not in all the king’s dominions more loyal subjects than Washington, Jefferson and Jay,” wrote Brooks Adams of these three Fathers of Independence.² From the outset of the American Revolution, John Jay, a New York lawyer, attempted to

¹ Edward Clarke, *A Treatise upon the Law of Extradition*, 2nd ed. (London: Stevens and Haynes, 1874), p. 28.

² Cited in George Pellew, *John Jay* (New York: Houghton, Mifflin, 1890), p. 21.

maintain communications with Britain in official petitions to the King and in less official, sometimes secretive, missives. At the forefront of the independence movement, he was a delegate to the First Continental Congress in Philadelphia in 1774, in which capacity he drafted *The Address to the People of Great Britain* (1774), airing the grievances of the Colonists. Thomas Jefferson, without knowing the authorship of the *Address*, called it “a production certainly of the finest pen in America.” Already a member of the Virginia legislature, Jefferson was moved to write his own first major essay, “A Summary View of the Rights of British America” (1774), suggesting that the British Parliament had no authority to legislate for the Colonies.³

Jefferson joined Jay as a delegate to the Second Continental Congress, where Jay wrote an address to the inhabitants of Canada, translated into French, warning that measures used by Britain against the Thirteen Colonies could also be used against Canadians. “As our concern for your welfare entitles us to your friendship, we presume you will not, by doing us an injury, reduce us to the disagreeable necessity of treating you as enemies,” he wrote.⁴ Meanwhile, Jefferson, Benjamin Franklin and John Adams formed a committee to draft the Declaration of Independence, of which Jefferson is credited with being the principal author. As a member of the Congress of the Province of New York, Jay promoted the Declaration of Independence to his New York constituents after its adoption on 4 July 1776. The following year John Jay was appointed first Chief Justice of New York State.⁵

³ *Ibid.*, p. 36.

⁴ *Ibid.*, pp. 40-41.

⁵ Frank Monaghan, *John Jay: Defender of Liberty against Kings & Peoples, Author of the Constitution & Governor of New York, President of the Continental Congress, Co-Author of the Federalist, Negotiator of the Peace of 1783 & the Jay Treaty of 1794, First Chief Justice of the United States* (New York: Bobbs-

b) Treaties with France

By that time, an ocean away, Benjamin Franklin, the popular minister plenipotentiary to France, was negotiating an alliance with that country that was to set the tone for all future treaty negotiations and change the course of international history. The two treaties reached between America and France on 6 February 1778 – the “Treaty of Amity and Commerce” and the “Treaty of Alliance” – were the first treaties of any kind to be signed by the U.S., and directly tipped the scales of the War of Independence against the British: “Regardless of the motives behind French help, most Americans believed that without France there probably would have been no United States of America.”⁶ The Treaty of Amity and Commerce, “the first official recognition of the U.S. by a major power,” effectively brought France into the War of Independence and established reciprocal most-favoured-nation trading status.⁷ The Treaty of Alliance provided that neither France nor America would “conclude either Truce or Peace with Great Britain, without the formal consent of the other first obtain’d,” and pledged mutual support should war break out between France and Great Britain “until American Independence was assured.” Once achieved, American independence would be guaranteed by France “forever,” and the U.S. in turn guaranteed the status quo of French possessions in North America “forever.”⁸

Merrill, 1935, 1-404; Edward Dumbauld, *Thomas Jefferson and the Law* (Norman, OK: University of Oklahoma Press, 1978), p. 182.

⁶ Alexander DeConde, *Entangling Alliance: Politics and Diplomacy under George Washington* (Durham, N.C.: Duke University Press, 1958), p. 4; Edward C Corwin, *French Policy and the American Alliance of 1778* (Princeton, N.J.: Princeton University Press, 1916) pp. 1-22.

⁷ DeConde, *Ibid.*, p. 4.

⁸ *Ibid.*, p. 5,

c) The Negotiators and Extradition

Later in 1778, Jay was elected president of the Continental Congress. In that capacity he received a letter from George Washington, dated 2 June 1778, in which Washington asserted his distaste for any law that would force the removal of inhabitants from their country of residence:

“A proscribing system, or Laws having the same effect, when carried to an extent, ever appeared to me to be impolitic. And their operation should always cease with the cause, which produce them. Examples, in terrorem are necessary, but to exile many of its inhabitants cannot be the interest of any State.”⁹

Two decades later, Washington retained this view, writing in a letter to John Marshall regarding fugitives subjected to eviction or banishment : “To condemn them without a hearing, and consign them to punishment more rigorous perhaps than death, is the summit of despotism.”¹⁰ This sentiment was echoed by Thomas Jefferson, who openly supported protecting fugitives rather than giving them up to foreign powers.¹¹

In 1779 Jay was appointed minister plenipotentiary to Spain to negotiate a treaty similar to the ones negotiated with France, but was unsuccessful.¹² In the meantime, the treaties with France had led to the deployment of the French navy against the British, and to a huge infusion of French troops into Washington’s army. Outflanked, Britain capitulated on 19 October 1781 at Yorktown, Virginia.¹³

⁹ George Washington to Congress, 2 June 1778. Cited in G.W. Nordham, *George Washington and the Law* (Chicago: Adams Press, 1982), p. 45.

¹⁰ George Washington to John Marshall, 4 December 1797. Cited in Nordham, *ibid*.

¹¹ Thomas Jefferson, *Works* (ed. 1854), ii. 290, cited in A Berriedale Keith, ed., *Wheaton's International Law* 6th ed., vol. 1 (London: Stevens & Sons, 1929) at 214.

¹² Pellew, *supra*, note 2, pp. 117-128.

¹³ DeConde, *supra*, note 6, p. 8.

2. U.S. Relations with Britain after Independence

a) The Treaty of Paris

From that point on, Britain scrambled in an attempt to regain military, commercial, and eventually diplomatic detente with America. Sir Guy Carleton, who had been Governor of Canada until a disagreement with the British secretary of state forced his retirement in 1778, was appointed commander in chief of British forces in North America in 1782, and continued to hold New York for the British. In England, William Wyndham Grenville, son the late Prime Minister George Grenville, had been elected to the House of Commons on his way to a distinguished career that would include being chief negotiator of the Jay Treaty.¹⁴

Jay and Franklin, in Paris, jointly and secretly negotiated peace terms with Britain in 1782 which eventually were incorporated into the Treaty of Paris (better known in the U.S. as the "Treaty of Peace") of 3 September 1783.¹⁵ France naturally regarded America's suit for a separate peace with Britain, conducted under its nose, as not merely a breach of diplomatic etiquette but a breach of America's international obligations in the face of the Treaty of Alliance concluded by Franklin five years earlier. Conscious of the importance of obligations established by treaty, Jay stated flatly that he and Franklin had not intended to "deviate in the least from our treaty with France," and that since there

¹⁴ Samuel Flagg Bemis, *Jay's Treaty: A Study in Commerce and Diplomacy* (New Haven: Yale University Press, 1962), p. 286.

¹⁵ Bemis, *ibid.*, pp. 9-10; Monaghan, *supra*, note 5; A.L. Burt, *The United States and Great Britain and British North America from the Revolution to the Establishment of Peace after the War of 1812* (New Haven: Yale University Press, 1940), pp. 33-34.

“was no violation of our treaty with France, ... therefore she has no room for complaint, on that principle against the United States.”¹⁶

One of the main conditions of the peace accord with Britain was the withdrawal of British troops from American territory, including New York. Accordingly, the die-hard Guy Carleton gave up New York with his aide-de-camp, Major George Beckwith, returning to England, where Carleton was rewarded by being named Lord Dorchester. Bearing that title, he was appointed Governor of British North America.

The British had been overly generous with the American negotiators in concluding the Treaty of Paris, specifically with the intention of “weaning the United States from postwar French influence. Where English force had failed, English diplomacy might succeed.”¹⁷ Still, the Treaty of Paris left a number of issues unresolved, among them what to do with fugitives from justice. Understandably, extradition was still not a major priority to the fledgling nation, despite the President’s expression of concern regarding such issues to Congress.

To show its appreciation for his success in negotiating the Treaty of Paris, Congress elected John Jay to the post of Secretary of Foreign Affairs in 1784.¹⁸ However, relations with Britain remained strained. Both sides ignored some of the Treaty’s main provisions, especially with respect to garrisons along the Canadian border and northwest frontier.¹⁹

¹⁶ Bemis, *ibid.*, pp. 10-11, citing a letter from Jay to Robert R. Livingston, Paris, 17 November 1782, and subsequent conversation with Livingston on 19 July 1783.

¹⁷ *Ibid.*, at p. 9.

¹⁸ Monaghan, *supra*, note 5, p. 361; Julius Goebel Jr., ed., *The Law Practice of Alexander Hamilton* Vol. 1 (New York: Columbia University Press, 1964), p. 529.

¹⁹ Dumbauld, *supra*, note 5, pp. 33, 184.

Dissatisfaction with the way the “peace” was being administered in America, especially where United Empire Loyalists were concerned, led to the refusal by Britain to appoint an ambassador to the U.S.²⁰ Congress sent Thomas Jefferson to France to succeed Franklin as resident U.S. Minister, and Jefferson lived in Paris from 1784 until the beginning of the French Revolution in 1789.²¹ Congress also appointed John Adams as Minister Plenipotentiary to England, in which capacity on 8 December 1785 he presented a stiffly-worded memorandum to the British Secretary of State demanding that Britain comply with the terms of the 1783 Treaty by withdrawing its troops from garrisons at the fringes of U.S. territory in the Northwest. Britain responded with a protest of its own, indicating that she would continue to refuse to withdraw her troops from the outlying garrisons until America gave assurances that it would protect the interests of United Empire Loyalists from Patriot reprisals. In 1786, Carleton took up his post as Governor of British North America to monitor the situation.

b) Treaty Powers in the U.S. Constitution

The Constitution of the United States of America – largely concerned with the division of powers among Congress, the president and the judiciary, and with the balance between individual rights and the power of government – was drafted in the summer of 1787 and submitted for ratification to the 13 states on 28 September. Under Article I (8), Congress has the power “to define and punish Piracies and Felonies committed on the high Seas, and Offences against the Law of nations.” Under Article I (9), the writ of *habeas corpus* was specifically preserved. Under Article I (10), “No State shall enter into

²⁰ Goebel, *supra*, note 18, p. 521. DeConde, *supra*, note 6, p. 12.

²¹ Dumbauld, *supra*, note 5, p. 33; Nordham, *supra*, note 9, p. 35.

any Treaty, Alliance, or Confederation,” this right being reserved to the President under Article II (2): “He shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur.” Under Article III(2),

The judicial power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority; -- to all Cases affecting Ambassadors, other public Ministers and Consuls; -- to all Cases of admiralty and maritime Jurisdiction; -- to Controversies to which the united States shall be a Party....

By June, 1788, the required two-thirds majority of nine states had ratified the Constitution. Elections were held in the fall and the new government commenced proceedings on 4 March 1789.

c) British Espionage

Although England did not send an ambassador to America during this time, commencing in 1787, Carleton sent his aide-de-camp, Major Beckwith, on a series of secret missions to America:

In the three years from 1787 to 1790 Beckwith's role in the United States was that of secret agent serving under Lord Dorchester as Governor General of Canada....²² Beckwith was part of an extended system of intelligence activity in America that was supplied with funds by the British government and received orders from it or from Dorchester. The object of that activity, of course, was the acquisition of information, the establishment of connections with influential Americans, and the cultivation of sentiments favorable to the interests of Great Britain.²³

Having made no headway in negotiations, Adams was recalled from Britain in 1788, and for the next three years neither country was to have an exchange of

²² In fact, he was Governor. The position of Governor-General was not established until proclamation of the Constitution Act in 1791.

²³ Julian P. Boyd, *Number 7: Alexander Hamilton's Secret Attempts to Control American Foreign Policy, with Supporting Documents* (Princeton: Princeton University Press, 1964), p. 7.

ambassadors.²⁴ But with Beckwith ensconced in New York, Britain did not need an official ambassador to achieve its ends:

Beckwith opened up sources of information on matters of policy of such great importance as to give his reports a value in this respect greater than that of all intelligence gathered by others. Beckwith, Dorchester, and Grenville must have been astonished to find their recent enemies so fully and freely communicating their views and aims – even their cabinet secrets – to the confidential agent of a foreign power.²⁵

Grenville had been appointed Speaker of the British House of Commons in January and Secretary for Home Affairs in June, 1789. Not only did he find Beckwith's information helpful, but he used Beckwith to send messages in the other direction, as Beckwith himself wrote to Lord Dundas on his own behalf, in the third person, in support of his own promotion to the rank of Lieutenant-Colonel:

In the summer of 1789, he was honored by Lord Grenville with several conversations on American Affairs, and in the month of August of that year, he was the bearer of a message from his Lordship, to The Executive Government of The United States, on the subject of discrimination of duties, an object then in agitation, and supported by a party in that Country; this message he delivered in the October following, at New York, which led to certain overtures on the part of their Government; these were communicated by Lord Dorchester.

In March, 1790, he was again sent from Canada into The States, at this period they had resolved to raise an army; in obedience to his instructions, Your memorialist transmitted direct information to Lord Grenville of their views on that subject, for which his Lordship was pleased to express his thanks by a letter....²⁶

The primary source and recipient of these communications in America was none other than Alexander Hamilton, George Washington's first Secretary of the Treasury, as has been ably documented by Julian Boyd:

It was also in the autumn of 1789 that the Secretary of the Treasury entered into these discussions, becoming thenceforth the most important public character upon

²⁴ Goebel, *supra*, note 18 at 520-521. Dumbauld, *supra*, note 5, pp. 183-184; Monaghan, *supra*, note 5 p. 361; DeConde, *supra*, note 6, p. 67.

²⁵ Boyd, *supra*, note 23, p. 9.

²⁶ Bemis, *supra*, note 14 at 377-380.

whom Dorchester's agent depended. In this opening interview Hamilton manifested his aim to influence foreign policy, thereby initiating the long divisive struggle in the cabinet – a struggle culminating five years later in the settlement that, in the words of the leading authority, more “aptly...might be called Hamilton's Treaty.”²⁷

3. The U.S. Assertion of Independence

a) Washington's Cabinet

By the time Jefferson returned to the U.S. in 1789 at the outset of the French Revolution, George Washington had been elected the first president of the United States, and had already named Adams as his vice-president and Hamilton as his Secretary of the Treasury, the most powerful and influential post next to the presidency.²⁸ John Jay retained his portfolio as Secretary of Foreign Affairs, even after he was appointed in September 1789 to the position of Chief Justice of the Supreme Court of the United States. Washington prevailed upon Jefferson to take a position on the cabinet as Secretary of State, in charge, among other things, of international relations.²⁹ Jay stepped down as Secretary of Foreign Affairs six months after his appointment as Chief Justice when Jefferson was sworn in as Secretary of State in March, 1790.³⁰

b) Canada as a Haven for United Empire Loyalists

By then, tens of thousands of United Empire Loyalists had pulled up stakes in America and were in the process of resettling in Nova Scotia, Prince Edward Island, and

²⁷ Boyd, *supra*, note 23, p. 11.

²⁸ Clinton Rossiter, *Alexander Hamilton and the Constitution* (New York: Harcourt, Brace and World, 1964) p. 87. “Only the Presidency itself was a more powerful and strategically located office than the Secretaryship of the Treasury...The fact that [Hamilton] was on the spot months before Jefferson gave him an advantage that he never lost.” See also DeConde, *supra*, note 6, pp. 31-65.

²⁹ Dumbauld, *supra*, note 5, p. 33. DeConde, *supra*, note 6, p. 29.

³⁰ DeConde, *supra*, note 6, p. 52.

Upper and Lower Canada, especially in what is now Southern Ontario and the Eastern Townships of Quebec. In Canada, the Constitution Act of 1791, drafted by Dorchester, provided a Governor-General for the country and created the provinces of Upper and Lower Canada. Britain at last deigned to appoint an official plenipotentiary to America, George Hammond, with whom Jefferson discussed directly the outstanding issues that seemed to threaten peace.³¹

The first Lieutenant-Governor for Upper Canada, Col. John Graves Simcoe, soon proved that he had a mind of his own. "Aggressive and bellicose, he was convinced that war with America was inevitable. He exulted in his dream of routing Washington on some future battlefield, for he had little esteem for the military talents of the American commander."³² Although each province had a Crown-appointed Legislative Council and a popular Assembly elected on a property franchise, in Upper Canada neither of these bodies had any real power under Simcoe, who remained bound to the notion of recreating the British Empire in North America, including a Parliament that represented an "image and transcript of the British Constitution."³³ This sat well with the transplanted United Empire Loyalists, who soon constituted more than half of the population of the province.³⁴

c) The U.S. as a Haven for Fugitives

The new American government was also anxious to establish a reputation as a civilized state. Jefferson realized that the easiest way to do that was to adopt English law

³¹ *Ibid.*; see also Goebel, *supra*, note 18, p. 522-523; Monaghan, *supra*, note 5 at 362.

³² Monaghan, *ibid.*

³³ Stephen Leacock, *Canada: The Foundations of Its Future* (Montreal: Seagram, 1941), p. 118.

³⁴ *Ibid.*, 119.

and English values, including some of the hallmarks of British diplomacy and foreign policy where this did not obviously conflict with the principles upon which an independent America had been founded.³⁵ “Our ancestors adopted their system of law in the general,” Jefferson stated. “...The two Houses of Assembly, both under our regal and republican governments, have ever done business on the constant admission that the law of parliament was their law.”³⁶ Furthermore, “a treaty ‘was a law of superior order because it not only repeals past laws, but cannot itself be repealed by future ones.’”³⁷ As secretary of state, Jefferson refused to demand the return of fugitives from Florida by way of extradition, since, as he wrote to Washington in 1791,

England has no convention with any nation for the surrender of fugitives from justice, and their laws have given no power to their executive to surrender fugitives of any description, they are accordingly constantly refused....The laws of the United States, like those of England, receive every fugitive; and no authority has been given to our executives to deliver them up. If, then, the United States could not deliver up ... a fugitive from the laws of his country, we cannot claim as a right the delivery of fugitives from us.

He added: “I do not think that we can take for granted that the Legislature of the United States will establish a convention for the mutual delivery of fugitives.”³⁸

As I.A. Shearer has stated, “States do not extradite criminals in the absence of a treaty or a municipal law which empowers them to do so. The existence of a treaty commitment to the requesting State is an express condition precedent to extradition.”³⁹

³⁵ Dumbauld, *supra*, note 5, pp. 18-19, 25, 31.

³⁶ Report of the Conference Committee, 4 December 1777, 2 F. 312. Cited in Dumbauld, *Ibid.*, p. 31.

³⁷ *Ibid.*, pp. 182-183.

³⁸ Jefferson, *Works* (ed. 1854), ii. 290; cited in *Wheaton's International Law*, *supra*, note 11, p. 214; and in *Holmes v. Jennison* (1840), 14 Peters 538 at 548-549.

³⁹ I.A. Shearer, *Extradition in International Law* (Manchester: University Press, 1971), p. 22. Shearer states, “It is clear that States do not extradite criminals in the absence of a treaty or a municipal law which empowers them to do so. The existence of a treaty commitment to the requesting State is an express condition precedent to extradition in the United States, Great Britain, and the country of the Commonwealth whose extradition laws are modelled on those of Great Britain.”

For the first 18 years after U.S. Independence there had been no such “condition precedent” in place. If the U.S. wished to be a player on the international scene, an extradition treaty, or at least an article or term within a treaty pertaining to extradition, was required. Yet as secretary of state, Jefferson clearly opposed extradition. More to the point, he believed that his position reflected the will of Congress.

4. Honoring International Commitments

a) Treaty Commitments vs. Extradition

Like Jay, Jefferson regarded treaties as extremely serious commitments. But as a Republican he believed that a treaty can only be approved, rescinded or declared infringed by Congress:

“Treaties are legislative acts. A treaty is the law of the land. It differs from other laws only as it must have the consent of a foreign nation, being but a contract with respect to that nation....

1. ...It must concern the foreign nation, party to the contract.
2. [It must fall within] those objects which are usually regulated by treaty, and cannot be otherwise regulated.
3. [The Constitution] must have meant to except out of these the rights reserved to the States; for surely the President and Senate cannot do by treaty what the whole government is interdicted from doing in any way.”⁴⁰

His attitude towards treaties, and the relative powers of Congress and the presidency in treaty interpretation, was to have major repercussions on the way the American public perceived the division of powers where treaty and extradition matters were concerned.

When war broke out between England and France in 1793, Jefferson wished to strengthen the alliance with France, while Hamilton wished to jettison the treaties with France in favour of a new alliance with Britain. In fact, Hamilton became the principal

⁴⁰ Dumbauld, *supra*, note 5, p.31-32

architect of the Jay Treaty.⁴¹ George Washington took Jefferson's advice over Hamilton's only to allow for the appointment of a French envoy, Edmond Charles Genet – who proved to be a loose cannon, and almost immediately requested the extradition of French fugitives who had sought refuge in the U.S.A. Despite his sympathy with France, Jefferson responded to Genet's request consistently and unambiguously:

“The laws of this country take no notice of crimes committed out of their jurisdiction. The most atrocious offender coming within their pale, is received by them as an innocent man, and they have authorized no one to seize or deliver him. The evil of protecting malefactors of every dye is sensibly felt here, as in other countries; but until a reformation of the criminal codes of most nations, to deliver fugitives from them, would be to become their accomplices. The former is viewed, therefore, as the lesser evil.”⁴²

On the substantive issue of neutrality, Washington ignored Jefferson and took his own path, writing that he wanted the United States of America to remain

“free from political connections with *every* other country, to see them independent of all, and under the influence of none. In a word, I want an *American* character that the powers of Europe may be convinced that we act for *ourselves*, and not for others.”

This meant that when other nations were at war, America must “adopt and pursue a conduct friendly and impartial towards the Belligerent Powers.”⁴³

b) Neutrality

In enunciating a policy of strict neutrality in the Proclamation of 22 April 1793, Washington made it clear that he would not take Jefferson's advice on substantive matters of foreign policy. Hamilton quickly leapt into the breach, defending the

⁴¹ Monaghan, *supra*, note 5, p. 368.

⁴² *Holmes v. Jennison*, *supra*, note 38 at 549; see also Rossiter, *supra*, note 28, p. 84.

⁴³ Felix Gilbert, *To the Farewell Address: Ideas of Early American Foreign Policy* (Princeton: Princeton University Press, 1961), pp. 116-117.

Proclamation of Neutrality, and demonstrated handily that he held more influence with the President in international affairs than Jefferson, even though the Secretary of State, not the Secretary of the Treasury, was responsible for foreign relations and international affairs.⁴⁴ Still, for Jefferson, the main issue was one of jurisdiction. Jefferson regarded the declaration of neutrality, like a declaration of war or the ratification of a treaty, to be the domain of Congress, not of the Executive. By declaring neutrality without congressional approval, Washington had overstepped the bounds of executive privilege, in Jefferson's view.⁴⁵

Jefferson resigned as Secretary of State on 31 December 1793, to be replaced by U.S. Attorney-General Edmund Randolph, whose main focus, like Jefferson's, was to be on maintaining good relations with France and Spain at the expense of Britain. This left Alexander Hamilton free to develop the idea of a separate, expanded treaty with Britain, something he had been desiring to achieve, by fair means or foul, since his appointment as Secretary of the Treasury.⁴⁶

5. The Jay Treaty (1794)

a) "Hamilton's Treaty"

Clearly where the Jay Treaty was concerned, Chief Justice John Jay took his instructions from Alexander Hamilton, who had nominated him as envoy in the first place.⁴⁷ To a startling degree, as we have seen, Hamilton in turn took his instructions

⁴⁴ DeConde, *supra*, note 6, pp. 63, 81.

⁴⁵ DeConde, *supra*, note 6, pp. 88-90; Rossiter, *supra*, note 28, p. 85.

⁴⁶ Jerald A. Combs, *The Jay Treaty: Political Battleground of the Founding Fathers* (Berkeley: University of California Press, 1970), pp. 48-51. See also Boyd, *supra*, note 23; DeConde, *supra*, note 6, p. 81: "The Secretary of the Treasury told the British minister that Jefferson's views could be ignored with impunity; they were not a true reflection of government policy."

⁴⁷ Rossiter, *supra*, note 28, p. 85; DeConde, *supra*, note 6, pp. 102-104; Monaghan, *supra*, note 5, p. 368.

from Lord Dorchester, Governor-General of Canada, and Lord Grenville, now Great Britain's Secretary of State for Foreign Affairs and Leader of the House of Lords.⁴⁸ Little wonder that John Jay could make little headway in negotiations! As Samuel Bemis has documented, Hamilton had kept the British Minister, George Hammond, better informed of emerging American foreign policy than he had Jay:

Whether Grenville might have accepted ultimately any of [Jay's] proposals, many of which were very reasonable, will never be known. Ten days previously he had received news from Hammond that made the outlook much brighter for England. As to the United States' joining another Armed Neutrality, Hammond assured Grenville that there was little danger, an assurance which came from Alexander Hamilton himself. Hamilton had said, "with great seriousness and with every demonstration of sincerity...that, ...it was the settled policy of this Government in every contingency, even in that of an open contest with Great Britain, to avoid entangling itself with European connexions.... In support of this policy, Mr. Hammond urged many of the arguments advanced in your Lordship's despatch...."⁴⁹

Bemis called the Jay Treaty "Hamilton's Treaty," and now we begin to see why. Not only was Hamilton the driving force behind it, he played both ends against the middle to achieve what he himself regarded as most important, in the process sacrificing some important diplomatic points that could have been scored by Jay had he been allowed a level playing field.⁵⁰

b) Article 27

Curiously, in none of Hamilton's instructions, itemized as 19 "objects of such a treaty," was there a word about the content of Article 27, which deals with the return of

⁴⁸ Boyd, *supra*, note 23, *passim*.

⁴⁹ Bemis, *supra*, note 14, pp. 337-339.

⁵⁰ Rossiter, *supra*, note 28, p. 9; Monaghan, *supra*, note 5, p. 368-369; Bemis, *supra*, note 14, pp. 289-298. Bemis gives a detailed analysis of the instructions, and concludes: "More aptly the treaty might be called Hamilton's Treaty" (p. 373).

fugitives accused of the crimes of murder or forgery.⁵¹ Nor did Hamilton mention the subject in a confidential supplementary letter of instruction to Jay dated the same day as the formal Instructions.⁵² Nor did it come up in his discussions with Hammond. Hamilton's single oblique reference to the Article, made after its signing in London but before its ratification in Washington, was his remark to the President that the last ten articles "were generally acceptable...for they were becoming formulas in most modern treaties."⁵³ His cavalier attitude towards the last part of the Treaty suggests that those articles were not of his invention, were not part of his agenda, and were not included in his instructions to Jay.

Every step of the negotiations process between Chief Justice Jay and Lord Grenville has been documented.⁵⁴ Not until Jay submitted a draft proposal on 30 September 1794 did the subject of extradition arise in any form.⁵⁵ The details of the extradition clause appear to have been brought into the Treaty on Jay's own initiative as Article 25 of his draft of 30 September 1794. Article 27 of the Treaty remained essentially true to Article 25 of the draft except for an important reference to criminality. Article 25 of the draft Treaty stated:

It is further agreed that his Majesty and the United States on mutual requisitions, by them respectively or by their respective minister 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, *and that on such evidence of criminality*, as according to the laws of the place where the fugitive or person so charged shall be

⁵¹ Bemis, *ibid.*, pp. 291-295.

⁵² *Ibid.*, pp. 296-297.

⁵³ Helene Johnson Looze, *Alexander Hamilton and the British Orientation of American Foreign Policy, 1783-1803* (The Hague: Mouton, 1969), p. 90.

⁵⁴ Bemis, *supra*, note 14, pp. 318-345. See also Forrest McDonald, *The Presidency of George Washington* (Wichita: University Press of Kansas, 1974), pp. 149-153.

⁵⁵ "Extradition" did not become a term of art in Britain until the passage of the Extradition Act in 1870. See Shearer, *supra*, note 39, p. 12.

found, would justify his apprehension and commitment for Tryal, if the offence had there been committed. The expence of such apprehension and delivery shall be born and defrayed by those who make the requisition and receive the fugitive.⁵⁶

Article 27 of the Treaty signed by Jay and Grenville in London on 19 November 1794

was modified where the important concept of “criminality” was concerned:

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.⁵⁷

Most extradition treaties and supporting legislation ever since have supported the principle of “dual criminality” or “double criminality,” a concept originating with Vattel’s *The Law of Nations*, which posits that the action that is the substance of the crime for which a fugitive sought in the requesting country must also be a crime in the requested country.

c) “Murder and Forgery”

The curious nature of the bedfellows of “murder or forgery” is one of the few parts of the Treaty that would appear to bear the imprimatur of President Washington, who from the earliest years of his tenure proved susceptible to the machinations of forgers who subsequently sought refuge in Great Britain. He was peculiarly sensitive to forgery and regarded it as a potentially dangerous crime. As early as 1777, a series of forged

⁵⁶ Reproduced in Bemis, *supra*, note 14, p. 432. Emphasis added.

⁵⁷ *Ibid*, p. 482; also reproduced in John Leslie, ed. *The Treaty of Amity, Commerce and Navigation, 1794-1796: The Jay Treaty* (Ottawa: Treaties and Historical Research Centre, Department of Northern Affairs Canada, 1979), p. 9. Also cited *passim* in Shearer, *supra*, note 39, p. 13.

letters was circulated raising questions about Washington's loyalty and dedication, as he indicated in a letter to a friend:

“I have seen a letter published in a handbill at New York and extracts of it republished in the Philadelphia paper, said to be from me to Mrs. Washington, not one word of which did I ever write.”⁵⁸

Later, Washington described a letter ““written to show that I was an enemy to independence and with a view to create distrust and jealousy.””⁵⁹ A whole collection of forged letters was circulated in England in pamphlet form; a similar pamphlet circulated in America was supplied to Washington from several sources, including his own brother, John Augustine Washington, to whom George wrote: ““Thank you for your intelligence respecting the pamphlet of forged letters said to be written by me, not one sentence of which, you may rely on it, did I ever write.”” He wrote to Richard Henry Lee:

“Every word contained in the Pamphlet, you were obliging enough to send me, was spurious.... The whole is contrivance to answer the most diabolical purposes. Who the author of them is, I know not.”⁶⁰

Three weeks before Jay left for London, Washington personally gave instructions to Jay at an early morning meeting on 15 April 1794, called at the President's request. The meeting lasted “for several hours.”⁶¹ On 30 April, Washington sent Jay a “secret and confidential” letter, among other things inviting Jay to become Minister to Great Britain once negotiations were completed. Since the subject matter of the letter was confidential, Jay returned the letter to Washington ““without retaining any copy or memorandum, except in my memory.””⁶²

⁵⁸ Nordham, *supra*, note 9, p. 20.

⁵⁹ *Ibid.*

⁶⁰ *Ibid.*

⁶¹ Monaghan, *supra*, note 5, p. 366

⁶² *Ibid.*, p. 370.

It will be recalled that Washington was in general against any kind of proscription such as exile that would render up a person to “punishment more rigorous perhaps than death.”⁶³ Crimes that would be the subject of extradition in a treaty endorsed by Washington would have to be regarded as serious crimes indeed, such as murder. But what about forgery?

The President defended freedom of speech and freedom of the press. He did not usually react to strong words set down on paper if he knew the source. Consider the words of Thomas Paine, who publicly accused Washington of being “treacherous in private friendship and a hypocrite in public life....The world will be puzzled to decide whether you are apostate or an imposter; whether you have abandoned good principles or whether you ever had any.”⁶⁴ Washington did not bat an eye at these published remarks from a known source.⁶⁵

But he had good reason to regard forgery, perpetrated in America by persons who subsequently surfaced in England, as being more than a mere nuisance. Forgers were potentially dangerous, since their work was insidious and unanswerable, undermining in a dishonest and treacherous way the root principles of free speech and freedom of the press. To Washington, who had experienced the pain caused by forgeries first hand, it was inexcusable criminal behaviour. He had ample opportunity to convey these sentiments to John Jay.

⁶³ Nordham, *supra*, note 9, p.45.

⁶⁴ *Ibid.*, p. 39.

⁶⁵ The custom of the day was to take umbrage at such remarks to the point of defending one's honour in a duel. Jefferson's vice-president, Aaron Burr, for example, after being unceremoniously dumped as Jefferson's running mate in the 1804 election, challenged Alexander Hamilton to a duel ostensibly for calling him a “traitor” – a classic case of the pot calling the kettle black. Hamilton had thwarted Burr's chances for the presidency in 1800, and for the governorship of New York in 1804; Hamilton's insult was the last straw. Stupidly, Hamilton accepted the challenge and was shot dead.

6. Aftermath of the Treaty

When Jay returned to America with his Treaty in 1795, President Washington sat on it for months. He refused even to release the text, fearing political backlash. He even asked for John Jay's resignation as Chief Justice,⁶⁶ the title that Jay had borne proudly throughout the negotiations, along with the equally high-sounding titles of "Plenipotentiary" and "Envoy Extraordinary."⁶⁷ Then Washington sat on the signed draft of the treaty for months. He refused even to release the text, fearing political backlash:

There is evidence that the draft was not put before Congress then in session, the inference being that if it had been, Congress would never have accepted the final Treaty because of apparent concessions. As it was, the interval of fifteen months between signing and promulgation is indicative of the obstructions to ratification raised in the U.S. Senate and House of Representatives.⁶⁸

Eventually, however, Washington deigned to allow the House of Representatives to debate the value of the Treaty. As a result of the delay, ratifications were not exchanged until 28 October 1795. This was significant, because Article 28 of the Treaty set a time limit on most of the provisions of the Treaty to 12 years from ratification:

It is agreed that the first ten articles of this treaty shall be permanent, and that the subsequent articles, except the twelfth, shall be limited in their duration to twelve years, 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.

Perhaps it was by design that Washington delayed the process. Certainly he expressed strong doubts whether Article 27 could be carried into effect without "the

⁶⁶ Jay received his final salary payment for the pay period April 1-June 30, 1795.

⁶⁷ Julius Goebel, *History of the Supreme Court of the United States*, Vol. 1 (New York: Macmillan, 1971), p. 747.

⁶⁸ Leslie, *supra*, note 57, p. 7.

action of Congress,"⁶⁹ even once the Treaty itself had been ratified.⁷⁰ However, he took no steps to put such legislation in place. Nor would he likely have succeeded had he tried:

Even after proclamation on 29 February 1796, the anti-Treaty faction in the House of Representatives attempted to defeat the instrument by withholding implementation funds – the necessary appropriation was eventually approved by the narrow majority of three votes.⁷¹

After the Jay Treaty was signed into law and the public had a chance to assess it, Jay was thoroughly pilloried in the press and in the House of Representatives for selling out to the British. It was argued that he had violated the principle of separation of powers by exercising executive discretion in the treaty negotiating process. As Samuel Spear remarked, "Because the Court was already strongly committed to this doctrine, this charge was difficult to counter."⁷²

Thus John Jay's career as Chief Justice ended much as it had begun, with Jay holding down two of the most prestigious jobs in the country at the same time. Little wonder the press was contemptuous of the jurist, who had to weather a storm of scorn and mockery, as in the versified "Dialogue on the Treaty," 50 lines long, that appeared in the *South Carolina State Gazette*:

⁶⁹ Samuel T. Spear, *Law of Extradition, International and Inter-State* (Albany: Weed, Parsons, 1885), p. 57.

⁷⁰ This principle was first set out in U.S. decisions by Marshall, U.S.C.J. in *Foster v. Neilson*, 2 Pet 253, when he stated,

Our Constitution declares a treaty to be the law of the land. It is consequently to be regarded in courts of justice as equivalent to an act of the legislature, whenever it operates of itself without the aid of any legislative provision. But when the terms of the stipulation import a contract, when either of the parties engages to perform a particular act, the treaty addresses itself to the political, not the judicial department; and *the legislature must execute the contract before it can become a rule for the court.*

The doctrine was reaffirmed in *United States v. Arredondo*, 6 Pet. 691. See

⁷¹ Leslie, *supra*, note 57, p. 7.

⁷² Spear, *supra*, note 69, p. 56.

J—Y

May't please your highness, I, John Jay,
Have travell'd all this mighty way
To inquire if you, good Lord, will please
To suffer me while on my knees,
To shew all others I surpass
In love – ly kissing of your a—se;
As by my 'xtraordinary station
I represent a certain nation,
I thence conclude and so may you:
They all would wish to kiss it too.
So please your highness suffer me
To kiss—I wait on bended knee.⁷¹



Figure 1: Caricature of John Jay and William Cobbett working out the details of the Jay Treaty. Collection of the Historical Society of Pennsylvania.

⁷¹ Cited in Monaghan, *supra*, note 5, p. 402. The caricature is reproduced in Monaghan at p. 391.

CHAPTER THREE

MISPLACED "OBLIGATIONS" AND DISPLACED RIGHTS: THE EXTRADITION OF JONATHAN ROBBINS (1799)

1. The Extradition of Jonathan Robbins, a.k.a. Thomas Nash

a) Suppression of the Case

Understandably, the Jay Treaty was ineffectual as an instrument of extradition in the dozen years before its provisions expired on 28 October 1807, especially in light of the distractions of the Napoleonic Wars. A major misapprehension is perpetuated in all three editions of *LaForest's Extradition to and from Canada* (1961, 1977 and 1991), which state "...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."¹ There is absolutely no evidence to support this speculative assertion. Further, E.G. Clarke lists the Jay Treaty as the last of a total of five treaties concluded by Britain between 1174 and 1794, stating that virtually the only time they were used was for securing delivery of political offenders. However, there is no evidence that the Jay Treaty was used for this purpose, and in light of the continuing strained relations between Britain and the U.S. during the operative period of the Treaty, and the limited scope of the Treaty pertaining to murderers and

¹ G.V. LaForest, *Extradition to and from Canada*, 1st ed. (New Orleans: Hauser, 1961), p. 2; *ibid.*, 2nd ed. (Aurora: Canada Law Book, 1977), p. 2; Anne Warner LaForest, *LaForest's Extradition to and from Canada* (Aurora: Canada Law Book, 1991), pp. 2-3.

forgers, it is unlikely that Clarke meant his assertion regarding the political nature of early extradition to apply to the Jay Treaty.²

Indeed, no extradition requests were made in England by the United States, and only one case was brought before an American court pursuant to the provisions of the Jay Treaty – the case of *Re Jonathan Robbins* (1799).³ That one case “produced an intense excitement among the people,” Samuel Spear wrote nearly a century later, “and led to a warm discussion in the House of Representatives.”⁴ The “warm discussion” was described more precisely by Taney J.A. in *Holmes v. Jennison*⁵: “The case of Jonathan Robbins, which was the only one that arose under this treaty, produced much excitement in the country and animated debates in Congress.” The animated debates in Congress included a direct attack on President Adams: “It was claimed by some that the court had no jurisdiction to make the delivery, and by others that the President could not execute the stipulation until authorized to do so by an act of Congress.”⁶ The *Robbins* case was a black mark on the reputation of John Adams.

After the dust of the election had settled, and John Adams found himself quite unexpectedly out of office, attempts were made to suppress accounts of the *Robbins* fiasco. No reference to the case appears in Adams’ published papers, although there are

² Harvard Research in International Law, “Extradition” (1935), 29 Am. J. Int. L. Supp. 15 at 41, fn. 2. See also E.G. Clarke, *A Treatise upon the Law of Extradition*, 4th ed. (London: Stevens & Haynes, 1903) at 18-22. Clarke’s assertion with respect to other, earlier extraditions has been challenged by O’Higgins, “The history of extradition in British practice,” 13 Indian YB of Int’l Aff., 78 (1964) at 108. See I.A. Shearer, *Extradition in International Law* (Manchester: University of Manchester Press, 1971), pp. 5-6.

³ Wharton’s State Trials, pp. 392-457; cited in Samuel Spear, *The Law of Extradition: International and Inter-state* (Littleton: Rothman & Co., 1983), pp. 54-57. Spear was paraphrasing from the judgment of Taney, C.J.U.S., in *Holmes v. Jennison*, 14 Peters 541, at 570. “The case of Jonathan Robbins, which was the only one that arose under this treaty, produced much excitement in the country and animated debates in Congress.”

⁴ *Supra*, note 3 at 55.

⁵ (1840), 10 U.S.S.C.R. (14 Peters) 540, at 570.

⁶ Spears, *supra*, note 3, p. 55.

many missing documents, and no entries at all for days at a time during the critical periods of 1799-1800 when Adams committed his *faux pas* and came under attack.

John Wood wrote an exposé of the Adams administration in 1802, the first and only edition of which was bought up while it was in press by an Adams sympathizer, identified only as a “political *star*” – possibly Adams’ son (and future U.S. President), John Quincy Adams, who later appears to have acquired the copyright.⁷ The *History of the Administration of John Adams* included an unexpurgated account of the case of Jonathan Robbins, with affidavits entered as exhibits – apparently the only source of these extant. A copy of the suppressed edition survived and somehow fell into the hands of Thomas Jefferson, who, as third President of the United States, presented it to Judge Sherburne of the U.S. District Court of New Hampshire. Judge Sherburne’s son, John Henry Sherburne, inherited the judge’s library, discovered the book, and arranged for its belated publication in 1846 as *The Suppressed History of the Administration of John Adams (from 1797 to 1801); As Printed and Suppressed in 1802*.⁸ It is upon this text, as well as upon the papers of Adams’ contemporaries (including those of his successive secretaries of state, Thomas Pickering and John Marshall, and Secretary of the Treasury Oliver Wolcott), that I have relied in reconstructing the case of Jonathan Robbins.

b) The Crime

Robbins was alleged to have been involved in a mutiny on board the British frigate *Hermione* in 1797, at a time when Britain’s navy, embroiled in the war with

⁷ John Wood, *The Suppressed History of the Administration of John Adams (from 1797 to 1801); As Printed and Suppressed in 1802* (New York: Burt Franklin, 1846), pp. 10-11.

⁸ *Ibid.*

France, was flexing its muscles on the high seas. Robbins admitted that he had been on board the ship, but said he was an American sailor who had been impressed into service against his will.

British press-ganging of Americans and others into service was quite a common phenomenon, and very much a concern to the average American, who was still at most a generation away from arriving in the New World on a boat. The concern of American mothers and wives was especially acute, “for British captains supposed they had, when out of British ports, an unlimited authority to tyrannize over the rest of mankind.”⁹ Impressment was the subject of a number of complaints from ships captains to the Adams administration, although the pro-British, Federalist administration of John Adams was slow to respond to these outrages except at the lowest levels.

On 23 May 1797, for example – at about the time of the mutiny on the *Hermione* – James Hammond, an American sailor on shore leave in Madeira from his own ship, *Hope*, was pressed by Captain James of the British brig-of-war *El-Corso* and “carried forcibly on board in open day, before the house of the American consul.” The American vice-consul protested and managed to secure the release of Hammond. “But the day before the *Hope* intended to sail, a boat’s crew came again on board from the *El-Corso* and carried off five men, three of them Americans.” When Captain Pierce of the *Hope* protested this outrage to Captain James, Pierce was thrown into the brig.¹⁰

A similar incident occurred in Madras on board the ship *Betsey*, from which Captain Cook of the British frigate *Sybil* pressed Edward Hulen, a native of Salem.

⁹ *Ibid.*, p. 95..

¹⁰ *Ibid.*

Cook allegedly said that if there were any complaints, "he would not only take every seaman, but every officer from the *Betsey*....

He had thirty-five men over and above the ship's complement. He added, that he believed fifteen of them were real American citizens; that he had pressed them from on board of American ships at Lisbon, in spite of the remonstrances of the American consul at that place. Cook farther declared, that he would keep these men in perfect security till the end of the war.¹¹

Interestingly, Jonathan Robbins claimed in a sworn affidavit, dated 25 July 1799,

"that about two years ago, he was pressed from on board the brig *Betsey*, of New York, commanded by Captain White, and was detained there contrary to his will, into the service of the British nation, until the said vessel was captured by those of her crew, who took her into a Spanish port by force, and that he gave no assistance in such capture."¹²

He would have been well advised to have sworn nothing, for the initial complaint sworn out by fellow mariner William Portlock on 20 February 1799 deposed that they had served together before the mast "in the schooner *Tanner's Delight*, which was commanded by Captain White, who arrived here about three weeks ago"¹³

In his affidavit, Portlock swore that on the previous Christmas Eve, in the city of St. Domingo, he had overheard Robbins telling some French privateersmen that he had been "boatswain's mate of his majesty's frigate *Hermione*, when she was carried into the port of Cavilla." Later, "when he was drunk, he, the said Robbins, would mention the name of the *Hermione*, and say bad luck to her, and clench his fist."¹⁴

Based strictly on this overheard narrative, without anything approximating an extradition request from Britain, Robbins was summarily arrested in February 1799 in

¹¹ *Ibid.*, p. 96.

¹² *Ibid.*, p. 215.

¹³ *Ibid.*, p. 213.

¹⁴ *Ibid.*

Charleston, South Carolina, and detained without benefit of hearing while evidence was assembled by Thomas Hall, the justice of the peace who had witnessed Portlock's initial deposition, and by U.S. District Judge Bee.

c) Presidential Intervention

On 18 April 1799, Judge Bee took the affidavit of John Forbes, supposedly a midshipman on the *Hermione* prior to the mutiny, identifying Robbins as actually being Thomas Nash, also a midshipman aboard the *Hermione* prior to the mutiny.¹⁵ According to the Secretary of the Treasury, Oliver Wolcott,

In May, 1799, Mr. Liston, the British Minister, had addressed the Secretary of State, requesting the delivery, pursuant to the treaty of London, of a seaman named Nash, who was charged with piracy and murder on board a British national vessel, and an order was thereupon sent to the District Judge of South Carolina directing his delivery, provided such evidence of his criminality should be produced, as by the laws of the United States or of South Carolina would justify his apprehension and commitment for trial, if the offence had been committed within the jurisdiction of the United States.¹⁶

Clearly President Adams knew of the detention of Robbins, for he wrote to Secretary of State Timothy Pickering on 21 May 1799, "How far the President of the United States would be justifiable in directing the judge to deliver up the offender is not clear. I have no objection to advise and request him to do it."¹⁷

Robbins had been in custody for five months, still without a hearing, before Pickering, on behalf of President Adams, informed Judge Bee that a demand had been made to the President for Robbins' delivery to England as a fugitive criminal. Judge Bee

¹⁵ *Ibid.*, pp. 213-214.

¹⁶ Oliver Wolcott, *Memoirs of the Administrations of Washington and John Adams*, George Gibbs, ed, Vol. 2 (New York: Burt Franklin, 1971), p. 338.

¹⁷ Spear, *supra*, note 3, p. 56.

was in turn notified by the Secretary of State "that the President, if the evidence was sufficient to sustain the charge, advised and requested him to deliver the prisoner to 'the consul or other agent of Great Britain who shall appear to receive him.'"¹⁸ A few days before the court hearing, Bee received another letter from Pickering,

mentioning that an application had been made by the British minister, Mr. Liston, to the President for the delivery of the prisoner, under the twenty-seventh article of Jay's treaty, and containing these words: "The President advises and requests you to deliver him up"¹⁹

These were precisely the same words used in Adams' communication to Pickering of 21 May. Judge Bee promptly informed Pickering of his "compliance with the request of the President of the United States."²⁰

Bee claimed that he had judged that the evidence against Robbins was "sufficient to sustain the charge on which he had been demanded."²¹ However, it was clear from the nature of his remarks that he intended from the outset to pander to the President.²² 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.²³

As Congressman John Marshall wryly stated in the House of Representatives, "The experience of this unfortunate criminal, who was hung and gibbeted, evinced to him that

¹⁸ *Ibid.*, p. 55.

¹⁹ Wood, *supra*, note 7, pp. 214-215.

²⁰ *Ibid.*

²¹ *Ibid.*

²² Wolcott, *supra*, note 16, p. 338.

²³ *Ibid.*, p. 216.

the punishment of his crime was of a much more serious nature than mere banishment from the United States.”²⁴

2. The Congressional Debate

a) Jefferson's Campaign

Both in and out of Congress, Thomas Jefferson assembled a propaganda team, “men of political sagacity through whom he could work while maintaining the semblance of aloofness....Everywhere Jefferson had men on whom he could depend.”²⁵

Not least, nor least effective, among the methods of propaganda were the congressional letters with which the Jeffersonian members flooded their constituents, setting forth in vigorous fashion all the counts in the indictment.... Many years afterward Adams recalled them with rage – these letters that ‘swelled, raged, foamed in all the fury of a tempest at sea against me,’ a flood so enormous that ‘a collection of those letter would make many volumes.’ Adams never forgave his party for finding no means for their suppression.

These letters were part of the Jeffersonian plan to reach the people and set the tongues to wagging....Thus, to Madison: ‘Every man must lay his pen and his purse under contribution....Set aside a portion of every post day to write what may be proper for the public.’²⁶

One particularly prolific letter writer was “Manlius,” who, though never identified (it could have been Jefferson himself, since the letter was dated at Richmond, Virginia, Jefferson's home town²⁷), seemed to stay one step ahead of issues in Congress.²⁸ On 18 January 1800, “Manlius” wrote to Marshall,

The person who shall dare to censure the conduct of administration, enters upon a pilgrimage of the most gloomy and hazardous nature. When it is obvious that among those men only who chaunt the hallelujahs of adulation to the ears of

²⁴ Charles T. Cullen, ed. *The Papers of John Marshall* (Chapel Hill, N.C.: University of North Carolina Press, 1984), p. 103.

²⁵ *Ibid.*, pp. 446-447.

²⁶ *Ibid.*, pp. 445-446.

²⁷ *Ibid.*, p. 61. “Printed, Anonymous, *A Letter from Manlius, to John Marshall, Esq. Member of Congress* (Richmond, 1800).”

²⁸ Claude G. Bowers, *Jefferson and Hamilton: The Struggle for Democracy in America* (New York: Houghton Mifflin, 1925), pp. 462-463.

government, all its favors are profusely squandered. When it is notorious that every feeble voice of opposition, is not only attempted to be crushed, by the hissing refinement of degradation, but by holding up the terrible beacons of poverty and disgraceful confinement, the persecuted martyr to the constitution from that quarter, has not the faintest ray to cheer him. Spurned as a reptile, from her angry, inflated bosom, he has nothing to receive but despair, when even mercy, the attribute of the savage wanderer, flies her hated presence to promulge a most horrid deed! I mean the case of Jonathan Robbins, than which, a blacker outrage could not have been perpetrated on the rights of humanity. —It has been reported that Robbins has ultimately been discovered to have been a foreigner. Admitting the report to be true, it neither patronizes or changes the principles upon which Judge Bee acted, previous to the development.²⁹

On 4 February 1800, the Republicans attempted to revive the Robbins matter as a campaign issue.³⁰ A motion of Inquiry in the House of Representatives brought by Republican Edward Livingston, a strong supporter of Jefferson, led to other motions of censure of the President. They declared that there had been abuse of power in the “Nash” matter: the discretion exercised by the Executive in the Robbins case properly belonged to the Judiciary, and the discretion exercised by the Judiciary properly belonged to the Executive.³¹

There was widespread belief in Congress and among the public that the U.S. District Court at Charleston had had no jurisdiction to deliver up Robbins to the British consul. Other Representatives, citing Washington’s remarks that he had “strong doubts whether this part of the treaty of 1794 could be carried into effect without the action of Congress,”³² stated that President Adams “could not execute the stipulation until

²⁹ Cullen, *supra*, note 24, pp. 61, 73-74. Cullen notes: “On the verso of the title page, the printer, Samuel Pleasants, Jr. wrote that this letter “was received at the Office of the Printer on the 18th of January last, but from other pressing engagements, he has been reluctantly compelled to postpone the publication thereof.” The letter was printed in Feb. 1800.

³⁰ *Ibid.*, p. 35.

³¹ *Ibid.*, at 339.

³² Spear, *supra*, note 3, p. 57.

authorized to do so by an act of Congress.”³³ These activities in the House were widely reported by pro-Jefferson newspapers, such as the Philadelphia *Aurora*, which by then had been established in every state.³⁴

Congressman Livingston also presented a resolution requesting documents relating to Adam’s alleged misconduct in the Robbins case, and the State Department quickly complied by furnishing several documents, which, however, were not helpful to the Republicans demanding the review. At the same time, Livingston presented a resolution calling for enabling legislation with respect to Article 27 of the Jay Treaty. Again the resolution was adopted by the House, but that important issue, though raised again later by Livingston and John Nicholas, soon became sidelined by the main debate on the conduct of the President in the Robbins affair.³⁵ Although Federalist James A. Baynard tried to defuse the controversy by presenting a resolution asking the House to approve of the President’s conduct, in effect requesting a vote of confidence, Livingston responded on 20 February with a resolution condemning Adams.

“These resolutions of censure,” wrote Wolcott, “were vehemently debated for some days.”³⁶

b) John Marshall Speak Out

Finally, on 6 March 1800, John Marshall, in the words of Adams’ somewhat biased Secretary of the Treasury, “silenced opposition, and settled then and forever the

³³ *Ibid.*, p. 55.

³⁴ Bowers, *supra*, note 28, pp. 445, 455.

³⁵ Cullen, *supra*, note 24, pp. 35-36.

³⁶ Wolcott, *supra*, note 16, p. 339. See *Annals of Congress*, X, 511-512, 515-518, 526, 532-533, 541-578, 584-620

points of national law upon which the controversy hinged,³⁷ in what some authorities consider to be Marshall's best speech.³⁸ Although Marshall was still nearly a year away from being appointed Chief Justice of the U.S. Supreme Court, his speech reads like a Supreme Court decision. He reviewed the law, cited precedents, and laid new ground for future decisions. The case, "*as stated to the President*, was completely within the 27th article of the treaty," he declared as an opening proposition.

The *casus foederis* of this article occurs, when a person, having committed murder or forgery within the jurisdiction of one of the contracting parties, and having sought an asylum in the country of the other, is charged with the crime, and his delivery demanded, on such proof of his guilt as according to the laws of the place where he shall be found, would justify his apprehension and commitment for trial, if the offence had there been committed.

The case stated is, that Thomas Nash, having committed a murder on board a British Frigate, navigating the high seas under a commission from his Britannic Majesty, had sought an asylum within the United States, and on this case his delivery was demanded by the minister of the King of Great Britain.

It is manifest that the case stated, *if supported by proof*, is within the letter of the article, provided a murder committed in a British frigate, on the high seas, be committed within the jurisdiction of that nation.³⁹

Marshall quickly dispensed with the notion of jurisdiction: American jurisdiction did not reach to a British sailor on a British frigate navigating the high seas under a commission from the British king. Thus he adroitly sidestepped the central factual question as to whether Robbins was in fact an American sailor impressed onto a British frigate against his will.⁴⁰ Far more pressing than the facts were the underlying principles of international law, including the law of piracy, with which Robbins had been charged along with mutiny and murder:

³⁷ Wolcott, *ibid.*

³⁸ Cullen, *supra*, note 24, p. 35.

³⁹ *Ibid.*, p. 83. Italics added.

⁴⁰ *Ibid.*, p. 86.

In truth, the right of every nation to punish, is limited, in its nature, to offences against the nation inflicting the punishment. This principle is believed to be universally true.

It comprehends every possible violation of its laws on its own territory, and it extends to violations committed elsewhere by persons it has a right to bind. It extends also to general piracy.

A pirate under the law of nations, is an enemy of the human race. Being the enemy of all he is liable to be punished by all. Any act which denotes this universal hostility, is an act of piracy. Not only an actual robbery therefore, but cruising on the high seas without commission, and with intent to rob, is piracy. This is an offence against all and every nation and is therefore alike punishable by all. But an offence which in its nature affects only a particular nation, is only punishable by that nation.⁴¹

General piracy, said Marshall, is "an offence against the whole community of nations," not to be confused with piracy by statute, which is an offence against the nation defining the act of piracy.⁴²

It is true that the offence may be complete by a single act – but it depends on the nature of that act. If it be such as manifests general hostility against the world, an intention to rob generally, then it is piracy; but if it be merely a mutiny and murder in a vessel, for the purpose of delivering it up to the enemy, it seems to be an offence against a single nation, and not to be piracy. The sole object of the crew might be to go over to the enemy, or to free themselves from the tyranny experienced on board a ship of war, and not to rob generally.⁴³

In any case, "For the murder, not the piracy, Nash was delivered up. Murder, and not piracy, is comprehended in the 27th article of the treaty between the two nations."⁴⁴ Anyone indicted of murder, whether or not the offence was piracy, should be punished as if he had committed the offence on land.⁴⁵ Since an acquittal for piracy would not have discharged the murder, he must in any case have been delivered to the British government on the charge of murder. It follows that "the President of the United States might, very

⁴¹ *Ibid.*, p. 87.

⁴² *Ibid.*, pp. 87-88.

⁴³ *Ibid.*, p. 90

⁴⁴ *Ibid.*

⁴⁵ *Ibid.*, p. 89.

properly, without prosecuting for the piracy, direct him to be delivered up on the murder.”⁴⁶ To do otherwise would have been a breach of a “most solemn compact,” “a breach of faith and a violation of national duty,” since “the case stated was completely within the letter, and the spirit, of the 27th article of the treaty.”⁴⁷

Marshall’s second proposition was that the case was one of executive discretion, not judicial decision. It was the duty of each replete department to resist encroachment by the other. A case proper for judicial decision may arise where treaty rights are to be asserted or defended in court. However, judicial power does not extend to “political compacts” such as the case of “the delivery of a murderer under the 27th article of our present treaty with Britain.” In short, “a case like that of Thomas Nash, is a case for Executive and not judicial decision”:⁴⁸

The President is the sole organ of the nation in its external relations, and its sole representative with foreign nations. Of consequence the demand of a foreign nation can only be made on him

He possesses the whole executive power. He holds and directs the force of the nation. Of consequence any act to be performed by the force of a nation, is to be performed through him.

He is charged to execute the laws. A treaty is declared to be a law. He must then execute a treaty, where he and he alone possesses the means of executing it.⁴⁹

Marshall’s remarks were carefully premised on the President being properly apprised of the facts of the case, supported by proof. As a footnote to his speech, he addressed the concerns of Albert Gallatin: An impressed American seaman who had

⁴⁶ *Ibid.*, pp. 90-91.

⁴⁷ *Ibid.*, p. 94.

⁴⁸ *Ibid.*, p. 101. See also Larry D. Cress, “The Jonathan Robbins Incident: Extradition and the Separation of Powers in the Adams Administration,” *Essex Institute Historical Collections*, CXI (1975), 99-121.

⁴⁹ *Ibid.*, p. 104.

killed for the purpose of securing his freedom from the vessel in which he was confined ought not to be given up as a murderer. Marshall concurred, saying he believed the opinion to be "unquestionably correct":

But he felt the most perfect conviction, founded on the general conduct of the government, that it could never surrender an impressed American to the nation, which, in making the impressment, had committed a national injury.

This belief was in no degree shaken, by the conduct of the executive in this particular case.

In his own mind it was a sufficient defence of the President, from an imputation of this kind, that the fact of Thomas Nash being an impressed American, was obviously not contemplated by him in the decision he made on the principles of the case.⁵⁰

If a new circumstance arose of which the President had not been apprised before making his decision, the judge ought not to have acted on the executive decision prior to bringing the new circumstance to the attention of the executive. Furthermore, the sufficiency of the evidence was entirely the domain of the judge:

If Thomas Nash had committed a murder, the decision was that he should be surrendered to the British minister, if he had not committed a murder, he was not to be surrendered.

Had Thomas Nash been an impressed American, the homicide on board the *Hermione*, would, most certainly, not have been murder.

The act of impressing an American is an act of lawless violence. The confinement on board a vessel is a continuation of that violence, and an additional outrage. Death committed within the United States, in resisting such violence, would not have been murder, and the person giving the wound could not have been treated as a murderer.⁵¹

Marshall agreed that the courts had no power "to seize any individual and determine that he shall be adjudged by a foreign tribunal," but argued (counter to his later judgment in

⁵⁰ *Ibid.*, p. 108.

⁵¹ *Ibid.*, p. 109.

*Foster v. Neilsen*⁵²) that in the absence of any legislation from Congress, the President had the power to deliver up Nash/Robbins to the British.⁵³

3. The Response to Marshall's Speech

a) Critical Response

Immediately after the speech, Jefferson wrote to Madison that Marshall had distinguished himself greatly in the Robbins debate.⁵⁴ Yet when he received a printed copy of the speech, Jefferson wrote critical remarks on the back of the last page:

1. It was Pyrracy by the law of nations, & therefore cognisable by our courts. 2. If alleged to be a murder also, then whether he was an impressed American was an essential enquiry. 3. Tho' the President as a party subordinate to the court might enter a Nolle pros, he could not countroul the court as a requisition in the style of a Superior by requisition was a violation of the Constitutional independancy of the Judiciary."⁵⁵

However, it was a political speech for a political purpose. Viewed as a judgment, as it sometimes has been,⁵⁶ the speech was seriously flawed. For example, it was clear that President Adams had not in fact exercised his executive authority, leaving it up to the judge to transfer Robbins to British hands if the evidence warranted. Nor had the President conferred any authority upon Judge Bee, whose role was merely to hear an argument for *habeas corpus* to determine if Robbins was lawfully detained. Nor had he allowed the judge do make a judicial decision unfettered from the pressure of being told what the President expected of him. Nor was the treaty itself validated or enabled by legislation. As Spears noted,

⁵² 2 Pet. 253.

⁵³ Spear, *supra*, note 3, p. 55.

⁵⁴ Bowers, *supra*, note 28, p. 440.

⁵⁵ *Political Pamphlets*, I, no. 7, Virginia Historical Society. Cited in Cullen, *supra*, note 24, p. 109 fn.

⁵⁶ See Spear, *supra*, note 3, pp. 55.

The twenty-seventh article of the treaty of 1794 with Great Britain was a contract in which the parties mutually pledged their faith with respect to action *in futuro*, but in which they made no provision as to the agency for the delivery of fugitive criminals. They simply agreed that the delivery should be made in the cases and circumstances stated. The contract did not by its own terms execute itself, and, hence, needed legislation to make it operative, and, hence, was not, in the absence of the requisite legislation, "the law of the land" for courts. Courts, according to the principle laid down in *Foster v. Neilson*, *supra*, could exercise no power under it until Congress should legislate for its execution.

Was the article "the law of the land" for the President? It certainly was not so in express terms. The President has power to make treaties. These treaties, if self-executing without the aid of legislation, are laws of the land; yet it is not a constitutional prerogative of his office to execute treaties, any more than it is to execute the Constitution, except as he is authorized to do so.⁵⁷

Spears pointed out that even though Congress may have had a duty to pass appropriate legislation to support the treaty, its failure to do so did not add to the powers of the President: "Legislative omissions are not a source of positive powers to any department of the Government."⁵⁸ The surrender of Robbins was therefore without legal authority.

But quite apart from the question of legal authority was the question of the sufficiency of the evidence. Bee himself had been compromised in this regard, since three months earlier he had taken the affidavit of the principle witness against Robbins. He pointedly disregarded the only evidence he had before him, including the affidavits of Portlock, who had simply overheard Robbins in his cups recounting a yarn, and that of Lieutenant Forbes, who deposed, baldly,

That on the 19th of September following, he was sent on board of the said British frigate, at which time he saw and left the said Nash in the same station, on board that vessel, as he was at the time of this deponent's being a midshipman therein. That on the 22d of the said month, the crew mutinied on board the said frigate, killed the principal officers, piratically possessed themselves of her, carried her into Laguyra, and there disposed of her to certain subjects of his Catholic Majesty. That the said Thomas Nash was one of the principals in the commission of the said acts of murder and piracy; whose conduct in that transaction has become

⁵⁷ *Ibid.*, pp. 56-57.

⁵⁸ *Ibid.*, p. 57.

known to this deponent by depositions made, and testimony given in court-martial, where some of the said crew have been tried.

“JOHN FORBES

“Sworn before me this 18th April, 1799

“THOMAS BEE,

“District Judge, South Carolina.”⁵⁹

As John Wood remarked in 1802, “there does not appear to have existed the slightest cause for even a commitment of Jonathan Robbins. The testimony on the part of Portlock is trifling in the extreme, and that of Lieutenant Forbes entirely verbal report”:

The fate of Jonathan Robbins, and the story of this unfortunate seaman, are too well known and too deeply impressed on the hearts of Americans to require any comment or introductory remarks previous to the narration of the mock trial which the clemency of a southern judge granted him.⁶⁰

Clearly the administration’s perceived duty to meet international obligations, however ill-formed, far outweighed the individual rights of Jonathan Robbins, in the perception of both the court and the government. This conflict of imperatives between international obligations and individual rights remains an issue to this day.

Although John Nicholas joined Edward Livingston in the debate over the need to draft enabling legislation to fully activate the Jay Treaty, their compeers in the House of Representatives quickly lost interest after debate on the Robbins case itself had been exhausted and Livingston’s motion of censure was defeated.⁶¹ Several objections were advanced by Nicholas after the Robbins debate with respect to the need for legislation,⁶² but each was shot down by Marshall, who now had the ear of the House as never before. The debate over proposed legislation had been upstaged by the very case that had brought

⁵⁹ Wood, *supra*, note 7, pp. 212-213.

⁶⁰ Wood, *supra*, note 7, p. 214.

⁶¹ *Annals of Congress*, X, 621.

⁶² The continuing debate between Nicholas and Marshall is to be found at *Annals of Congress*, X, 537, 754-655, 691.

the legislation issue into focus, "the most controversial political skirmish to occur during this session,"⁶³ and the only extradition case ever advanced under the Jay Treaty: the case of Jonathan Robbins.⁶⁴

b) Presidential Response

President Adams was even more impressed than Jefferson by John Marshall's defence of his actions in the Robbins affair. Almost immediately, he appointed him Secretary of State, replacing Timothy Pickering, who had failed to advise President Adams as to the possible political ramifications of applying the Jay Treaty in the Robbins case. Pickering himself had been considering running against Adams as a Federalist presidential candidate in the election of 1800, and had nothing to lose by letting the President wander into the line of fire, "having been long accustomed to ignoring or thwarting the wishes of his chief."⁶⁵

Adams lost the election of 1800 to Thomas Jefferson and Aaron Burr.⁶⁶ Although the Robbins case was not overtly a campaign issue outside Congress, the damage done in the political debates in the House of Representatives a mere two months before the election helped the Democratic-Republicans cast doubt on Adams' capability, so that even the Federalist forces were deeply divided. As Sir Edward Clarke remarked, "The public feeling was so strong that the incident had a considerable effect on the result of the contest for the presidency between Adams and Jefferson in 1801."⁶⁷

⁶³ Cullen, *supra*, note 24, pp. 35-37.

⁶⁴ *Holmes v. Jennison*, *supra*, note 3, at 570.

⁶⁵ Bowers, note 28, p. 457.

⁶⁶ Jefferson and Burr were tied in the number of electoral votes. The House of Representatives, swayed by Alexander Hamilton, chose Jefferson for president over Burr, who became Jefferson's vice-president and Hamilton's mortal enemy: the enmity culminated in a duel in which Hamilton was shot dead.

⁶⁷ Clarke, *supra*, note 2 (2nd ed., 1874), pp. 36-37.

In one of the last acts of his presidency, Adams appointed John Marshall Chief Justice of the Supreme Court of the United States – no doubt an act of gratitude – where Marshall distinguished himself for the next 35 years, clarifying constitutional issues such as the division of powers among the executive, the judiciary and the legislature, and the distribution of power and responsibility between federal and state bodies – and in particular establishing for the Court the power of judicial review, which would henceforth bring unresolved extradition issues before the highest court in the land.⁶⁸

⁶⁸ *Marbury v. Madison* (1803).

CHAPTER FOUR

BETWEEN TREATIES (1807-1842): THE PERSISTENCE OF INTERNATIONAL "OBLIGATIONS" OVER INDIVIDUAL RIGHTS

1. The War of 1812

a) "A National Injury"

As President, Thomas Jefferson was committed to a policy opposite that of the Adams administration where extradition was concerned, and there were no more extraditions from the U.S. to Britain before the Jay Treaty had run its course in October, 1807. At the height of the Napoleonic Wars, the British navy escalated the impressment of neutral American mariners and seizure of neutral American ships. Jefferson, like John Marshall, regarded impressment as "a national injury," an act of aggression.

Just as Adams had rewarded Marshall for his performance in Congress with an appointment to the prestigious position of Secretary of State, so Jefferson awarded the Republican spokesman in that debate, Albert Gallatin, to the position of Secretary of the Treasury. James Madison remained Secretary of State for the two terms of Jefferson's presidency. Under him, Jefferson appointed the Governor of Virginia, James Monroe, as Minister to Great Britain in 1803 specifically to deal with the outrage of impressment. Monroe did not make much headway, partly because of the distractions of the Louisiana Purchase, which effectively doubled the land mass of the U.S. But by 1806, he was negotiating in earnest.

The crowning insult to American pride was Britain's handling of the impressment issue. One of Monroe's main objectives in seeking a treaty with Britain in 1806

was to end kidnapping of American sailors accused of being British deserters. Monroe and William Pinckney had been dispatched to London in 1806 to make a treaty with Britain upon the expiration of Jay's Treaty of 1794. The result was so unacceptable to Jefferson that he refused to present it to the Senate.¹

The draft treaty signed with the British by Monroe and Pinckney on 31 December 1806 was in effect a modified extension of the Jay Treaty. Jefferson flatly rejected it, specifically because it did not deal with the issues of impressment and seizure of American ships. He sent the document back to Monroe in England for revision, complaining that the negotiators had not followed their instructions. Predictably, England regarded his rejection of the signed treaty as an act of bad faith.

...If Britain had acted with some sense of moderation in this issue, she might have calmed American feelings; Jefferson, even after strong rebuffs, was willing to continue negotiations. Britain, however, abandoned all caution, and the *Chesapeake* incident was the result.²

Jefferson was as shaken by this enormity as any of his countrymen. He immediately summoned his cabinet to consider measures of retaliation.... Jefferson might have had satisfaction from the British if he had been willing to accept an apology and amends for that crime, but in asking for amends he insisted as well upon the abolition of impressment itself.³

The British refused to reopen negotiations. Accordingly, immediately upon the expiration of the pertinent terms of the Jay Treaty (including Article 27), Jefferson instituted the *Embargo Act* restricting American trade with Europe. Britain retaliated with Orders in Council by which the Royal Navy was ordered to blockade French ports

¹ Lawrence S. Kaplan, *Engtangling Alliances with None: American Foreign Policy in the Age of Jefferson* (Kent, OH: Kent State University Press, 1987), pp. 113, 221.

² The American ship *Chesapeake* was sunk by the British ship *Leopard* off the coast of Norfolk in 1807. This is the first "*Chesapeake* incident," not to be confused with the second, which involved the hijacking of an American steamer of the same name by Confederate sympathizers from New Brunswick during the U.S. Civil War.

³ Kaplan, *supra*, note 1, pp. 113-114. Sir Edward Clarke was clearly mistaken when he remarked in *A Treatise upon the Law of Extradition*, 2nd Ed. (London: Stevens & Haynes, 1874), "At the expiration [of the Jay Treaty] the relations between the two countries were so unfriendly that no attempt was made to renew the treaty." (p. 35).

and seize all American ships which had the temerity to trade with France without first reporting to British ports to pay stiff duties. The path to the War of 1812 was assured.

b) The War That Was Won Before It Was Begun

It could be said that that War of 1812 was won before it was begun. Madison had two main objectives: cessation of the seizure of American ships brought about by the existence of the Orders in Council ordering a blockade of France, and eviction of the British from Canada for supplying arms to Tecumseh and the Shawnees in Indiana. The Shawnees, led by Tecumseh's brother, Laulewasikau (The Prophet) were effectively routed in the Battle of Tippecanoe seven months prior to the start of the war, although The Prophet escaped to Canada. Extradition proceedings were out of the question, since The Prophet was a Canadian protégé. In the words of Emmerich de Vattel, "The sovereign who refuses to deliver up the guilty, renders himself in some measure an accomplice in the injury and becomes responsible for it."⁴ In other words, "If we screen him from ... punishment, we become parties to his crime, -- we excite retaliation."⁵

This was the position of the War Hawks, led by Speaker of the House Henry Clay and Chairman of the Foreign Relations Committee John C. Calhoun, a strong

⁴ Cited in *Re Washburn* (1819), 4 Johnson Ch. (10 U.S.) 548 at 549. Swiss jurist Emmerich de Vattel, whose *The Law of Nations* (1758) had gained popularity in America at the time of the drafting of the Declaration of Independence, remained a major influence on jurists in America, and was often cited favourably as an authority by American politicians to support their position on neutrality, as well as the principles of liberty and equality. Vattel was cited by both American and Canadian courts in support of the principle of extradition in the face of the absence of a treaty. Taney, C.J. of the U.S. Supreme Court, quoted Vattel at length in *Holmes v. Jennison* (1840) 14 Peters 540 at 572, then remarked: "After reading these extracts, we can be at no loss to comprehend the intention of the framers of the Constitution in using all these words, 'treaty,' 'compact,' 'agreement.' ... And the use of all these terms, 'treaty,' 'agreement,' 'compact,' show that it was the intention of the framers of the Constitution to use the broadest and most comprehensive terms." Clearly in the opinion of Taney, the framers of the Constitution were inspired by, and borrowed the language of, Emmerich de Vattel.

⁵ Per Reid, C.J. in *Re Fisher* (1827), 1 Stuart 245 (K.B.) at 251.

Jeffersonian who had been pressing for war with Britain since 1807. Calhoun introduced the Declaration of War against Britain into the House in June, 1812 and President Madison signed the Declaration on 18 June 1812, days *after* the British had rescinded the Orders in Council that had been the primary cause of tensions in the first place.

c) A Rising Star: Lt. John Beverley Robinson

By August, General Hull had crossed the Detroit River into Canada and occupied the village of Sandwich. Despite advice from the British commander-in-Chief, Sir George Prevost, not to engage the Americans, General Isaac Brock, the military commander of Upper Canada, pulled out all the stops, enlisting the assistance of all available militia units to support his 1,600 regular soldiers. After a forced march from York to Fort Malden, the Third York Regiment joined the assembled forces of Col. Henry Proctor and were assured of the support of Tecumseh's several hundred warriors. Hull retreated to Detroit. The British crossed the river in pursuit. The militiamen donned the spare uniforms of the regular troops to give the appearance of a massive force of trained British soldiers descending upon Detroit. Tecumseh joined forces with the British to capture Detroit, then threw his support behind another British regiment to invade Ohio.

Among the officers engaged in the capture of Detroit was the attorney-general of Upper Canada, John Macdonell, who (though at 26 he had never before fought a battle) had obtained the rank of Lieutenant-Colonel in the militia, and was provincial aide-de-camp to Brock. Lt. John Beverley Robinson of the York militia, then 21, had been a law clerk for Macdonell before the war. Together, they entered Detroit on 16 August 1812 to negotiate the terms of capitulation, which included fewer than 1,000 Canadian troops

taking 2,000 American soldiers captive. Brock claimed the territory "ceded to the arms of His Brittanick Majesty."⁶

Soon, however, the remaining Americans had regrouped to attack Queenston on the Niagara River. They took position of Queenston Heights, and in the attempt to dislodge them, Brock was fatally shot, leaving Macdonell in charge of the militia. He attempted to mount a second offensive, only to be shot dead himself. Both sides regrouped, the British assisted by the arrival of a new commander, General Roger Sheaffe, with reinforcements: an artillery unit, the all-black Niagara Company consisting largely of escaped slaves, and a brigade of Indians. With Macdonell dead, Robinson commanded General Sheaffe's flank company. As Robinson recounted, the Indians proved irrepressible, and an inspiration to the rest of the troops:

The Indians were the first to advance. As soon as they perceived the enemy they uttered their terrific war-whoop, and commenced a most destructive fire, rushing rapidly upon them. Our troops instantly sprang forward from all quarters, joining in the shout.

The Americans stood a few moments, gave two or three general volleys, and then fled by hundreds down the mountain. The consternation of the enemy was complete.⁷

General Sheaffe was sufficiently impressed by the performance of the 21-year-old law clerk that he promoted him to the rank of captain, and promptly appointed him acting attorney-general of Upper Canada in place of Macdonell.⁸

One of the first legal questions Robinson was asked by the General was whether Michigan residents could be conscripted into the British army, since Brock had declared

⁶ Patrick Brode, *Sir John Beverley Robinson: Bone and Sinew of the Compact* (Toronto: University of Toronto Press, 1984), pp. 11-14, 18.

⁷ *Ibid.*, p. 16.

⁸ *Ibid.*, p. 17.

the territory British. "I am of the opinion that they cannot," Robinson replied. "By the capitulation of the 16th August 1812, Fort Detroit only, with the troops regulars as well as militia, were surrendered to the British forces."⁹

After the defeat of the British fleet on Lake Erie in September 1813, U.S. forces under General William Henry Harrison invaded Canada. Tecumseh again joined forces with the British, and in fact directed the fighting, but the combined forces were routed by the Americans at the Thames River and Tecumseh was killed on 5 October 1813 in what was possibly the turning point in the war.

It was clear to Robinson, as chief prosecutor in the province, that the Americans could not have accomplished the invasion and rout without inside help. Soon, the 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.¹⁰

The Americans had invaded York, briefly, in April and July, 1813, and the Canadian forces reached Washington, each invasion force setting fire to some buildings before retreating; but basically the War of 1812 was a deadlock. In fact, its most decisive battle, the Battle of New Orleans, was fought on 8 January 1815 – two weeks *after* the signing of the Treaty of Ghent on Christmas Eve, 1814.

d) The Treaty of Ghent

The Treaty of Ghent effectively ended the war and created a mechanism for settling U.S. - Canada boundary disputes. The subject of extradition came up only obliquely during the peace negotiations. The American commissioners, Albert Gallatin

⁹ *Ibid.*, p. 18.

¹⁰ *Ibid.*, pp. 24-25.

and Henry Clay, were reminded by Secretary of State James Monroe in a formal letter that “offenders, even conspirators, cannot be pursued by one power into the territory of another, nor are they delivered up by the latter, except in compliance with treaties, or by favour.”¹¹ Other than this oblique reference in correspondence between two high-ranking members of Madison’s cabinet, the Treaty of Ghent did not deal directly with the issues of extradition, impressment or neutrality rights that had led to the war in the first place. This time, President Madison did not appear to regard this oversight as sufficient grounds to send it back.

2. Extradition Cases without Treaty or Statute

a) *Re Washburn* (1819)

The “Great Peace” that followed ratification of the Treaty of Ghent led in the Munroe years to a period of cooperation between the Province of Upper Canada and the U.S. This desire to cooperate is reflected in the lip-service paid by a New York court to the principle of cooperation in the exchange of offenders pursuant to the “law and usage of nations,” even in the absence of a treaty. *Re Washburn*¹² (1819) was the first reported attempt by American authorities to detain a Canadian preparatory to his possible extradition to Canada. The case is ringed around with qualifications, since Canadian authorities did not have a chance to act on it, Daniel Washburn being discharged before it got to that stage.

¹¹ Cited in *Holmes v. Jennison*, *supra*, note 4 at 549.

¹² *Re Washburn*, *supra*, note 4 at 548, 553.

As in the case of Jonathan Robbins, Washburn was arrested on a complaint by a confidant.¹³ Washburn had allegedly taken some money from a fellow patron of a Kingston, Ontario, pub, then travelled with a friend, Parks, to Troy, New York, where Parks visited a bank to exchange an unspecified amount of "Montreal" currency for an unspecified amount of American currency. That was the evidence.

Quite correctly, Washburn was discharged on the sole ground of insufficiency of the evidence.¹⁴ But the chancellor's *obiter* interpretation of extradition law established a precedent that was followed, even in in Canada,¹⁵ despite the fact that it was completely wrong as a statement of law. 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.¹⁶

However, even when nations are on friendly terms, as the U.S. and Canada were for the first time decades, there is no obligation in the absence of a treaty to return fugitives to where they had allegedly offended.

The Commissioner compounded the error:

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

¹³ *Ibid.*, at 548.

¹⁴ All three editions of *LaForest's Extradition to and From Canada* (New Orleans: Hauser Press, 1961; Toronto: Canada Law Book, 1977 and 1991) state erroneously in the first three pages of the book, "Canada and the United States continued to surrender fugitives to one another. Thus, in 1819, one Daniel Washburn was extradited from the United States to Canada on a charge of theft."

¹⁵ *Re Fisher*, *supra*, note 5 at 252, 253, 255, 359.

¹⁶ *Re Washburn*, *supra*, note 4 at 548.

application be made, and duly recognized, within a reasonable time, the prisoner will then be entitled to his discharge upon *habeas corpus*.¹⁷

It could be argued that the *Robbins* case, though not referred to, provided a precedent for this statement of law, since Robbins had been arrested and detained on information for months before British authorities were so much as informed of his existence in America; whereupon they were invited to make an official "requisition" pursuant to the treaty, and did so. However, even if it is conceded that the Jay Treaty was valid without enabling legislation, Article 27 had expired 12 years earlier. The chancellor noted the fact that it had expired, but interpreted the expiration as serving to broaden the law rather than narrow it:

The twenty-seventh article of the treaty of 1795, between the United States and Great Britain, provided for the delivery of criminals charged with murder or forgery; but that article was only declaratory of the law of nations..., the recognition, not the creation of right.¹⁸

Article 27 had reverted to being "equally obligatory upon the two nations, under the sanction of public law, since the expiration of that treaty....

During the existence of the treaty of 1795, it might well have been doubted whether the two governments had not, by that convention, restricted the application of the rule to the two specified cases of murder and forgery, for it is a maxim of interpretation, that *enumerato unius est exclusio alterius*. But if it were so, yet upon the expiration of that treaty, the general and more extensive rule of the law of nations revived.¹⁹

According to this 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, such as theft, now fell within the purview of the executive:

¹⁷ *Ibid.*, at 548-549.

¹⁸ *Ibid.*, at 551-552.

¹⁹ *Ibid.*, at 552-553.

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.²⁰

Chancellor Kent may have been prescient in his judgment in the sense that he anticipated, as a matter of common sense and desirable national policy, where the world would have to go in the next century and a half if it were to meet the ends and ideals of "civil society." But however desirable his statement of law might be from a policy standpoint, without so much as an extradition treaty on the horizon, let alone enabling legislation, getting to that point would be a challenge that would require at least as much good diplomacy and uncommon negotiating as good will and common sense.

In the wake of the *Washburn* case, the State of New York passed legislation on 5 April 1822 which gave discretion to the governor to surrender up to a foreign government, upon its requisition, fugitives charged with any crime but treason.²¹ The following year, however, the Supreme Court of Pennsylvania ruled in *Commonwealth ex parte Short v. Deacon* (1823)²² that s. 27 of the Jay Treaty "gave each nation a right which did not before exist, and which ceased at its expiration." Tilghman C.J. ruled that no state court had the right to detain an individual "in order to afford the President of the United States an opportunity to deliver him up," especially where an executive decision

²⁰ *Ibid.*, 552.

²¹ This law was eventually ruled unconstitutional in 1871. See Clarke, *supra*, note 3, pp. 39, 76.

²² (1823), 10 Serj., & Rawl., 125.

not to do so had already been made.²³ Furthermore, no arrest could be made merely at the request of a private person. Therefore, Short was discharged.

In 1825, Governor Van Ness of Vermont conveyed to U.S. 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. Van Ness conveyed Clay's advice back to the acting Governor of Canada:

"I am instructed by the President to express his regret to your Excellency, that the request of the acting Governor of Canada cannot be complied with under any authority now vested in the executive government of the United States; the stipulation between this and the British government, for the mutual delivery of fugitives from justice being no longer in force, and the renewal of it by treaty, being, at this time, a subject of negotiation between the two governments."²⁴

America could not return the British soldiers held in Vermont on the basis that there was no treaty. This opinion of U.S. President John Quincy Adams, no doubt all too aware of the power of extradition decisions to unseat presidents from the Robbins case that had helped Jefferson unseat his father, appeared to be totally lost on extradition proceedings going the other way, however, as was demonstrated in *Re Fisher*.

b) *Re Fisher* (1827)

In 1827, the Court of Queen's Bench for the District of Montreal attempted to import the principles enunciated in *Washburn* into Canadian law, ruling 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

²³ See Clarke, *supra*, note 3, pp. 40-41.

²⁴ Cited in *Holmes v. Jennison*, *supra*, note 4 at 541, 554.

jurisdiction.”²⁵ Fisher, said to be an alien from Prussia, was arrested on 10 May 1827 and taken to debtors prison in Montreal on the basis of a civil suit for an alleged debt of 160 pounds owing to a New Hampshire merchant. Later, on 28 May, he was charged with stealing \$638 from the same merchant’s locked trunk in Middlebury, Vermont. Two days later a warrant was issued in the name of the King, signed by Governor Dalhousie, ordering the sheriff to “immediately convey and deliver to such person or persons, as according to the laws of the said state of Vermont may be lawfully authorized to receive the same....” Again, there was no applicable treaty or law in place to support returning Fisher to the American authorities other than a perceived “moral duty to do so imposed by the comity of nations.”²⁶ The Court remanded Joseph Fisher to the custody of His Majesty, who had the executive discretion to process his surrender to the U.S.; whether he should or would be surrendered by the executive was not a matter for the Court to decide.²⁷

Reid C.J. expressly followed *Re Washburn* rather than British precedent. He noted several times that Fisher was an alien, not a British subject; then, alluding to Grotius, Puffendorf, Vattel, Heineccius, Burlamaqui and Martens, he stated:

It is impossible that any unprejudiced man can read these authors without being satisfied that the principle here objected to, stands admitted as a thing understood, practised and recognized by the comity of nations, that the offender against the laws of one nation, taking refuge with another, may be surrendered to the offended nation for the ends of justice.²⁸

²⁵ *Re Fisher*, *supra*, note 5 at 245.

²⁶ I.A. Shearer, *Extradition in International Law* (Manchester: University of Manchester Press, 1971), p. 25.

²⁷ *Re Joseph Fisher*, *supra*, note 5, pp. 261-263. All three editions of LaForest, *supra*, note 14, cite this judgment in support of the assertion that “in 1827 Joseph Fisher, an alien, was surrendered to the United States by Upper Canada.” However, it is not clear whether the Governor actually exercised his discretion.

²⁸ *Ibid.*, p. 251.

To deliver up an offender to “the offended nation” is an obligation, he held – part of the “social compact which directs that the rights of nations as well as of individual should be respected.”²⁹ The fact that no demand for surrender had been made by the U.S. government was not for the court to inquire into. “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.”³⁰

Fisher, like *Washburn*, is not sound law. Extradition between nations (as opposed to deportation or *refoulement* of convicted felons) without reliance upon either treaty or municipal statute was unheard of at that time in Canada or in Great Britain, and there was absolutely no case law supportive of the decision, except maverick American decisions such as *Washburn*.³¹ The *Fisher* decision made it clear that Upper Canada not only wished to receive back its own alleged offenders to face trial at home, but also, and perhaps more earnestly, wished to send back alleged offenders who had sought refuge within its borders, thereby potentially sully the peace and prosperity of the province.

c) *Holmes v. Jennison* (1840)

The question of extradition between Canada and the U.S. first reached the Supreme Court of the United States in 1840 on a question as to the validity of the state court remanding a Canadian, George Holmes, to the custody of the governor of Vermont preparatory to sending him back to Lower Canada for trial for the murder of Louis Tache. Since there seemed to be a division of opinion among the states as to their extradition

²⁹ *Ibid.*

³⁰ *Ibid.*, p. 261.

³¹ Clarke, *supra*, note 3, pp. 39, 89.

powers, the Supreme Court took the opportunity to review and explore the principles of extradition for the first time.

The main issue to be decided was whether, in the absence of a treaty, the U.S. had the right to give up a fugitive to a foreign power, on request. A second issue was whether the Governor of Vermont had the right to detain Holmes with a view to delivering him up to the authorities in Lower Canada. The Court, almost by design, was split down the middle on both issues, and on the question of its own jurisdiction. Deadlocked in this way, their words of wisdom can at best said to be *obiter*. But the remarks of the Chief Justice, speaking for fully half of the deadlocked court, are illuminating with respect to the positions taken by the U.S. in the absence of a treaty:

Since the expiration of the Treaty with Great Britain, negotiated in 1793, the general government appears to have adopted the policy of refusing to surrender persons, who, having committed offenses in a foreign nation, have taken shelter in this. It is believed that the general government has entered into no treaty stipulations upon this subject since the one above mentioned; and in every instance where there was no engagement by treaty to deliver, and a demand has been made, they have uniformly refused, and have denied the right of the executive to surrender, because there was no treaty, and no law of Congress to authorize it. And acting upon this principle throughout, they have never demanded from a foreign government anyone who fled from this country in order to escape from the punishment due to his crimes.³²

Thompson, J. took the position that "This power to surrender fugitives from justice to a foreign government has its foundation, its very life and being, in a treaty to be made between the United States and such government." Without such a treaty in place, the State of Vermont could not be said to be encroaching on the power of the President, since the President had denied he had such a power.³³

³² *Holmes v. Jennison*, *supra*, note 4, at 574.

³³ *Ibid.*, at 583.

Holmes' application for a writ of *habeas corpus* was dismissed by the deadlocked court, but the reporter inserted after his report of the judgment the following cryptic note:

Although no judgment was given in the case, it will be seen that a majority of the Court concurred in the opinion that the Governor of the State of Vermont had not the power to deliver up to a foreign government a person charged with having committed a crime in the territory of that government.

After this case had been disposed of in the Supreme Court of the United States, on a habeas corpus issued by the Supreme Court of Judicature of the State of Vermont, George Holmes was discharged. The judges of that court were satisfied, on an examination of the opinions delivered by the justices of the Supreme Court, that by a majority of the court it was held that the power claimed to deliver up George Holmes did not exist.³⁴

Despite the stalemate, the attorneys-general in the U.S. regarded *Holmes* as standing for the proposition that, in the absence of a treaty, foreign governments could not extradite fugitives from the U.S. As Edward Clarke put it,

Whether the President had not, in the absence of special laws, the right to act as the representative of the nation had never been decided; but the effect of Robbins's case was not yet forgotten, and American politicians did not care to risk their popularity merely for the sake of testing a disputed power.³⁵

3. A *Fugitive Offender Act* for Upper Canada

a) The *Habeas Corpus Act*

Although the Court of King's Bench and the Governor of Lower Canada were prepared without benefit of treaty to send alleged offenders, including thieves, back from whence they had come, the Governor of Canada, Lord Aylmer, recognized that British subjects had legal rights, not least of which was *habeas corpus*. In *Figsby et al.* (1833), Lord Aylmer refused a request from Governor Marcy of New York to surrender four

³⁴ *Ibid.*, at 597-598.

³⁵ Clarke, *supra*, note 3, p. 45.

Canadians "who had come over the line, and barbarously murdered a young woman in the town of Champlain."³⁶ Aylmer wrote to Marcy on 27 May 1833:

"I have been under the necessity of delaying an answer to your Excellency's letter of the 4th of April last, in consequence of objections raised by the Attorney-General of the province to the surrendering of the four individuals charged with the murder of Elizabeth Stevenson; that officer being of opinion 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 Corpus Act. The subject has received every consideration, and I very much regret to say the opinion of the Attorney-General is confirmed by a majority of those who have been called upon."³⁷

Section 11 of the *Habeas Corpus Act*³⁸ alluded to by Aylmer stated:

...that 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 that every such imprisonment, or transportation, is hereby enacted and declared to be illegal.

This blanket indemnification of British subjects was backed by the threat of a hefty 500-pound fine for bounty hunters or other blackguards who had the temerity to send them back to face American justice.

b) Governor vs. Assembly in Upper Canada

Similar provisions in the *Habeas Corpus Act* in Upper Canada did not sit well with the Legislature of Upper Canada. In the 20 years since the Treaty of Ghent, the

³⁶ Described in *Holmes v. Jennison*, *supra*, note 4, at 554-555.

³⁷ Letter of Lord Aylmer to General Marcy, 27 May 1833, cited in *Holmes v. Jennison*, *supra*, note 4, 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."

³⁸ Prov. Stat. 24 Geo. III, c.1, s. 11). See LaForest, *supra*, note 14 at p. 3, and Clarke, *supra*, note 3, p. 93.

population of British America had shifted from primarily American to primarily British, some 400,000 British immigrants having relocated. The expansion led to a great deal of hardship, which was summarized by Lord Durham in his comprehensive Report: "On the American side all is activity and bustle.... On the British side of the line, with the exception of a few favoured spots, all seems waste and desolate."³⁹ A profound gloom pervaded Upper Canada, stemming in part from the culture shock of predominantly urban British subjects moving into a vast untamed wilderness which had only pockets of development. Furthermore, in the early 1830s, there was a perception on the part of the Assembly that the Governor of Canada was not representing their wishes, and a perception on the part of the Governor that the Assembly was not doing its job:

The Assembly could not control the public funds; could not control the public lands. As the population grew apace, this seemed all the greater hardship. There were 77,000 people in Upper Canada just before the War of 1812; 150,000 in 1824 and at the outbreak of rebellion 400,000. But even at that, there are limits to the principle of self-government, especially in a new country with a handful of settlers and boundless resources. Who could hand over half a million square miles, ten times all England, to 400,000 settlers and throw in a fleet and army to guard it? What they needed as yet was not different government but better government. The quarrel as between Governor and Assembly went from bad to worse.⁴⁰

c) The Many Hats of John Beverley Robinson

One person who tried valiantly to bridge the gap was John Beverley Robinson. He was in a unique position to do so. The war hero who had been appointed acting attorney-general at 21 had served as full-fledged attorney-general for years, holding a seat in the Assembly since 1820. He was elevated to chief justice of Upper Canada in 1829,

³⁹ Cited in Stephen Leacock, *Canada: The Foundations of Its Future* (Montreal: Seagrams, 1941), p. 132.

⁴⁰ *Ibid.*, p. 133.

and until 1831 presided over the executive council advising the lieutenant-governor, Sir John Colborne. Only after Lord Goderich expressed reservations over the chief justice doing double duty on the executive counsel did Robinson resign from the executive council, but he thereafter held an enhanced position as Speaker in the Legislative Counsel, a position he held until 1836.⁴¹

Robinson had long been a proponent of keeping undesirable “aliens” – especially American fugitives – out of the province, a position that he debated tirelessly in the Assembly. There is little question that the Assembly of Upper Canada imposed discriminatory practices against blacks.

Equality would be hard to realize in a society in which blacks were regarded by most as inferior and by some as dangerous nuisances. Blacks were regularly denied employment, opportunities to buy houses, and admission to hotels. “British North Americans shared the patterns of prejudice found in the North, although these patterns appeared in colors muted by distance from the central scene of the action.”

Perhaps indicative of white Canadian attitudes towards blacks were the comments of the province’s chief justice, Sir John Beverley Robinson. He was the descendant of Virginia loyalists, a family of slave-owners who keenly resented the government’s attempts in the 1790s to put an end to slavery.... Robinson’s low opinion of blacks was counterbalanced by his determination that all men would be treated fairly under the law.⁴²

Under the leadership of Speaker Robinson, the Assembly adopted *An Act respecting the apprehension of fugitive offenders from foreign countries and delivering*

⁴¹ Brode (1984), *supra*, note 6, pp. 59, 183-185.

⁴² Patrick Brode, *The Odyssey of John Anderson* (Toronto: The Osgoode Society, 1989), p. 16. See also Donna J. Gillie, “The Pursuit of Knowledge under Difficulties: Education and the Fugitive Slave in Canada” (1982) 74 *O.H.* 94, at 102; Robin W. Winks, *The Blacks in Canada: A History* (New Haven: Yale University Press, 1977), 149; Jason H. Silverman, *Unwelcome Guests: Canada West’s Response to American Fugitive Slaves, 1800-1865* (Millwood: Associated Faculty Press, 1985).

them up to justice,⁴³ or, simply “The Fugitive Offenders Act (1933).” But what “fugitive offenders” did Robinson and the legislature have in mind?

As chief justice, Robinson was in the unique position of being able to interpret and apply the very laws he had helped create. Robinson’s decisions “recognized the discriminative policies imposed by the legislature”; but “black or white, the law was to be applied as Parliament had written it.”⁴⁴

The Fugitive Offenders Act has been regarded as an attempt to tighten the loophole used by Lord Aylmer as an excuse not to turn British subjects over to the American authorities, even for serious crimes. To answer Lord Aylmer’s explanation to New York Governor Marcy that he as Governor of Canada was not empowered to send offenders out of the country, the new Upper Canada legislation specifically 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 in Upper Canada.⁴⁵

d) The “Fugitive [Slave] Offenders Act”

Understandably, Westminster ignored the legislation, and had serious doubts as to its legality. Indeed, there seems to have been a decidedly racist agenda – for the only fugitives ever prosecuted under the Act were runaway slaves.⁴⁶ In the wake of the *Fugitive Offenders Act*,

⁴³ 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.

⁴⁴ Brode (1984), *supra*, note 6, pp. 265, 312.

⁴⁵ *Ibid.*, s. 1.

⁴⁶ Alexander J. Murray, “The Extradition of Fugitive Slaves from Canada: A Re-evaluation,” *Canadian Historical Review* 43 (1962) 298; Jason H. Silverman, *Unwelcome Guests: Canada West’s Response to*

A fugitive slave's greatest fear was that he might face criminal extradition, for it was virtually impossible to escape from slavery without committing some offence. One might have to steal a horse or forge a master's name on a pass. To what extent did this render a fugitive slave liable to extradition?⁴⁷

The first case to be tried under the Act was that of a Kentucky slave, Jesse Happy, who late in 1833 had "borrowed" his master's horse to bolt for Canada. Happy had the temerity to write to his master thanking him for its use and telling him where and how to find it at the American side of the border in New York.⁴⁸

The authorities in New York, knowing the Canadian government would not give him up as a fugitive slave, took a bill or indictment before the grand jury at New York, and got a true bill returned for felony in stealing the horse, and then claimed him.⁴⁹

Lieutenant-Governor Sir Francis Bond Head referred the matter to Chief Justice Robinson,⁵⁰ who as Speaker in the Legislative Council had shepherded through the Fugitive Offenders Act mere months before. Robinson 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."⁵¹

Happily for Happy, the lieutenant-governor was not convinced by Robinson, and in 1834 referred the matter to Sir John Campbell, then attorney-general of Great Britain. Campbell advised that if there was evidence of criminality that would warrant apprehension of the fugitive "if the alleged offence had been committed in Canada," he

American Fugitive Slaves, 1800-1865 (Millwood: Associated Faculty Press, 1985), pp. 41-42; Robin Winks, *The Blacks in Canada: A History* (New Haven: Yale University Press, 1977), 149, 172.

⁴⁷ Brode (1989), *supra*, note 42, p. 17.

⁴⁸ J. Moore, *A Treatise on Extradition and Interstate Rendition*, vol. 1 (Boston: Boston Book Co., 1891), p. 626; LaForest, *supra*, note 14, p. 3.

⁴⁹ Clarke, *supra*, note 3, pp. 80-81.

⁵⁰ Brode (1984), *supra*, note 6.

⁵¹ J.M. Leask, "Jesse Happy: A Fugitive Slave from Kentucky," *Ontario History* 54 (1962) 87 at 98.

should be delivered up to justice in the foreign country "without reference to the Question of whether he is, or is not, a Slave."⁵² However, like the *Washburn* and *Short* cases in the U.S., the matter was decided in Happy's favour on the facts: there was no *animus furandi*, and therefore insufficient evidence of horse-theft to send him back. It had not been the slave's primary intention to deprive his master of his horse; otherwise he would not have attempted to make sure it was returned.⁵³ This question of the sufficiency of the evidence was the very matter that could and should have been decided in the reference to Chief Justice Robinson.

Not every runaway slave received the same treatment as Happy at the hands of the Canadian Government. In 1841, Nelson Hackett, a black slave from Arkansas, also borrowed his master's horse to make his getaway. Knowing that he was heading to a colder climate, he also took his master's beaver coat. And because he knew he had a fair distance to ride, he took a saddle from the neighbour. And his gold watch. The State of Arkansas asked for Hackett's return.

In the fall of 1841, Lord Sydenham died after a fall from his horse. After the funeral in Kingston, then the capital of the Province of Canada, Chief Justice Robinson administered the oath of office to the new Governor General of Canada, Sir Charles Bagot.⁵⁴ No doubt briefed on the *Hackett* case by the seasoned chief justice, the fledgling governor promptly complied with the American request to surrender him, explaining to Colonial Secretary Lord Stanley that Hackett had taken more than he needed to make

⁵² *Ibid.*, at 95.

⁵³ Clarke, *supra*, note 3, p. 80, citing 60 *Hansard* 326 (per Lord Campbell), and *Forsyth's cases and Opinions on Constitutional Law*, p. 370.

⁵⁴ Brode (1984), *supra*, note 6, p. 228.

good his escape.⁵⁵ Certainly Hackett would have needed all the things he took – one cannot imagine riding 1,000 miles bareback without a coat, and a timepiece would seem to be essential for such a trek. Perhaps it was the quality of the watch – or the horse – that irked Bagot. Suffice to say that, no thanks to John Robinson, Hackett was returned unceremoniously to Arkansas – and to slavery.

By the same token, when a black man was convicted of cattle theft in Canada West and fled the province for America, the chief justice was opposed to extraditing him back to Canada to face justice. “I think I would have him where he is,” he explained to the lieutenant-governor. “They have too many such people about Amherstburg already. He was convicted in killing a cow on the common with intent of stealing the carcass, a very common offence among the blacks.”⁵⁶

Even after the Act of Union of 1840, which came into force in 1841, the Governor of a reconstituted Canada (Upper Canada was now “Canada West” and Lower Canada “Canada East”) continued to take his instructions from the British government rather than from the Assembly. Accordingly when in 1842 the new Governor, Lord Bagot, sought instructions to surrender a fugitive under the 1833 Act, he followed the wishes of Westminster, which regarded the 1833 Upper Canada extradition statute as not only ineffectual, but invalid. This attitude reflected the clear policy of the English courts, which in the first half of the 19th Century, “by strict and narrow interpretation almost completely nullified the operation of the few treaties in existence.”⁵⁷

⁵⁵ Letter Bagot to Stanley dated 20 January 1842. *British Parliamentary Papers (U.S.A.)*, vol. 46 (Shannon: Irish University Press, 1971), p. 9.

⁵⁶ Brode (1984), *supra*, note 6, p. 265.

⁵⁷ LaForest, *supra*, note 14, p. 3.

Except for the *Hackett* case, the Governor steadfastly refused to surrender fugitives to the U.S. in the absence of a treaty, adding to the mounting need to reach an agreement on such a treaty quickly.

The British abhorrence of the use of criminal extradition to return escaped slaves was apparent early in the negotiations. In 1840 Lord Palmerston, the foreign secretary, had said that if robbery and horse-theft (the only two crimes he considered a fleeing slave likely to commit) were excluded from the treaty, the fugitives would be safe.⁵⁸

Furthermore, in the notorious case of the slave ship *The Creole*,⁵⁹ Britain refused to surrender slaves to the United States after they sought refuge in the Bahamas upon allegedly murdering a passenger and rising up against the master of the ship, on the grounds that no treaty between Britain and America was in place:

The mutual surrender of criminals is indeed sometimes stipulated for by treaty, but as there is not at present any subsisting treaty to that effect with the United States of America, we think that Her Majesty's Government is not bound on the demand of the Government of the United States to deliver up the persons in question, or any of them, to that Government to be tried within the United States.⁶⁰

That was all the impetus American Secretary of State Daniel Webster needed to roll up his sleeves and start negotiating a serious extradition treaty with Great Britain.

⁵⁸ Brode (1989), *supra*, note 42, p. 20; Murray, *supra*, note 46, at 300-302.

⁵⁹ Described in the Proceedings of the House of Lords, 14 February 1842.

⁶⁰ 6 *British Digest* (1965) at 456.

CHAPTER FIVE

THE ASHBURTON-WEBSTER TREATY (1842), CONFEDERACY, AND CONFEDERATION

1. The Ashburton-Webster Treaty (1842)

a) The Devil and Daniel Webster

Daniel Webster, who would come to be known with Clay and Calhoun as one of the “great triumvirate” of secretaries of state, had been a strong advocate of the Bank of the United States – both figuratively and literally, since he had been its legal counsel and director of the Boston branch of the Bank. In 1842, he was still regarded, derisively, as a “friend of the rich.” And few people in America were more rich than the British Ambassador to the U.S., Lord Ashburton; for Lord Ashburton also happened to be Alexander Baring, the chief executive officer of Baring Brothers Co., at that time the biggest promoter of U.S. bonds and the leading financier of U.S. foreign trade. Baring had recently married Anne Bingham, the richest woman in Pennsylvania.¹

The question of extradition was central to the negotiations between Webster and Ashburton:

The British abhorrence of the use of criminal extradition to return escaped slaves was apparent early in the negotiations. In 1840 Lord Palmerston, the foreign secretary, had said that if robbery and horse-theft (the only two crimes he considered a fleeing slave likely to commit) were excluded from the treaty, the fugitives would be safe....In the end they made no attempt to address the question of the fugitive slaves. Ashburton reported to the foreign secretary that President Tyler was “very sore and testy about the Creole.” Yet nothing in the treaty guaranteed the Americans that the British would return fugitive slaves. Likewise,

¹ See *The New Encyclopedia Britannica*, 15th ed. (Chicago: University of Chicago, 1990), s.v. “Baring Family,” “Webster, Daniel.”

the treaty did nothing to exempt escaped slaves from its provisions.... As Lord Aberdeen, the foreign secretary who supervised the final negotiations of the treaty, astutely observed, "The treaty of extradition of criminals may lead to some difficulties in defining the character of those Acts which are committed by a Slave in order to obtain his freedom."²

However, in Parliament, Lord Aberdeen sang a different tune:

Some people had supposed that a fugitive slave might be given up under this treaty. This, he must say, was a most unfounded notion. Not only was a fugitive slave guilty of no crime in endeavouring to escape from a state of bondage but he was entitled to the sympathy and encouragement of all those who were animated by Christian feelings.³

What other position could he publicly adopt in support of a treaty that included as one of its objects "The Final Suppression of the American Slave Trade"?

Besides extradition and slavery, the Ashburton-Webster Treaty (U.S. authorities prefer "Webster-Ashburton Treaty") dealt with other outstanding issues, including the division of New Brunswick and Maine. Stephen Leacock, a Canadian satirist who occasionally turned his hand to history, described this part of the negotiations:

Lord Ashburton and Daniel Webster divided the territory as between friends. That either party got cheated is just a legend. Ashburton and Webster, being friends, sat discussing the clauses, since the weather was warm, "in their shirt-sleeves." This gave history the same kind of offence as when Lord Elgin presently made the Reciprocity Treaty of 1854 by "floating it through on champagne." Yet what better way to make treaties? Made thus they lasted. Champagne and shirt sleeves proved better than "blood and iron."⁴

Indeed, the Ashburton-Webster Treaty was to remain in force until it was superseded by the current U.S.-Canada Extradition Treaty in 1976. It is arguably one of the most influential documents in the development of extradition law, not only as between Britain and the U.S., but internationally.

² Patrick Brode, *The Odyssey of John Anderson* (Toronto: The Osgoode Society, 1989), p. 20.

³ *Hansard Parliamentary Debates* 3rd ser., vol. 70 (30 June 1843) col. 472.

⁴ Stephen Leacock, *Canada: The Foundations of Its Future* (Montreal: Seagram, 1941), pp. 142-143.

b) Article "X"

The extradition provision of the Treaty specifies:

1842

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 X. It is agreed that the United States and Her Britannic Majesty shall upon mutual requisitions by them, or their ministers, officers or authorities, respectively made, deliver up to justice, all persons who, being charged with the crime of

Murder, or

Assault with intent to commit murder, or

Piracy, or

Arson, or

Robbery, or

Forgery, or

The utterance of forged paper,

Committed within the jurisdiction of either, shall seek an asylum, or shall be found within the territories of the other;

Provided that this shall only be done 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;

And 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.

The expense of such apprehension and delivery shall be borne and defrayed by the party who makes the requisition, and receives the fugitive.

ARTICLE XI. The Xth Article shall continue in force until one or the other of the parties shall signify its wish to terminate it, and no longer.⁵

It is to be noted that the wording Ashburton-Webster Treaty as almost identical to that of the Jay Treaty in one important respect: the concept of the necessity of demonstrable "criminality" of the actions of the fugitive in the requested state:

Jay Treaty:

...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 trial, if the offence had there been committed.

Ashburton-Webster Treaty

...provided that this shall only be done 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.

Clearly Lord Ashburton and Daniel Webster, whether in shirt sleeves or not, had simply adopted the wording of the earlier, ineffectual Treaty with respect to double "criminality."

Webster's successor as secretary of state, John C. Calhoun, had his own interpretation of what was meant by "criminality." In a letter to the American minister in London, he wrote of the "true intent" of the Treaty: "The criminality of the act charged should be judged by the laws of the country within whose jurisdiction the act was perpetrated."⁶ Although Lord Ashburton seemed to believe that the Treaty excluded slaves who were seeking emancipation, he wrote to Thomas Clarkson on 17 March 1843:

⁵ "Treaties with the United States" in G.V. LaForest, *Extradition to and from Canada* 1st ed. (New Orleans: Hauser Press, 1961) at 164.

⁶ Cited in Manley O. Hudson, "The Factor Case and Double Criminality in Extradition," (1934), 28 *Am. J. Int'l L.* 274, at 298.

It is perfectly true that in the surrender of real criminals no distinction can or will be made with respect to colour & condition & therefore the Slave committing crime will be treated like any other person.⁷

Interestingly, the very ship bearing the ratifications of the Ashburton treaty from England to America also bore its test case, so to speak. Christiana Corchrane, a Scot, had allegedly murdered her husband, fled to England, then hopped on a ship bound for New York, where she was arrested. An application by her American counsel to prove her not guilty by virtue of insanity was "overruled." The evidence of murder being sufficient, she was surrendered to Great Britain, the first case to fall under the Treaty.⁸

2. Enabling Legislation

Arguably, the Ashburton-Webster Treaty came into effect in Upper Canada immediately upon its being ratified, by virtue of the pre-existence of the Act of 1833.⁹ However, Westminster had already expressed grave doubts as to the legality of that statute, as we have seen, and the Act of 1833 was quickly superseded by specific enabling legislation to give effect to the Treaty in an imperial domestic statute which was passed by Westminster later in 1842, becoming law the following year.¹⁰

Unfortunately, the English enabling legislation specified that no arrest of a fugitive would take place without the Governor issuing a warrant asserting that the U.S. had officially authorized the requisition. Although Canada was bound by the Treaty, the supporting imperial statute proved to be impractical, since it put a huge burden on the

⁷ A.H. Abel and F.J. Kingsberg (eds), *A Side-light on Anglo-American Relations, 1839-1858* (New York: Kelley, 1970), 33.

⁸ Edward Clarke, *A Treatise upon the Law of Extradition*, 2nd ed. (London: Stevens and Haynes, 1874), p. 48.

⁹ This is the position taken by Anne LaForest, *LaForest's Extradition to and from Canada* (Aurora: Canada Law Book, 1991,) p. 4.

¹⁰ 6 & 7 Vict. (Imp.) c. 76.

Governor (in theory, at least). In any case, by the time the official requisitions and warrants were put in place, the fugitive would in all likelihood have got wind of the pending extradition and made good his escape. Thus in 1849, the Province of Canada was moved to pass "An Act for better giving effect within the province to the treaty, &c.,"¹¹ reciting by way of preamble that some provisions of the English statute were "inconvenient":

More precisely that provision which requires that before any such offender as aforesaid shall be arrested, a warrant shall issue under the hand and seal of the person administering the government to signify that such requisition as aforesaid hath been made by the authority of the United States, ...inasmuch as by the delay occasioned by compliance with the said provision, an offender may have time afforded him for eluding pursuit.¹²

The Canadian statute instead provided for arrest of a fugitive merely on the strength of an information laid before a judge or justice of the peace. Otherwise, it substantially adopted the wording of the imperial statute, which was effectively and officially replaced by the Canadian statute, where the Province of Canada was concerned, by Imperial Order in Council.¹³ 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.

3. "The Whole of the Law"

As far as Macaulay, C.J. of the Court of Queen's Bench of Upper Canada was concerned, as of 1851 the Ashburton Treaty contained "the whole of the law of surrender

¹¹ 12 Vict., c. 19, later consolidated in the Consolidated Statutes of Canada, 1859, c. 19. The development of Canadian legislation is discussed in the following section.

¹² *Ibid.*

¹³ "Extradition Practice," 9 C.C.C. 264 at 284-285.

as between Canada and the United States.”¹⁴ So he held in *R. v. Tubbee*, a bigamy case arising under the Treaty, adding that the 1833 *Fugitive Offenders Act* of Upper Canada had been superseded by the Ashburton Treaty, even though that Act may continue to apply to other nations without treaties. Although the 1833 Act would have covered the charge of bigamy, the Treaty and later Acts expressly did not. Tubbee was discharged.

Going in the other direction, in *Ex parte Von Aernam* (1854),¹⁵ Canada successfully obtained the surrender of a fugitive charged with uttering forged documents in Canada in 1854. The extradition commissioner ruled that the evidence was sufficient. He 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.¹⁶ Once he 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. of the Upper Canada Court of Common Pleas held that

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.¹⁷

The fact of Von Aernam’s extradition had an obvious a prejudicial effect on the court.

Grotius’ maxim “extradite or prosecute” was nowhere more poignantly observed than in the case of U.S. Marshal William Tyler, who on 29 November 1858 boarded the U.S. brig *Concord* in Canadian waters on Lake Erie. The captain attempted to protect his

¹⁴ *R. v. Tubbee* (1851), 1 U.C.P.R. 98.

¹⁵ 3 Blatchford Cir. Ct. Rep. 160.

¹⁶ *Ibid.*

¹⁷ *R. v. Van Aernam* [sic] (1854), 4 U.C.C.P. 288.

ship, and in the process was shot. Tyler nonetheless arrested the injured man and conveyed him to the American side of the lake, where the captain died.¹⁸

The British Ambassador to the U.S., Lord Napier, demanded Tyler's surrender for murder. The Americans, without definitively refusing surrender, stated that they would try Tyler in Michigan, since the master of the ship had died on American soil. Tyler was tried by Federal Circuit Court, convicted of manslaughter, and sentenced to 30 days in jail plus a \$1 fine.¹⁹ The British government protested that the sentence was inadequate, and Tyler was rearrested, but successfully pled *autrefois convict* before the State Circuit Court. The prosecution appealed, saying that the first conviction was not valid since the Federal Court that first heard the case had no jurisdiction.²⁰ The Supreme Court of Michigan agreed, and Tyler was retried in November, 1859, convicted of second degree murder, and received a six year sentence.²¹

The British government expressed satisfaction with the outcome.

4. *Anderson's Case* (1860, 1861)

a) The Crime

In 1853, John Anderson did more than steal a horse to make good his escape from slavery in Missouri: while trying to evade capture, he stabbed to death with a knife a white planter who blocked his path. Seneca Diggs, was merely trying to do his civic duty under the U.S. *Fugitive Slave Act* (1850) to apprehend a runaway slave, for which he stood to gain a substantial reward of \$1,000, as prescribed by the law of Missouri. Diggs

¹⁸ *The People v. William Tyler* (1859), 7 Michigan Reps. (Cooley), 161.

¹⁹ *Ibid.*

²⁰ 9 Ops. Of Att.-Gen., 379 (Black).

²¹ *The People v. William Tyler, No. 2* (1859) 8 Michigan Reps (Cooley), 320.

died of the two stab wounds two weeks after the incident. Anderson made his way to Canada, on foot, where in ensuing years he made a respectable life for himself, even buying a house.²²

Anderson had confided in a black friend that he had stabbed a white man in trying to escape slavery. Years later the friend, after a falling out, reported Anderson's "confession" to a local magistrate, who issued a criminal information against Anderson, submitting it to justice of the peace William Matthews.²³ The information stated that Anderson was wanted man for stabbing an unknown man in Missouri. After an investigation, Anderson was detained in custody on a warrant alleging "that he, the said John Anderson, did, in Howard county, in the state of Missouri, on the 28th day of September, 1853, wilfully, maliciously and feloniously stab and kill one Seneca T.P. Diggs, of Howard County."²⁴

The informant, a fugitive named Wynne, had told the magistrate that Officer Samuel Port knew all the circumstances and had been looking for Anderson unsuccessfully for years, hoping to execute a dated American warrant. Once Anderson was arrested, Port identified Anderson as the wanted killer:

How Port could identify Anderson in view of his inability to capture him in 1854 was inexplicable. Indeed, it is questionable whether he ever laid eyes on Anderson before 1860. In any event, Port's identification was acceptable to Mathews. Port had had the foresight to retain the warrant for Anderson's arrest that had been sworn in 1854. He was undoubtedly aware that Missouri's thousand-dollar reward was still outstanding; sensing that if he moved fast he could earn a great deal of money, he notified a Detroit detective, James A. Gunning, of Anderson's arrest. In later months Mathews's enemies, and

²² Brode (1989), *supra*, note 2, p. 17.

²³ *Ibid.*, p. 22.

²⁴ *Re John Anderson* (1861), 11 U.C.C.P. 9, at 10.

especially the *Toronto Globe*, would pillory him for acting "the part of the kidnapper for the Missouri slave-catchers."²⁵

On the advice of Archibald McLean, J. of the Court of Queen's Bench, Anderson was released after four weeks in custody. Gunning then swore out a new information that Anderson "did wilfully murder Seneca Diggs" and had Anderson rearrested by Brantford constable Richard Yeoward for a determination as to whether he should be committed for extradition. He was guarded day and night, and for extra measure was kept handcuffed while in jail. He was allowed to see his white lawyer, but was not allowed any black visitors, including the Rev. Hawkins, his black minister, who at one point was unceremoniously ejected from the jail: "The Sherriff had given strict orders that no nigger should be permitted to see him."²⁶

In William Mathews's mind there existed little doubt of his prisoner's guilt. Mathews alleged (without proof) that Anderson had been involved in a knifing incident a few years earlier, that "he had stabbed a negro in a drunken brawl," that he had written to his fellow blacks in Missouri, urging them to rise up "to murder their masters right and left, and come off to Canada, where they would be quite safe." Finally, he had "applied his knife with murderous intent to Mr. Yeoward." Mathews had sized up his man. The abolitionists were trying to free a violent criminal "*from the hands of justice, thereby, cheating the gallows of its prey* and setting him free to extend his Bowie-knife practice to Canadians instead of Southern slaveholders. A sweet creature this is, truly, to make so much ado about!"²⁷

b) Prime Minister *cum* Attorney-General John A. Macdonald

At the time Anderson was first crossing the border into Canada, John A. Macdonald, a Kingston lawyer who for years had served as Leader of the Opposition in the Assembly of the Province of Canada, was in the throes of forming a coalition

²⁵ Brode (1989), *supra*, note 2, pp. 22-23.

²⁶ *Toronto Globe*, 14 November 1860.

²⁷ Brode (1989), *supra*, note 2, pp. 25-26, citing the *Hamilton Spectator*, 14 December 1860.

government with George Etienne Cartier, the leading spokesman for Canada East. As one of the joint leaders of the Liberal-Conservative Party, Macdonald became prime minister of the Province of Canada in 1857, and from then on he and Cartier served turn about, in the infamous "Double Shuffle," each also serving as the Attorney-General of their respective sub-provinces. George Brown, the publisher of *The Toronto Globe*, was part of this equation, since during the Macdonald-Cartier years he served as leader of the opposition – and (briefly, in 1858) as prime minister himself.

Much of the publicity in the Anderson case was generated by *The Globe*,²⁸ a great deal of which was directed against Attorney-General Macdonald for his handling of the case.²⁹ Macdonald was certainly not new to extradition matters. In January 1860, he had been consulted regarding the sufficiency of the documentation in the extradition case of Joseph Bocarde. He responded in a non-nonsense memo to the provincial secretary which left no doubt that he knew his extradition law and procedure:

"The copy of the evidence as certified by the Magistrate in this case is not alone sufficient. The papers should therefore be returned to Mr Matthews, the Magistrate that he may certify as required by chap. 89 of the Consolidated Statutes of Canada sect. 1, that the evidence is deemed sufficient by him to sustain the charge according to the laws of this Province if the offence alleged had been committed herein, together with the copy of the testimony."³⁰

Ever unsure of himself, Mathews presided over an extradition hearing in August, 1860, a month before he was to hear the Anderson case, and specifically asked the advice of Macdonald as to how he should conduct proceedings. Macdonald explained that,

²⁸ See the issues of 9 April, 14, 28, 30 November, and 3, 5, 8, 10, 11, 17, 18, 20, 26 December 1860; 4, 9, 16 January, 2, 7, 8, 11, 12, 13, 18, 24, 27 February, 1 March, 9 May, and 2 July 1861; 5 February 1863.

²⁹ See in particular issues of 3, 5, 8 and 10 December 1860; and 7, 9 January 1861.

³⁰ J.K. Johnson and Carole B. Stelmack, *The Papers of the Prime Ministers: The Letters of Sir John A. Macdonald 1858-1861* (Ottawa: Public Archives of Canada, 1969), p. 204.

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."³¹ Ironically, William Mathews, the same magistrate who had made the clerical omission in the Bocarde case, made an almost identical omission in the case of John Anderson. Ultimately, it was to be determinative of the case.

The laws of the province were naturally paramount in the attorney-general's mind. It would not have escaped his notice that in the previous year, the Hamilton Chief of Police had been convicted of kidnapping Louis Snow, a fugitive slave, after an authorized "extradition" in which Snow was returned to America without benefit of due process. Said Judge McLean, in fining the Chief of Police \$50, "We know that parties committing crimes have been frequently abducted not only from our own country but from the States."³² That activity had to stop.

The release of Anderson was ultimately a matter of executive discretion – a political decision. Accordingly, Anderson's lawyer, Sam Freeman, approached Attorney-General Macdonald to see if he could discharge Anderson since it was so obvious that Anderson had taken Diggs' life "to prevent his being carried back to slavery." That, surely was manslaughter, not murder. And manslaughter was not an extraditable offence.³³ Macdonald replied,

"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

³¹ *Brantford Expositor*, 3 August 1860. Cited in Brode (1989), *supra*, note 2, 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.

³² *Toronto Leader*, 7 February 1859.

³³ Letter, Freeman to Macdonald, 6 October 1860, Province of Canada, No. 22, *Sessional Papers*, vol. 4 (1861).

circumstances all I can do is to give you every assistance in testing the questions before the Courts or a Judge by Habeas Corpus.”³⁴

Macdonald was on a protracted speaking tour through Canada West, stumping for the upcoming election, when the Anderson case was heard on 24 November 1860. The Court reserved judgment to 29 November, then bumped it over another two weeks. Criticism of Macdonald in the press escalated to the point that Macdonald felt compelled to defend himself. In a lengthy address delivered at St. Catharines on 3 December, he protested that he himself had taken steps to ensure that Anderson’s rights would be protected – even to the point that Anderson would receive legal aid from the government to pay his legal expenses:

“Strange to say, however, Mr. Brown of the *Globe*, attempts to make it a matter of political capital against me, *that 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.*”³⁵

c) Chief Justice Robinson’s Decision

At Anderson’s extradition hearing, it had been contended by his lawyer, Samuel Freeman, that the runaway slave was justified in stabbing Diggs in defence of his own liberty. This had been a principle expounded upon by John Marshall when he had talked about impressment in his famous speech in reply to Albert Gallatin’s hypothetical case of an impressed American:

...An impressed American seaman, who should commit homicide for the purpose of liberating himself from the vessel in which he was confined, ought not to be given up as a murderer. In this, Mr. Marshall said, he concurred entirely.... He believed the opinion to be unquestionably correct....

³⁴ Letter, Macdonald to Freeman, 18 October 1860, Province of Canada, No. 22, *Sessional Papers*, vol 4 (1861).

³⁵ *Chatham Planet*, 10 December 1860. Italics in original. Cited in Brode (1989), *supra*, note 2, p. 50.

The act of impressing an American is an act of lawless violence. The confinement on board a vessel is a continuation of that violence, and an additional outrage. Death committed within the United States, in resisting such violence, would not have been murder, and the person giving the wound could not have been treated as a murderer.³⁶

Unfortunately, the parallels between an impressed white sailor and an oppressed black slave were lost on the average person in North America in 1860.

Finally, after a great deal of attention in the press, the Court of Queen's Bench was ready to give its judgment:

On the judgment day, 15 December 1860, fifty Toronto policemen, the bulk of the force, were called out to prevent any attempt by sympathizers to free Anderson. Twenty of the policemen were armed with muskets and fixed bayonets, which they stacked neatly on the lawn outside Osgoode Hall. The police were a tangible warning that, if necessary, armed force would uphold the law. As further insurance, a company of soldiers of the Royal Canadian Rifles were stationed a mere five-minute march away at Government House. For the first time since the Rebellion of 1837, the courts at Osgoode Hall bore the appearance of an armed camp.³⁷

J.E. Farewell, a law clerk in Toronto at the time, recounted,

The day in which judgment was given was one not to be forgotten. It was generally understood that the coloured people intended to use force to prevent Anderson's extradition. The courtroom was packed with coloured men, also the space between the walls and the railing surrounding the rotunda, the stairs, the ground floor, and the grounds outside the Hall. A visitor at the hall would have been surprised to see that nearly every regular policeman and many specials, with rifles and fixed bayonets, were stationed in the court-room in and around the approaches to the stairs.³⁸

The judgment of Robinson, C.J. stands in stark contrast to *The Creole* case of 11 years earlier.³⁹ The Chief Justice carefully set out the principles of extradition law under

³⁶ Charles T. Cullen, ed. *The Papers of John Marshall*, vol. IV (Chapel Hill: University of North Carolina Press, 1984), pp. 108-109.

³⁷ Brode (1989), *supra*, note 2, p. 57. See *Toronto Globe*, 17 December 1860.

³⁸ J.E. Farewell, "The Anderson Case," *Canadian Law Times* 32 (1912) 256 at 260.

³⁹ *In the Matter of John Anderson* (1860), 20 U.C.Q.B.R. 134.

the Ashburton Treaty of 1842, including the double criminality provisions by which he was governed. But he ignored the implications of sending Anderson back to a possibly hostile mob in Missouri, ignored the fact that Anderson in all likelihood would be executed for murdering a white man who had legally apprehended him, ignored the fact that Anderson had no status in Missouri other than fugitive slave, and one accused of murder of a white man, at that. Instead, he focused vigilantly on the legal niceties of whether what Anderson had done would amount, under the provisions of the Ashburton-Webster Treaty, to criminality in Canada. He decided that, whether or not Anderson was a slave, there was enough evidence to support a conviction for a crime which, had he committed the act in Canada, would have been murder.

Diggs had had a legal right to try to apprehend Anderson. Anderson had had a legal obligation to obey him. That was the law of Missouri, as it was recognized by Canada at the time it opted to sign a treaty with the U.S.A. That situation had to be inserted into the scenario when one contemplated whether the actions of Anderson would have been a crime in Canada. By a two-to-one decision, Anderson was to be remanded for possible surrender to the U.S. The Court had thrown the ball back to the executive.

The decision was met with outrage in the press, and the aging Robinson was pilloried as few judges have been in Canada before or since. The decision was a "disgrace to the British Bench":

The chief justice was accused of having 'labored so to twist the evidence, the facts and the law as to support this foregone conclusion.' ...Furthermore, 'the judges have sunk themselves a hundred percent in public estimation; and faith in the purity of the administration of justice in the high Courts has received a shock it will take years to recover from.'⁴⁰

⁴⁰ Brode (1989), *supra*, note 2, pp. 62-63.

Indeed, the 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, which in a controversial decision purported to retain jurisdiction to grant *habeas corpus* even though Canada had courts of its own that could grant that remedy.⁴¹

d) Onwards (and Downwards) to the Court of Common Pleas

Back in Canada, Anderson's lawyer, Samuel Freeman, sought the permission of Attorney-General Macdonald to take the Anderson matter to the Court of Error and Appeal.

Freeman asked the government's help, and reminded the attorney general that if he was successful he would relieve the minister of a very embarrassing obligation. John A. Macdonald needed no reminding. He assured Freeman that the government would consent to any appeals he might wish to bring.⁴²

However, in light of the *habeas corpus* issuing out of London, Freeman instead made an application before the Court of Common Pleas.⁴³ There, Draper C.J., predictably enough, reaffirmed the judgment of the Robinson C.J., 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 found the warrant defective since it alleged that Anderson did "wilfully, maliciously and feloniously stab and kill" Diggs rather than "murder" him. "The treaty and our statute," opined Draper,⁴⁴ "do not authorize a surrender, and consequently not a committal for the purpose of surrender, for any homicide not

⁴¹ *Ex parte Anderson* (1861), 3 El. & El. 487.

⁴² Brode (1989), *supra*, note 2, p. 90.

⁴³ *Supra*, note 24.

⁴⁴ *Ibid.*, 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 Patrick Brode, *Sir Beverley Robinson: Bone and Sinew of the Compact* (Toronto: University of Toronto Press, 1984), pp. 228, 250.

expressed to be murder.” Thus Anderson was saved from surrender to the U.S., and almost certain death at the hands of a Missouri lynch mob, by a technicality.

Interestingly, Draper, C.J., did not take credit for discovering either the technicality or the precedent upon which he relied – an obscure 1844 English Queen’s Bench decision, *Ex parte Besset*.⁴⁵ Early in February 1861, after Freeman had filed his application but before the hearing started, Draper explained, he had had a discussion about the Anderson case with Chief Justice Robinson in which Robinson had shown Draper a copy of *Besset*.

The two chief Justices had, in their chambers, read the case and decided that Anderson should be released because of the faulty writ: ironically, the decision to liberate Anderson had been made before the eight-and-a-half-hour ordeal in Common Pleas.⁴⁶

The following month, still smarting from the thorough excoriation received in the *Anderson* case, Sir John Robinson asked the governor, Sir Edmund Bond Head, to relieve him of his duties as Chief Justice.

e) The Critical Response to Robinson’s Decision in *Anderson*

The future first prime minister of the Dominion of Canada, however, had other plans for the Chief Justice, and set out to draft a statute that would allow Robinson to continue to sit in a judicial capacity, as president of the Court of Error and Appeal:

“Macdonald’s efforts on behalf of the chief justice indicated his respect for one of the

⁴⁵ (1844), 6 QB 481, 115 E.R. 180.

⁴⁶ Brode (1989), *supra*, note 2, p. 98.

province's surviving founders."⁴⁷ The following year, Macdonald named Robinson to his cabinet as president of the Council,⁴⁸ where he served for a year before his death.

The principle of extradition treaty interpretation enunciated by Robinson, C.J., though unpopular with the citizenry, became the standard view of the law, where extradition was concerned, and *Anderson's Case* 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 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.⁴⁹

Clarke compared Anderson's situation with that of three armed poachers out together at night. Under the English Act,⁵⁰ any person would be authorized to apprehend them.

It is very probable that American Judges would disapprove of that Act as part of what they might consider an iniquitous system of game laws; but, so long as it remains upon the English statute book, a poacher killing a person so attempting to apprehend him, would unquestionably be guilty of murder, and England would have an indisputable right to claim him under the treaty. So far as this question was decided in the case of Anderson, it was decided rightly.⁵¹

In Canada, Duff J. also endorsed the reasoning of the Chief Justice, stating:

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

⁴⁷ Brode (1984), *supra*, note 44, p. 265.

⁴⁸ Joseph Pope, *Memoirs of the Right Honourable Sir John Alexander Macdonald G.C.B., First Prime Minister of the Dominion of Canada* (Toronto: Oxford University Press, 1930), pp. 248-249.

⁴⁹ *Supra*, note 8, p. 250 fn. See also I.A. Shearer, *Extradition in International Law* (Manchester: University of Manchester Press, 1971), p. 142.

⁵⁰ 14 & 15 Vict., c. 18.

⁵¹ Clarke, *supra*, note 8, p. 250.

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.⁵²

Thus the notion of double criminality, originally voiced in the Jay Treaty and repeated in the Ashburton-Webster Treaty, came to be defined and refined in *Anderson*. In the conflict of imperatives, international obligations had won the day over individual rights. 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.

A week after the *Anderson* case was heard by the Court of Queen's Bench in Toronto, South Carolina announced its secession from the Union, and within a year, America was plunged into a bloody Civil War between North and South. One of the main issues deemed worth fighting for was the freedom of black slaves in the South.

5. Fallout from the Civil War

During the U.S. Civil War (1861-1865), the U.S. Government was concerned with pursuing fugitives who sought asylum in Canada, especially those who claimed to be Confederate soldiers. Three such cases reached prominence in what is now Canada – the

⁵² *Re Collins* (1905), 10 C.C.C. 80 at 101-103.

case of David Collins *et al.*,⁵³ who had allegedly hijacked the American steamer *Chesapeake* off Nova Scotia in early December 1663, killing the engineer; the case of *Re Burley*, who had allegedly robbed the steamer *Philo Parsons* in Lake Erie on 19 September 1664;⁵⁴ and the case of William Hutchinson, who was alleged to be part of a group of 20 men who on 19 October 1864 raided a bank in St. Albans, Vermont, and held several citizens hostage until, on stolen horses, they escaped north to Canada.⁵⁵ In each case, the defence was that the men involved were Confederate soldiers engaged in acts of warfare.⁵⁶

a) The *Chesapeake* Case⁵⁷

In the *Chesapeake* case, Collins, James McKinney and Linus Seely were accused of piracy and murder. Two lawyers appeared before Ritchie J. in the Court of the Province of New Brunswick for "the prosecution on behalf of the Federal authorities," and two appeared for "the prisoners on behalf of the Confederate States."⁵⁸ The court heard from an array of witnesses, including the captain of the ship, who testified that the accused had boarded the ship as passengers in New York *en route* to Portland, Maine on 5 December, and two days later had forcibly seized the ship at gunpoint, shooting the

⁵³ "The *Chesapeake*" David Collins, *et al.* (St. John, N.B.: J. & A. McMillan, 1864).

⁵⁴ (1985), 1 U.C.L.J. (N.S.) 20.

⁵⁵ L.N. Benjamin, ed. *The St. Alban's Raid: A Complete and Authentic Report of All the Proceedings* (Montreal: self-published, 1865).

⁵⁶ In fact, only one application for extradition made by the U.S. 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.

⁵⁷ Not to be confused with the first "Chesapeake incident" of 1807, in which a different American ship was sunk off the Norfolk coast by the British ship *Leopard*, increasing tensions at the end of the Jefferson era. See Chapter Four, *supra*.

⁵⁸ "The *Chesapeake*," note 53, *supra*, at 5.

second engineer dead and wounding two others. Most of the crew, including the captain, were set ashore in New Brunswick.

Word of the hijacking having got back to America, an American gunship was dispatched, and made quick work of recapturing the ship in Sambro, Nova Scotia. Collins and company were safe and sound in Nova Scotia, by this time, and so the U.S. Consul in St. John addressed two letters to Provincial Secretary Samuel Leonard Tilley (with John A. Macdonald soon to be distinguished as one of the founding fathers of Confederation), supported by affidavits from the captain and second mate of the steamer, demanding the apprehension of the men. Tilley passed the request on to the lieutenant-governor, who on Christmas Day issued a warrant. Collins and company were arrested soon after.⁵⁹

For the prisoners it was argued that the Court had no power to try piracy, since under the *Imperial Act* that was the domain of a special commission that must be convened for the purpose. Furthermore, the warrant was insufficient since "it does not show upon the face facts which are essential, under the Treaty with the United States, to bring this matter into the Courts of this province," and since it charged "two distinct offences triable before two different tribunals."⁶⁰

Ritchie J. dismissed the argument that the men were *bona fide* Confederate soldiers, since they were all British subjects, and "the plot to seize the vessel was concocted in this City."⁶¹ Furthermore, the only "commission" that any of the accused had received was that of Collins – and that had been signed by an Englishman:

⁵⁹ *Ibid.*, at 5.

⁶⁰ *Ibid.*, at 6.

⁶¹ *Ibid.*, at 47.

Had this commission been from Jefferson Davis⁶² it might have been easily understood and possibly free from question; but issued by a British subject to a British subject, in the Queen's Dominions, it is certainly a proceeding, to say the least of it, novel in its character and fairly challenging investigation.⁶³

Ritchie J. not only found the warrant to be defective on its face, he found the evidence to be insufficient to support the allegations. "Not a word is alleged by the Consul of this crime of Murder, and not a statement made by him that either Piracy or Murder had been committed within the jurisdiction of the United States." Furthermore, the warrant was issued at the request made by a Consul "on behalf of the United States," not *by* the United States. Who authorized the request? "This was not the proper mode of proceeding under the Statute," said Ritchie J., before discharging the prisoners.⁶⁴

This was by no means an isolated incident. Two weeks before Collins and associates seized the *Chesapeake*, an almost identical hijacking took place on the U.S. steamer *Joseph L. Gerrity*, bound from Matamoras to New York. Six passengers, including one Tivnan, seized the ship in the name of the Confederate service and set the captain and some of the crew adrift in a lifeboat. Some of the hijackers surfaced in Liverpool. On application from the American consul, the Secretary of State issued a warrant for piracy. The Court of Queen's Bench decided that England had equal jurisdiction with the U.S. to hear a case of piracy. There was no proof that the putative pirates had seized the ship for the Confederate Government.⁶⁵

⁶² President of the Confederate States of America throughout its existence during the U.S. Civil War.

⁶³ "*The Chesapeake*," *supra*, note 53, at 48.

⁶⁴ *Ibid.*, at 49, 52.

⁶⁵ *R. v. Tivnan* (1864), 5 B. & S. 645, 122 E.R. 971.

b) *Re Burley*

Similarly, in the *Burley* case, where boarding party led by Burley took possession of the *Philo Parsons* on Lake Erie, Burley could not prove to the satisfaction of the Court that he was a commissioned Confederate officer, even though "his acts were avowed and assumed in a manifesto by President Davis."⁶⁶ Burley claimed to be a belligerent, in the service of the Confederate States engaged in a mission to effect the release of prisoners of war held on Johnson's Island in Lake Erie. Draper, C.J., now of the Court of Queen's Bench,⁶⁷ with Hagarty and Wilson JJ., ruled that Burley's actions were suspicious enough that if they had occurred in Canada he would have to face trial for robbery. Wilson J. added, with questionable logic: "For us judicially to give effect to the avowal and adoption of these acts would be to recognize the existence of the nationality of the Confederate States, which at present our government refuses to acknowledge."⁶⁸ Slightly more to the point, Burley claimed to be a British subject.

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."⁶⁹ This ruling has been cited with approval ever since, with LaForest J. stating in *Schmidt v. The Queen* (1987), "In principle, as Hagarty J. long ago reminded us, the country seeking surrender under a treaty must be trusted with the trial of offences."⁷⁰ La Forest cited the case in support of his thesis that fulfilling

⁶⁶ *Re Burley*, *supra*, note 54.

⁶⁷ During the *Anderson* case in 1861 he had been Chief Justice of the Court of Common Pleas.

⁶⁸ 1 U.C. L. J. (N.S.) 20.

⁶⁹ *Ibid.*, at 50.

⁷⁰ (1987), 33 C.C.C. (3d) 193 (S.C.C.) at 209.

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.

The fact overlooked by LaForest is that once Burley was surrendered to the U.S. 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. Released on low bail, Burley disappeared.⁷¹ 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.

c) The St. Albans Raiders

In the case of the St. Albans Raiders, an initial attempt was made to argue that the matter fell under the original imperial extradition statute, which required the Governor-General to issue a warrant, rather than with the amended statute, which did not. Five of the raiders were released on this basis, only to be re-arrested on short order. Smith J. finally discharged them all, holding

that the attack on St. Albans 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. And therefore...no act committed in the course of, or as incident to, that attack can be made the ground of extradition under the Ashburton treaty.⁷²

⁷¹ *Ibid.*, p. 99 fn.

⁷² Benjamin, *supra*, note 55.

The case remains the only clear illustration of the "political exemption" rule, then considered to be an established principle of international law, and now contained in the Canada-U.S. Treaty and in Canadian (but not American) legislation. Smith J. stated that "political offenders have always been held to be excluded from any obligation of the country in which they take refuge to deliver them up," and that "all civilized countries," including the U.S. itself, had excused offences arising from "political convulsions":

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.⁷³

Perhaps, in this last remark, Smith J. had *Burley* in mind.⁷⁴

Upon the defeat of the Confederate Army, slavery was abolished, and the U.S. entered a period of reconstruction that was matched in Canada by a new wave of nationalism that led in 1867 to Canadian Confederation. At the same time, unscrupulous types crisscrossed the border with get-rich schemes, often fraudulent. With the war out of the way, both the U.S. and Canada became more amenable to applying for, and allowing, extradition for cases of "white collar" crime, including fraud, forgery and obtaining money under false pretenses. John Paxton was successfully extradited from the U.S. by Canada for forgery, but once he was returned he was actually indicted for uttering forged paper, a similar but not identical charge. Upon being arraigned and called to plead on the indictment, Paxton stated:

⁷³ *Ibid.*

⁷⁴ J.-G. Castel and M. Edwardh, "Political Offences: Extradition and Deportation – Recent Canadian Developments" (1975), 13 Osgoode hall L.J. 89, p. 91.

I am here by virtue of an Act of Extradition upon the demand made by his Excellency the Governor-General on the United States, charging me with the crime of forgery, and I protest against being called upon to plead to or to answer any other charge than that for which I was so extradited, and I also protest against the unfairness of the Crown in denying the fact of my extradition, which is a violation of the good faith which should mark every proceeding under the treaty, and thus protesting plead not guilty.⁷⁵

He was convicted, and appealed. The appeal court confirmed the conviction, holding that the Courts could try a surrendered fugitive for a crime other than that for which he was surrendered,⁷⁶ thus reaffirming the judgment of Macaulay, C.J. in *R. v. Van Aernam*.⁷⁷ This violation of what came to be called the "specialty principle," an issue which also arose in U.S. courts,⁷⁸ would not be remedied until the Ashburton-Webster Treaty was amended by the Supplementary Convention of 1889.⁷⁹

⁷⁵ *Re Paxton* (1866), 10 L.C. Jur., 212.

⁷⁶ *Re Paxton* (1867), 11 L.C. Jur., 352.

⁷⁷ *Supra*, note 17, at 288.

⁷⁸ *United States v. Rauscher* (1886), 119 U.S. 407.

⁷⁹ See *R. v. Kelly* (1916), 27 C.C.C. 94 (Man. Q.B.), *affd.* 27 C.C.C. 140 (C.A.), *affd.* 27 C.C.C. 282 (S.C.C.); *Buck v. The King* (1917), 29 C.C.C. 45 (S.C.C.).

CHAPTER SIX

LEGISLATORS *vs.* THE COURTS:
POST-CONFEDERATION EXTRADITION POLICY1. The Canadian *Extradition Act*

Following Canadian Federation on 1 July 1867, the development of extradition policy in Canada fell to the legislators rather than to the courts, which were hard-pressed to keep abreast of the startling explosion of juridical decisions necessitated by the starburst of Confederation. By 1867, the Extradition Act of 1849 had been revised, repealed, re-enacted, consolidated,¹ and amended.² In the year after Confederation, it was repealed and re-enacted all over again.³ The new post-Confederation *Extradition Act*, assented to on 19 June 1868 and proclaimed in force on 8 August 1868,⁴ effectively replaced the Imperial Act of 1843 and eventually extended to the furthest reaches of Canada.⁵ It continued to govern Canada-U.S. extradition even after the passage of the English *Extradition Act* of 1870,⁶ until Canada's adoption in 1877 of *An Act respecting the extradition of fugitive criminals* – its own *Extradition Act*⁷ – which repealed all extant extradition legislation.

¹ C.S.C. 1859, c.89.

² S.C. 1861, c. 6.

³ S.C. 1868, c. 94.

⁴ Statutes of 1869, p. xi.

⁵ British Columbia, S.C. 1871, c. 13 and S.C. 1874, c. 42; Manitoba, S.C. 1871, c. 13; Prince Edward Island, S.C. 1873, c. 40; Northwest Territories, S.C. 1875, c. 49; and Newfoundland, *Terms of Union Act*, 1949 (U.K.), c. 22.

⁶ G.V. LaForest, *Extradition to and from Canada* (New Orleans: Hauser, 1961), p. 6.

⁷ S.C. 1877, c. 25.

The Canadian Act had the decided advantage over previous Acts (including the British *Extradition Act*) of providing for extradition for any crime mentioned in “an extradition arrangement” rather than gearing itself strictly to the schedule of crimes appended to the statute.⁸ However, it was close enough in its wording to the British *Extradition Act* of 1870 that Canadian judges considered themselves bound by British decisions considering principles arising from the imperial Act,⁹ which continued to apply to areas of the British Empire that had yet to join Confederation. However, the imperial Act had no direct application to Canada-U.S. extradition to or from the confederated territories already falling within the Dominion of Canada,¹⁰ despite the fact that it was not officially suspended in Canada until the Canadian Act was further amended in 1882.¹¹ The Canadian *Extradition Act* was consolidated as chapter 142 of the Revised Statutes of Canada in 1886, and a fresh Order in Council was subsequently passed on 17 November 1888.¹² 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.¹³

⁸ *Extradition Act* (R.S.C. 1985, c. E-23, ss 2, 3 and 8. See also Anne LaForest, *LaForest's Extradition to and from Canada* (Aurora: Canada Law Book, 1991), pp. 6-7.

⁹ See, for example, Duff J.'s comments in *Re Collins (No. 3)* (1905), 10 C.C.C. 80 (S.C.B.C.) at 85, where he states, “...The decision of the Queen's Bench Division in *Re Bellencontre*, [1891] 2 Q.B. 122, is conclusive, and is a decision which I am bound to follow.”

¹⁰ *R. v. Browne* (1881), 31 U.C.C.P. 484; affirmed 6 O.A.R. 386.

¹¹ S.C. 1882, c. 20. In the meantime, the *Fugitive Offenders Act* 44 & 45 Vict. c. 69 (Imp.) had been passed into law, governing procedure for the surrender of fugitives within the British Commonwealth, including Canada.

¹² The Canadian *Extradition Act* remained essentially unchanged until amended on 1 December 1992, replacing *habeas corpus* with a double system allowing for judicial review of ministerial decisions and appeal of extradition court decisions, both to be heard by the appropriate provincial court of appeal. In the new *Extradition Act* (Royal Assent received 17 June 1999), s. 57(9) specifies that “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.”

¹³ *Re Debaun* (1888), 32 L.C. Jur. 381.

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. Furthermore, as determined in the cases of seizure of ships such as the *Chesapeake*, 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.¹⁴ 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. Clearly the schedule of the Treaty, at least, needed refinement.

Between Confederation and the end of the century, the courts 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. In the absence of a national criminal code, was U.S. state law the criminal law of the country? This issue had been determined in the negative by British courts in *Re Windsor*,¹⁵ but received widespread acceptance in the courts in Canada.

¹⁴ *Re Tivnan* (1864), 5 B. & S. 645, 122 E.R. 971, at 113. See also the *Chesapeake* case, (1863), Parl. Papers, N., America, No. 10 (1876), p. 37.

¹⁵ (1865), 6 B. & S. 522, 122 E.R. 1288.

If there were several ways of looking at a case, including an innocent explanation, would the accused have to be returned to face trial? Yes, said *R. v. Gould*.¹⁶ A flurry of extradition cases descended on the courts seeking direction as to whether crimes were extraditable or met the double criminality test. One line of cases insisted that if affidavit evidence was to be relied on, instead of the *viva voce* evidence of living witnesses, the depositions had to be impeccable. Gwynn J. in *Re Lewis* (1874)¹⁷ stated:

When a prosecutor who seeks to have a person arrested in this country for committal under the Extradition Treaty, finds it more convenient to use *ex parte* affidavit evidence taken abroad in preference to bringing the living witnesses for examination face to face with the accused at the hearing of the complaint, 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. We have no right to deprive him of the protection which the non-compliance with any of these forms may afford to him; however heinous may be the offence with which he stands charged, he has a right to insist that only legal evidence shall be received against him.

Taking the same principled position, Osler J. in *Re Parker* (1882)¹⁸ added:

I think the prisoner must be discharged.... I regret it, if there be really any foundation for the charge, but if parties who are concerned in prosecuting it will not take common pains to make it, and are content to rest upon depositions only, which turn out to be insufficient, they must take the consequences.... 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 rights administered by the courts.

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, a body folded up in a sack. "A few days after the funeral, the body having

¹⁶ (1869), 20 U.C.C.P. 154.

¹⁷ 6 O.P.R. 236 at 237.

¹⁸ 9 O.P.R. 332.

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 J.

Parker was discharged.¹⁹

2. Amending the Treaty

The need to amend the Treaty became especially acute once the new Extradition Acts had been concluded in both Britain and Canada. In 1889, the U.S. and Canada signed a Supplementary Convention for the extradition of criminals²⁰ which added a number of extradition crimes, including specifically "Piracy by the law of nations."²¹ Violent crimes such as voluntary manslaughter,²² rape, abduction, child stealing, kidnapping,²³ and various kinds of mutiny²⁴ were covered, along with "crimes and offences against the laws of both countries for the suppression of slavery and slave-trading,"²⁵ a rather obvious product of changing attitudes since the American Civil War.

¹⁹ *Ibid.*, pp. 334-335.

²⁰ Signed at Washington 12 July 1889, ratified at London 11 March 1890.

²¹ *Ibid.*, Article I(8).

²² *Ibid.*, Article I(1).

²³ *Ibid.*, Article I(6).

²⁴ *Ibid.*, Article I(9).

²⁵ *Ibid.*, Article 1(10).

White-collar crime was equally a target: counterfeiting,²⁶ embezzlement, larceny, receiving money, valuable securities or other property known to have been fraudulently or otherwise illegally obtained,²⁷ “fraud by a bailee, banker, agent, factor, trustee, or director, or member or officer of any company, made criminal by the laws of both countries,”²⁸ perjury,²⁹ and more common property crimes such as burglary, housebreaking and shopbreaking.³⁰ Political crimes and offences were specifically excluded from the extradition process,³¹ and perhaps most important of all from the point of view of the rights of the accused,

No person surrendered by or to either of the high Contracting Parties shall be triable or be tried for any crime or offence committed prior to his extradition, other than the offence for which he was surrendered, until he shall have had an opportunity of returning to the country from which he was surrendered.³²

Thus the Rule of Specialty came to be enshrined in law.

Throughout the first half of the 20th Century, new extradition crimes continued to be added by amendments to the Ashburton-Webster Treaty in supplementary conventions. Specifically, procuring abortion, endangering life by wilful and unlawful destruction of railroads, and obtaining money or valuable securities or other property by false pretences were added as extradition offences effective April, 1901;³³ bribery and offences against bankruptcy law were added in 1906;³⁴ “wilful destruction or wilful non-support of minor

²⁶ *Ibid.*, Article I(2).

²⁷ *Ibid.*, Article I(3).

²⁸ *Ibid.*, Article I(4).

²⁹ *Ibid.*, Article I(5).

³⁰ *Ibid.*, Article I(7).

³¹ *Ibid.*, Article II.

³² *Ibid.*, Article III.

³³ Supplementary Convention of 1900, signed at Washington 13 December 1900, ratified at Washington 22 April 1901

³⁴ Supplementary Convention of 1905, signed at London 12 April 1905, ratified at Washington 21 December 1906

or dependent children” (applicable only in Canada or the U.S.) in 1922;³⁵ crimes or offences committed against the laws for the suppression of the traffic in narcotics in 1925;³⁶ and defrauding the public or making use of the mails for this purpose were added effective July, 1952.³⁷ However, these relatively minor refinements to the Treaty had nowhere near the impact on the extradition process as case law interpreting the *Extradition Act*.

3. Procedural Wrangling in the Courts

a) Late 19th Century Wrangles

By the end of the century, many extradition issues remained unresolved. Some judges gave the fugitive the benefit of the doubt. For example, both *Lewis*³⁸ and *Parker*³⁹ were cited with approval by Bole, J. sitting as an extradition judge in New Westminster in *Re Ockerman* (1998),⁴⁰ when he discharged Ockerman on the grounds that the affidavits tendered in support of his extradition were not precise.

On the other hand, in *Re Murphy* (1895),⁴¹ a case of forgery, the Ontario Court of Appeal was evenly divided as to whether it was necessary for the prosecutor to prove that the alleged offence was a crime according to American law as well as Canadian law – a reversal of the usual question.⁴² Hagarty C.J.O. said and MacLennan J.A. ruled that it

³⁵ Supplementary Convention of 1922, signed at London 15 May 1922, ratified at London 28 July 1922.

³⁶ Supplementary Convention of 1925, signed at Washington 8 January 1925, ratified at Washington 17 July 1925.

³⁷ Supplementary Convention of 1951, signed at Ottawa 26 October 1951, ratified at Ottawa 11 July 1952.

³⁸ *Supra*, note 144.

³⁹ *Supra*, note 145.

⁴⁰ 2 C.C.C. 262

⁴¹ 2 C.C.C. 578 (Ont. C.A.).

⁴² As in *Re Martin* (1897), 8 C.C.C. 326 (N.W.T.S.C.); *Re Gross* (1898), 2 C.C.C. 67 (Ont. C.A.).

wasn't necessary, and Burton and Osler, JJ.A., ruled that it was. Since the court was evenly divided on the issue, Murphy lost his appeal.

And *In the Matter of Louis Levi* (1897),⁴³ Levi was sent back to Pennsylvania to face perjury charges for testifying that the four Mazer brothers had failed to maintain and support their aged father. Evidence was led that they had indeed maintained and supported the old man – to the tune of \$1 each a week!

b) Early 20th Century Wrangles

At the beginning of the 20th Century, there was much confusion as to which law, schedule or treaty applied to extradition between Canada and the United States. Not surprisingly, many fugitives were not prepared to be surrendered to America without challenging the changing legislation. It is telling that the first 23 volumes of the popular law report, *Canadian Criminal Cases* – every volume published before the onset of the First World War – reported at least one extradition case, and some, several. Many of the reports documented procedural clarification, such as the necessity of proving the existence of a foreign warrant before proceedings were initiated;⁴⁴ whether a deposition or statement, even when duly authenticated, meets the requirements of the legislation;⁴⁵ whether a telegraphed complaint from the United States was adequate evidence on which to base extradition procedures;⁴⁶ whether confessions relied upon in extradition proceedings were legitimately obtained;⁴⁷ whether evidence was sufficient to make out

⁴³ 1 C.C.C. 74 (Que. Q.B.).

⁴⁴ *In re Bongard* (1900), 6 C.C.C. 74 (S.C.N.W.T.) (the charge being a species of embezzlement where a county treasurer from Minnesota was alleged to have made off with county funds).

⁴⁵ *Re Cohen* (1904), 8 C.C.C. 251 (Ont. H.C.J.).

⁴⁶ *Re Dickey* (1904), 8 C.C.C. 318 (S.C.N.S.); *Re Webber* (1912), 19 C.C.C. 515 (S.C.N.S.).

⁴⁷ *Re Lewis* (1904), 9 C.C.C. 233 (S.C.N.W.T.).

double criminality,⁴⁸ whether charges in both nations must be identical,⁴⁹ whether extradition conventions have retroactive effect;⁵⁰ whether fresh extradition proceedings can be brought where an extradition is rendered invalid by the failure of the judge to sign depositions;⁵¹ and of course whether specific crimes were extraditable under the Treaty in the first place.⁵²

An interesting departure from the norm arose in *R. v. Nesbitt*,⁵³ where the prosecutor sought to proceed in a Canadian court on a charge under the Canadian *Bank Act* of making a "wilfully false or deceptive statement" in a bank return. Nesbitt had been successfully extradited from the U.S. on a charge of "fraud." It was ruled by Middleton J. of the Ontario Supreme Court that fraud was not an essential ingredient of the *Bank Act* charge. Since the charge was materially different from the one under which Nesbitt was surrendered, the indictments against him were quashed.

c) *Re Gaynor and Greene*

The biggest procedural wrangle of them all occurred between May 1902 and October 1905 when Gaynor and Greene, two American citizens charged with conspiring

⁴⁸ *Re Latimer* (1906), 10 C.C.C. 244 (S.C.N.W.T.) (embezzlement falls under the criminal codes of both countries, as well as the Treaty); *Re Cohen, supra*, note 7 (merchandise is not "other property" within the meaning of the phrase "receiving any money, valuable security or other property knowing the same to have been embezzled, stolen or fraudulently obtained" in article 1 of the Extradition Convention of 1889); *Re Johnston* (1907) 12 C.C.C. 559 (S.C.B.C.) (where falsification of a written document is alleged, either the document itself must be produced or a foundation must be laid for secondary evidence of its contents); *Re Staggs* (1912), 20 C.C.C. 310 (a charge of obtaining a promissory note on false pretenses must be supported in Canada by proving that the person wronged was induced to part with his money); *Re O'Neill* (1912), 19 C.C.C. 410 (S.C.B.C.) (offences under the Canadian *Bank Act* are criminal offences under Canadian law).

⁴⁹ *Re Lorenz* (1905), 9 C.C.C. 158 (Que. K.B.) ("child-stealing" as opposed to "kidnapping"); *Re Moore* (1910), 16 C.C.C. 264 (Man. K.B.) and *Re Lewis, supra*, note 9 ("grand larceny" as opposed to "larceny").

⁵⁰ *Re Cannon* (1908), 14 C.C.C. 186 (Ont. H.C.J.).

⁵¹ *Re Royston* (1909), 15 C.C.C. 96 (Man. K.B.).

⁵² *United States v. Webber* (1912), 20 C.C.C. 1 (Halifax N.S. Co. Ct.) (fraudulent concealment of property by a foreign bankrupt).

⁵³ (1913), 21 C.C.C. 251 (Ont. S.C.).

to present false claims for work supposedly executed for the U.S. Government at Savannah, Georgia, doggedly fought their extradition through a dozen hearings from Montreal to London, England, and back again. Arrested in Quebec City, the men were taken before an extradition commissioner in Montreal and were remanded for three days to their hotel rooms. They filed writs of *habeas corpus* before the Lower Canada Superior Court in Quebec City, where they had been arrested. Since technically they were no longer in custody, a writ could not issue; so they applied to the extradition commissioner in Montreal to transfer them from "hotel arrest" to jail. Once there, they again applied to the Superior Court in Quebec for writs of *habeas corpus*.

The American government applied for the writs to be quashed, arguing before Andrews J. that the accused were properly detained on a legal process in Montreal, and that a judge sitting in Quebec City had no jurisdiction to interfere. Andrews J. agreed, and on 21 June 1902, Gaynor and Greene were returned to jail.⁵⁴ They thereupon filed fresh applications for *habeas corpus* in the same court, again in Quebec City.

This time, their applications were heard by Caron J., who on 13 August, over the objections of the U.S. Government, ordered Gaynor and Greene to be discharged, on the basis that the crimes alleged were not extradition crimes, and that the warrant was deficient on its face.⁵⁵

This, of course, would have disposed of the matter without a hearing. Outraged, the Americans appealed the matter to the Judicial Committee of the Privy Council in London, England, retaining as counsel none other than Sir Edward Clarke, the foremost

⁵⁴ *Ex parte Greene (No. 1), Ex parte Gaynor (No. 1)* (1902), 7 C.C.C. 375 (S.C.L.C.).

⁵⁵ *Ex parte Greene and Gaynor (No. 2)*, (1902), 7 C.C.C. 389.

authority on extradition law in the United Kingdom. As the court record indicates,

Sir Edward Clarke, K.C., for the appellants, briefly recited the facts of the case, stating that the extraordinary circumstances in connection with it had caused a great deal of discussion in Canada, and that the United States Government looked on it as a case of the greatest importance as concerning the full and effective administration of the extradition treaty which had been entered into between the two Governments.⁵⁶

Clarke argued that the information and complaint before the extradition commissioner clearly alleged *prima facie* extradition crimes committed by Gaynor and Greene in the U.S. The commissioner had exclusive jurisdiction to complete his inquiry to determine whether the prisoners should be discharged, since under the *Extradition Act* he retained all the powers and jurisdiction of "any Judge or Magistrate of the Province." Caron J. had no business interfering with the ruling of a brother judge in the same court and the same jurisdiction, but more to the point, *neither* of the two Superior Court judges in Quebec City had jurisdiction over a third judge in Montreal, a different judicial district. The decision of Caron J. to "discharge" the prisoners was tantamount to his deciding the case on the merits, and usurped the role and function of the commissioner, Clarke argued. "By the issue of the writs of habeas corpus complained of, and the judgments of Mr. Justice Caron, the appellants have been deprived of the rights secured to them by the Treaties, and by the Imperial and Canadian Statutes."⁵⁷

The Lord Chancellor, Lord Halsbury, held that Andrews J., once he recognized that he had made a mistake by purporting to take jurisdiction in the first place, "did what was obviously right. He remanded [Gaynor and Greene] to their lawful custody, from which they never ought to have been removed.... Then the somewhat extraordinary

⁵⁶ *United States v. Gaynor: Re Gaynor and Greene* (No. 3) (1905), 9 C.C.C. 205 at 213.

⁵⁷ *Ibid.*, pp. 210-217.

intervention of Mr. Justice Caron took place, which has given rise to this appeal.”⁵⁸

Naturally, the appeal was allowed.

Undaunted, Gaynor and Green took the matter back to the Quebec Superior Court for the third time, this time arguing that the extradition commissioner was without jurisdiction.⁵⁹ When they lost that application, they appealed the decision to two separate three-judge panels of the Court of King’s Bench, initially to challenge the jurisdiction of the extradition commissioner,⁶⁰ and later to challenge the constitutionality of the legislation.⁶¹

Gaynor and Greene made Chambers applications again and again on various issues, including an application for leave to appeal the preliminary question of jurisdiction to the Supreme Court of Canada.⁶² Although the lower court granted leave, the Supreme Court of Canada hastily declined to exercise jurisdiction, since the substantive extradition application had not yet been heard.⁶³ Gaynor and Greene then petitioned the Privy Council in London for leave to appeal *that* decision, but eventually abandoned their petition.⁶⁴

In the meantime, the extradition process continued where it had left off. On 6 June 1905, the original extradition commissioner in Montreal found that the affidavits and evidence supported surrender. Gaynor and Greene mounted a final appeal to the Court of King’s Bench in September 1905,⁶⁵ but the Court ruled that the commissioner

⁵⁸ *Ibid.*, p. 228, 230.

⁵⁹ *Ex parte Gaynor and Greene (No. 4)* (1905), 9 C.C.C. 240.

⁶⁰ *Re Gaynor and Greene (No. 5)* (1905), 9 C.C.C. 255.

⁶¹ *Re Gaynor and Greene (No. 6)* (1905), 9 C.C.C. 486.

⁶² *Re Gaynor and Greene (No. 7)* (1905), 9 C.C.C. 492.

⁶³ *Re Gaynor and Greene (No. 10)* (1905), 10 C.C.C. 21.

⁶⁴ *Ibid.*, at 24. The petition was dismissed by the Privy Council on 26 July 1905.

⁶⁵ *Re Gaynor and Greene (No. 11)* (1905), 10 C.C.C. 154.

was justified in accepting the affidavit evidence, and declined to review his decision with respect to sufficiency of the evidence. After 3½ years of legal wrangling, Gaynor and Green were extradited back to Georgia in October, 1905.⁶⁶

4. *Re Collins* - (1, 2, 3)

a) No. 1

It took a legal mind of the most Machiavellian kind to test the full extent of any residual ambiguity left in extradition procedure. George D. Collins had just such a mind. An attorney with a huge ego, Collins faced charges of bigamy and perjury in California after swearing that he was married, not to his wife, but to another woman.

Collins had received formal training in the basic skills required in the legal profession, including uncovering loopholes in legislation and treaties when they served his purposes. Presumably he had also received instruction in the niceties of affidavit- and oath-taking. He knew the function of grand juries and the importance of telling the truth under oath at trial. He knew that a higher-than-average standard of integrity and “truth-telling” was expected of him as a trained lawyer – especially in legal situations such as swearing on an oath in affidavits and in court. These were all considerations in his extradition case in 1905, in which Canadian extradition law was refined and tuned by the juristic mind of no less a light than Lyman Duff, J. who was later to distinguish himself as the Chief Justice of Canada, an appointment that followed hard on the heels of his decision in *Collins*.⁶⁷

⁶⁶ *Re Gaynor and Greene* (No. 10), *supra*, note 63, at 24.

⁶⁷ David Ricardo Williams, *Duff: A Life in the Law* (Vancouver: University of British Columbia Press, 1984), pp. 24-30.

Collins had fled to Canada in July 1905 initially to avoid the allegation of bigamy, for which he had been indicted in San Francisco the month before. His putative first wife had applied for maintenance for herself and her children, supporting her application with an affidavit. Collins answered the claim by suggesting that the Superior Court of California had no jurisdiction with respect to the issues of maintenance where less than a year had gone by since the claimed desertion. In any case, he stated, he had not married the plaintiff, Charlotta Eugenie Collins "on 15th May, 1889," as she claimed – "or at any other time, or at all." In support of his answer to the petition, Collins prepared an affidavit, filed on 30 June 1905, as was required by California law in maintenance cases. In the affidavit he deposed that he and the plaintiff had never, ever married.

One or the other of the Collinses was lying, and since Mrs. Collins had supported her affidavit with an original marriage certificate endorsed on the back by Mr. Collins, it seemed likely that she was telling the truth. As a result of his filing an allegedly false affidavit, Mr. Collins was charged with perjury.⁶⁸

Justice moved surprisingly swiftly. A fortnight after the filing of the affidavit, depositions against Collins were sworn in San Francisco before William P. Lawlor, the presiding judge of the Superior Court of the State of California, in support of the extradition of Collins from Canada for perjury.⁶⁹ Collins retained one of Victoria's most renowned lawyers, H.D. Helmcken K.C., to represent him.

On 24 July 1905, Helmcken argued in a preliminary objection in the County Court of Victoria before County Court Judge P.S. Lampman that perjury was not an extraditable

⁶⁸ *Re Collins (No. 2)* (1905), 10 C.C.C. 73 at 74-75.

⁶⁹ *Ibid.*

offence, and even if it was, the facts alleged did not constitute perjury.⁷⁰ Helmcken relied in his application on a narrow interpretation of the law and the facts. The *Extradition Act*⁷¹ provided that it had no application where it was inconsistent with any treaty. At the time of the passing of the Act the Ashburton-Webster Treaty of 1842 was fully in force, including the extradition provisions. The "certain cases" referred to in the title of the Treaty were specified in Article X of the treaty as "the crime of murder, or assault with intent to commit murder, or piracy, or arson, or robbery, or forgery, or the utterance of forged paper." Perjury was not on the original list of extraditable crimes.

However, the supplementary convention between the United Kingdom and the U.S.A. ratified on 11 March 1890 purported to amend and expand Article X of the Ashburton-Webster Treaty by adding "Perjury, or subornation of perjury."⁷² Helmcken argued that this supplementary convention was of no force or effect since it had not been adopted by Canada either by a separate Act or Order-in-Council. Judge Lampman held that the Act applied to "any new arrangement" without the necessity of an Order-in-Council, and that therefore perjury was an extraditable offence.⁷³

The second objection urged upon the Court by Mr. Helmcken was much more of a legalistic stretch. In California, the law required the defendant to swear an affidavit to verify an answer to a plea in an action for maintenance. An action for maintenance brought in British Columbia would not have required such an affidavit. Since in Canada

⁷⁰ *Re Collins (No. 1)* (1905), 10 C.C.C. 70.

⁷¹ R.S.C. (1886) c. 142, s. 3. As we have seen, the *Extradition Act* was first passed into law in Canada in 1877 (40 Vict., c. 25) and was amended in 1882 (45 Vict., c. 20) upon the suspension of the British *Extradition Act* (33 & 34 Vict., c. 52 (Imp.)).

⁷² "1889 Supplementary Convention between Her Majesty and the United States of America for the Extradition of Criminals," in G.V. LaForest, *Extradition to and from Canada*, 1st ed. (New Orleans: Hauser Press, 1961), p. 165.

⁷³ *Re Collins (no. 1)*, *supra*, note 70, at 72.

Mr. Collins would not have been required to swear an affidavit, such an instrument would have amounted to extraneous evidence. To which Judge Lampman responded,

I have no doubt an indictment for perjury would lie under sec. 148 [of the *Criminal Code*] in respect of a false statement contained in an affidavit of verification of a plea in an action of maintenance brought in Canada, *if the affidavit were required or permitted*.⁷⁴

b) Fool for a Lawyer

Perhaps disgruntled by the results of the preliminary application and no doubt confident in his own abilities as an attorney, Mr. Collins represented himself at his actual extradition hearing on 19 August 1905 before the same County Court judge as had heard the preliminary objection. Collins repeated the argument of Mr. Helmcken that perjury was not an extradition crime; the Court understandably ruled that that issue had already been decided against him. In keeping with the legalistic mind-set of the attorney, Collins next argued that the depositions that had been introduced into the extradition court from California were not certified as required by the Act. Judge Lampman found that that requirement had been met since in the U.S. Judge Lawlor had certified that the affidavits had been sworn before him as a judge.

Collins then made the same argument that he had made in his filed answer to the California court in equally legalistic terms: since the plaintiff had not claimed that she had been deserted for a year, the Superior Court of California had no jurisdiction to entertain the cause. Since the Superior Court of California had no jurisdiction, it had no need of or right to the affidavit. Therefore the affidavit was deemed not to exist, and there was no perjury.

⁷⁴ *Ibid.* at 72-73. Italics added.

Judge Lampman heard representations on the question of the jurisdiction of the Superior Court of California, which required experts on the foreign law in question. These experts were two lawyers: the Assistant District Attorney of San Francisco, Mr. Whiting, who stated that the Superior Court of California did have jurisdiction to grant relief to the plaintiff under these circumstances; and Mr. Collins himself, who took the stand as a lawyer to state baldly, as a fact, that the Superior Court of California did not have jurisdiction. Nonetheless, he had to admit that the Superior Court of California had overruled his demurrer to that effect, and had made an order for interim alimony. Judge Lampman found that this line of argument was a question of the sufficiency of the proof or allegations of the cause of action, rather than a question of jurisdiction. He therefore did not have to decide whether Mr. Whiting or Mr. Collins was correct on that point: either way, the action had been brought in the proper court.⁷⁵ Judge Lampman thus neatly sidestepped the question without appearing to disparage Mr. Collins' professional credentials as a California attorney.

The fourth line of argument brought by Collins, and the one most strongly relied upon, was that no oath had ever been administered to Collins, and that therefore the statement was not a sworn statement; unless it was sworn, there was no perjury. It is not clear whether the State of California or Mr. Collins called Mr. Henry, the notary who had allegedly taken the deposition. His testimony supported the notion that in a narrow, legalistic sense no affidavit had been sworn. However, the Court took the position that as a lawyer, Collins had a higher duty than the notary:

The evidence of Mr. Henry is that accused came to his office with the affidavit already signed, and producing it said, "Mr. Henry, that is my signature, and I

⁷⁵ *Re Collins (No. 2)*, *supra*, note 68, at 76.

swear to the statements therein being true," at the same time raising his right hand, whereupon Mr. Henry signed his name to the jurat and impressed the affidavit with his notarial seal and handed it to accused.⁷⁶

There is little doubt the average notary would be swayed by a full-fledged lawyer under these circumstances; however for the lawyer to subsequently rely on this lapse of attention to detail to support an argument for the invalidity of the affidavit stretched credulity. In this case, Collins argued "that no oath was in fact administered according to the law of either Canada or the United States." Surprisingly, no authority could be produced either to support or refute the point. Judge Lampman noted that the California case law relied on by Mr. Collins, although apparently supportive, was dated, and seemed to emphasize the need to amend the perjury provisions of the California Penal Code.⁷⁷ As it happened, perhaps in response to the cases cited by Collins, that Code had been amended earlier that very year, and Judge Lampman was able to cite it:

"It is no defence to a prosecution for perjury that the oath was administered or taken in an irregular manner, or that the person accused of perjury did not go before, or was not in the presence of, the officer purporting to administer the oath, if such accused caused or procured such officer to certify that the oath had been taken or administered."⁷⁸

Clearly if this section had broad application to the average person who tries to hoodwink a notary into signing and impressing an affidavit with his notarial seal without intending to take responsibility for the contents of what is sworn, then it would have even more applicability to a lawyer who must have known precisely the implications of what he was asking the notary to do. Judge Lampman seemed barely to contain his scorn when he concluded:

⁷⁶ *Ibid.*, at 76-77.

⁷⁷ *Ibid.*, at 78

⁷⁸ *Ibid.*, at 77.

I should think any Court would be slow to hold that a person charged with perjury who went before a notary, said he swore to the truth of certain statements, and at the same time holding up his right hand was in a better position than one who sent his affidavit to a Notary by an office boy, and thus procured the Notary's certificate that the affidavit had been sworn to before him.⁷⁹

This seems to have been a crucial point for Judge Lampman, who stated frankly that had Mr. Collins been able to show that the facts deposed to did not constitute perjury, "he would probably be entitled to his discharge."⁸⁰

Mr. Collins did not have to take the stand, but perhaps having a fool for a lawyer (or a fool for a client) he chose to testify. His evidence was so at odds with all the other evidence – in fact so downright odd – that Judge Lampman dismissed it out of hand. Despite the information on the face of his marriage certificate, including his own endorsement on the back, and despite viva voce and affidavit evidence from four witnesses, including two of the women involved, he swore he hadn't married the complainant, Charlotta, but rather had married her sister Agnes. This was news to Agnes: both she and Charlotta denied any such mix-up.

Judge Lampman's patience appeared to be wearing thin when he alluded to "the many alleged conspirators against the accused." However, he correctly stated the law with respect to extradition, namely that if a judge "finds sufficient evidence of guilt to justify a commitment, the question of a probability of a conviction is not one for his consideration."⁸¹ Thus he was able to bite his tongue beyond saying: "I think the evidence is sufficient to put the accused on his trial, and I determine that he must be committed to jail pending surrender."

⁷⁹ *Ibid.*

⁸⁰ *Ibid.*, at 78.

⁸¹ *Ibid.*, at 79.

c) Lyman Duff's *Coup de Grace*

Collins then made an application for *habeas corpus* to the Supreme Court of British Columbia. Duff J. adroitly sidestepped technical issues regarding the validity of the warrant of committal on its face, stating for posterity,

...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 salutary international arrangement.⁸²

Referring to British law,⁸³ by which he felt bound, and U.S. law,⁸⁴ which he found persuasive, he imported into Canadian law the principle that

Treaties must receive a fair interpretation according to the intention of the contracting parties, and so as to carry out their manifest purpose. The ordinary technicalities of criminal proceedings are applicable to proceedings in extradition only to a limited extent.⁸⁵

The "limited extent" implied a balancing that had already been explored by the U.S.

Supreme Court in *Grinn v. Shine*, which Duff J. also cited with approval.⁸⁶

These 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*.... Proceedings for a surrender are not such as put to issue the life or liberty of the accused. They simply demand of him that he shall do what all good citizens are required, and ought to be willing to do, namely, submit themselves to the laws of their country.⁸⁷

⁸² *Re Collins* (No. 3), *supra*, note 9, at 83.

⁸³ *Re Bellencontre* (1891), 2 Q.B. 122, which interpreted the English *Extradition Act* of 1870, essentially parallel to the Canadian *Extradition Act* of 1876 upon which Duff J. relied.

⁸⁴ *Grinn v. Shine*, 187 U.S. (1902) 184; and *Wright v. Henkel*, 190 U.S. 40 (1902) at 57.

⁸⁵ *Wright v. Henkel*, *ibid.*, per Fuller, U.S.C.J. Cited in *Re Collins* (No.3), *supra*, note 9, at 84.

⁸⁶ *Ibid.*, at 83.

⁸⁷ *Ibid.*, at 83-84. Emphasis added. Note that usually at least the liberty of the accused is compromised.

Duff J. refused to follow *In re Windsor*,⁸⁸ stating that in that case the Court had “proceeded under a misapprehension in respect to the federal laws of the United States; assuming against the fact that there is a common criminal law in the United States.”⁸⁹ For the purposes of application of the Ashburton-Webster Treaty, therefore, the demanding country was strictly the United States, but within the rules for applying and supplying evidence of criminality, “the demanding country is California.”⁹⁰ After reviewing the pertinent law of California with respect to perjury, Duff J. neatly used Collins’ own expertise as a lawyer against him. He remarked:

Apart from some statutory exceptions, there is one way, and only one way of proving foreign law, in a Court in this country, and that is by the evidence of experts, who give their opinion with regard to the foreign law as a question of fact. And it is dealt with entirely as a question of fact. Without the evidence of some person who was competent to give testimony as to the law of California upon that point, I think that neither the Extradition Commissioner, nor myself, would be entitled to consider that record.

But in the examination of the accused, who is a competent witness on the law of California, and was called as such before the extradition commissioner, the existence of this decision was proved.⁹¹

Thus on this point, at least, Collins was hoisted on his own petard. Yet Duff J. was even-handed in applying provisions of the Treaty with respect to dual criminality:

The meaning of the treaty provision, and the meaning of sec. 2 which specifically provides that the evidence shall be such evidence as would justify the committal of the accused for trial if the crime had been committed in Canada, has been the subject of a great deal of discussion in Canada and in the U.S.

It was held by Sir John Beverley Robinson and Mr. Justice Burns in *Re Anderson* (20 U.C.Q.B. 124), that that section, and the provision of the treaty I have read, were to be taken as providing only that the law of Canada is to supply the tests to determine the admissibility and the quantum of evidence, and not as requiring that the acts of the accused shall bring him within the imputed crime as defined by the law of Canada.... In *Wright v. Hankel*, *supra*, the Supreme Court of

⁸⁸ (1865), 6 B. & S. 522, 122 E.R. 1288.

⁸⁹ *Re Collins* (No. 3), *supra*, note 9, at 86.

⁹⁰ *Ibid.*, at 85.

⁹¹ *Ibid.*, at 93-94.

the United States treats the question as still open. I do not decide the controversy between these conflicting authorities. 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.⁹²

Without actually deciding the issue, Duff J. adopted the view most favourable to the accused, namely, that the test of justifying commitment for trial in the requested country applied not only to admissibility and quantum of evidence, as had been held in *Anderson's Case*, but also to the definition of the offence.⁹³ Yet he was careful to qualify what was meant by "criminality":

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 it 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 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.⁹⁴

Duff J. went on to establish, in effect, a two step test for determining "criminality":

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.⁹⁵

⁹² *Ibid.*, at 99.

⁹³ *Ibid.*

⁹⁴ *Ibid.*, at 101.

⁹⁵ *Ibid.*, at 103.

Thus Duff J. thoroughly interpreted both the Treaty and the Statute with respect to the issue of criminality. With the possible exception of his remarks about the necessity to prove foreign law,⁹⁶ his judgment established standards in Canadian extradition procedure that have withstood the test of time.

⁹⁶ The position taken by Duff J. has been tacitly supported by more recent decisions to look behind the law, in particular in the Supreme Court of Canada decision of *Washington (State) v. Johnson* (1988), 40 C.C.C. (3d) 546, [1988] 1 S.C.R. 327 (S.C.C.). See also the B.C. Court of Appeal decisions in *U.S.A. v. Schrang* (1997), 114 C.C.C. (3d) 553 (B.C.C.A.); and *U.S.A. v. Stewart*, (1997), 120 C.C.C. (3d) 78 (B.C.C.A.), at 81, 86. See the discussion regarding these cases and the examination of foreign law in Chapter Eight below.

CHAPTER SEVEN

CURRENT EXTRADITION PROCESS: TREATY, STATUTE AND CASE LAW

1. The Current Extradition Treaty

a) Extraditable Offences

The Treaty on Extradition between Canada and the U.S.A. signed in 1971¹ provided a comprehensive Schedule of Offences which went beyond the Ashburton-Webster Treaty and supplements to include unusual crimes such as throwing corrosive substances at another person,² making or possessing explosive substances with intent to endanger life or cause severe damage to property,³ unlawful sexual acts with or upon children,⁴ hijacking aircraft,⁵ endangering travellers,⁶ bribery (including soliciting, offering or accepting a bribe),⁷ extortion,⁸ and obstruction of justice.⁹ Attempts to commit or conspiracy to commit any of the crimes in the schedule also constituted extraditable offences.¹⁰ However, all of these categories became moot in 1988 when the concept of a Schedule was dropped altogether in favour of a blanket provision:

¹ Signed at Washington on 3 December 1971, amended by an Exchange of Notes on 28 June and 9 July 1976, and ratified 22 March 1976.

² Schedule to Treaty on Extradition, Clause 4.

³ *Ibid.*, Clause 29.

⁴ *Ibid.*, Clause 6.

⁵ *Ibid.*, Clause 23.

⁶ *Ibid.*, Clause 21.

⁷ *Ibid.*, Clause 13.

⁸ *Ibid.*, Clause 14.

⁹ *Ibid.*, Clause 30.

¹⁰ Protocol Amending the Treaty on Extradition, signed at Ottawa on 11 January 1988, Article I - 2(2).

Extradition shall be granted for conduct which constitutes an offense punishable by the laws of both Contracting Parties by imprisonment or other form of detention for a term exceeding one year or any greater punishment.¹¹

Thus virtually every indictable offence in the Canadian *Criminal Code*, and many other offences which garner a maximum sentence of more than a year,¹² are now automatically covered by the Treaty without the necessity of being listed in a schedule to either the Treaty or the *Extradition Act*.¹³ In fact, the new Act, which received Royal Assent on 19 June 1999, does not append a schedule of "extradition crimes."

The provisions of the Treaty describing the scope of extraditable offences (in this case governed by the maximum punishment of one year) supersede those specified in the Act (governed by a maximum punishment of two years).¹⁴ Accordingly, it is no longer necessary for the offences in the two countries even to be conceptually similar,¹⁵ let alone bear the same name.¹⁶ In fact, s. 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."

In the original Treaty, Article 2(3) appeared to give greater powers to the U.S. than to Canada by specifying, "Extradition shall also be granted for any offense against a

¹¹ *Ibid.*, Article I - 2.

¹² *Cotroni v. Canada (A.-G.)* (1974), 18 C.C.C. (2d) 513 (S.C.C.) (*Narcotic Control Act* offence). But see *U.S.A. v. Rennie* (1984), 56 A.R. 321, 34 Alta. L.R. (2d) 193 (Q.B.), where the Court dismissed an application to extradite a fugitive on a charge of conspiracy to traffic in hashish since there was no evidence that that activity was a criminal offence in Canada.

¹³ *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.).

¹⁴ *Extradition Act*, s 3(1). *Re Lazier* (1899), 3 C.C.C. 167, affd 3 C.C.C. 167 at 177 (Ont. C.A.).

¹⁵ *Extradition Act* (1999), s. 3(1). *U.S.A. v. McVey* (1992), 77 C.C.C. (3d) 1, [1992] 3 S.C.R. 475, [1993] 1 W.W.R. 289 (S.C.C.); *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.].

¹⁶ *U.S.A. v. McVey*, *supra*, note 15; *Re Lazier*, *supra*, note 14, at 177.

federal law of the United States in which one of the offenses listed ... is a substantial element, even if transporting, transportation, the use of the mails or interstate facilities are also elements of the specific offense.” This wording was substantially changed in the 1988 Protocol; however the new Article 2(2) still appears to give greater powers to the U.S. than to Canada where use of the mails is concerned:

An offense is extraditable notwithstanding

- (i) 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, or
- (ii) that it relates to taxation or revenue or is one of a purely fiscal character.¹⁷

There is no equivalent provision for “use of the mails or of other facilities” affecting foreign commerce as part of an offense in Canada.

Article 3 of the Canada-U.S. Treaty provides an expansive 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 (for the purposes of the Treaty an aircraft is considered in flight from the moment when power is applied for take-off until the moment the landing run ends¹⁸). Article 3 also deals with extraterritorial offences, which are considered extraditable if the State would have legal jurisdiction over such an offence were it committed in similar circumstances at home. In any case it is a matter of discretion, for the 1988 amendment adds, capriciously, that even “if the laws in the requested State do not so provide, the executive authority in the requested State may, in its discretion, grant extradition.”¹⁹

¹⁷ Protocol of 1988, Article I - 2(2).

¹⁸ Treaty of 1971, Article 3(1)

¹⁹ Protocol of 1988, Article III.

b) Mandatory Exceptions

Article 4 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. This variety of *res judicata* was considered by the Ontario District Court in *Re Gandy*,²⁰ which neatly passed the matter on to the Minister – since the Minister, not the Court, has the power to surrender the fugitive. Under the current Act, therefore, the *res judicata* argument should first be raised in submissions to the Minister following the extradition hearing, not to the extradition judge at the hearing. This is the import of s. 47(a) of the Act, which states, “The Minister may refuse to make a surrender order if the Minister is satisfied that (a) 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.”

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. In *R. v. Knapp*,²¹ for example, the B.C. County Court determined that Knapp’s prior conviction in Canada for conspiracy to traffic in cocaine precluded his surrender on U.S. charges of conspiracy to transport cocaine arising out of the same set of facts. However, s. 47(d) provides the Minister 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.”

Extradition shall not occur where a lapse of time bars prosecution in the requesting State. Section 46(1)(a) of the Act makes it mandatory for the minister to

²⁰ (1982), 7 W.C.B. 324.

²¹ (1987), 3 W.C.B. (2d) 369 (B.C. Co. Ct.).

refuse to make a surrender order if the Minister is satisfied that “the prosecution of a person is barred by prescription or limitation under the law that applies to the extradition partner. Nor shall extradition occur where the offence is of a political character.”²²

However, there is an obvious subjective element to determining if an offence is of a political character. The courts have ruled that this is a matter for the Minister, not the courts, to consider.²³ That position is supported by ss. 44(1)(b) and 46(1)(c) of the Act:

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

...(b) the request for extradition is made for the purpose of prosecuting or punishing the person by reason of...political opinion...or that the person’s position may be prejudiced for [that] reason.

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

...(c) the conduct in respect of which extradition is sought is a political offence or an offence of a political character.

“Shall” is to be construed as imperative, and indicates a mandatory provision.²⁴

Article 4(2) of the Treaty deals with exceptions to the exception, 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. The claw-back includes:

- (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;

²² J.-G. Castel and M. Edwardh, “Political Offences: Extradition and Deportation – Recent Canadian Developments,” 13 Osgoode Hall L.J. (1975).

²³ *U.S.A. v. Peltier* (1976), 32 C.C.C. (2d) 121 (B.C.S.C.); *Wisconsin (State) v. Armstrong* (1973), 10 C.C.C. (2d) 271, [1973] F.C. 437 (F.C.A.); *Meier v. Canada (Minister of Justice)*, (1983), 6 C.C.C. (3d) 563 (F.C. T.D.); *U.S.A. v. Liebowitz* (1987), 3 W.C.B. (2d) 169 (Ont. Dist. Ct.).

²⁴ *Reference re Language Rights under s. 23 of Manitoba Act and s. 133 of Constitution Act, 1867*, [1985] 1 S.C.R. 721 at 737.

- (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.²⁵

The new Act reinforces this provision by a specific qualifying proviso in s. 46(2):

46. ... (2) 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, counselling, 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).

This list covers virtually the same ground as the Treaty.

c) Discretionary Exceptions

Article 5 suggests the withdrawing of extradition proceedings against minors in cases where “extradition would disrupt the social readjustment and rehabilitation of that person” – a not unlikely outcome of the process, given its complexity. The wording of the parallel provision in s. 47 (c) of the Act is also permissive, empowering and conferring an area of discretion:²⁶

²⁵ Protocol of 1988, Article IV.

²⁶ *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.).

47. The Minister may refuse to make a surrender order if the Minister is satisfied that
...(c) the person was under the age of 18 years at the time of the offence and the law that applies to them in the territory over which the extradition partner has jurisdiction is not consistent with the fundamental principles governing the *Young Offenders Act*.

Clearly there is a two-prong test here that does not exist in the Treaty: the Minister's discretion ends when it is determined that that the extradition partner does have appropriate 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.

Article 6 pertains to cases where fugitives face the death penalty, a subject that will be discussed in detail in Chapter Nine. The Article states:

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.

The supportive provisions in the 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 both the Treaty and the Act 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.

Successive Ministers of Justice have been inexplicably reluctant to apply the protection implied in Article 6 of the Treaty to fugitives charged with capital offences such as murder – and the appellate courts have generally not interfered with their exercise of executive discretion. In *Gervasoni v. Canada (Minister of Justice)*,²⁷ for example, the Minister refused to seek formal assurances, saying that he was satisfied from informal verbal assurances that the death penalty would not be sought. The B.C. Court of Appeal held that this was within the parameters of his ministerial discretion. On the other hand, in *U.S.A. v. Chong*,²⁸ the Ontario Court of Appeal ruled that the Minister's "firm belief" that the death penalty would not be sought was not enough; he should seek a "formal, final and binding written assurance" from U.S. authorities before surrendering Chong. In *U.S.A. v. Burns*,²⁹ the B.C. Court of Appeal directed the Minister to seek Article 6 assurances as a condition of surrender.

More typically, in the twin cases of *Kindler v. Canada (Minister of Justice)*³⁰ (in which Kindler was a convicted murderer who had escaped death row) and *Reference re: Ng Extradition (Can.)*³¹ (in which an horrendous serial murder of women and children was alleged), the Minister's refusal to seek assurances that the death penalty would not be

²⁷ (1996), 119 W.A.C. 141 (B.C.C.A.).

²⁸ (1996), 91 O.A.C. 319 (Ont. C.A.), leave to appeal to S.C.C. refused 99 O.A.C. 79n.

²⁹ (1997), 116 C.C.C. (3d) 524 (B.C.C.A.).

³⁰ (1991), 67 C.C.C. (3d) 1, [1991] 2 S.C.R. 779 (S.C.C.).

³¹ (1991), 67 C.C.C. (3d) 61, [1991] 2 S.C.R. 858 (S.C.C.).

sought were deemed appropriate. In the more recent case of *R. v. Campbell*,³² the Ontario Court of Appeal held that seeking Article 6 assurances was the exception rather than the rule; such assurances should be sought only when warranted by "special circumstances."

Article 7, as amended in 1988, gives discretion to 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. Consistent with this Article, s. 64 of the Act provides:

64. (1) Unless the Minister orders otherwise, a surrender order made in respect of a person accused of an offence within Canadian jurisdiction or who is serving a sentence in Canada after a conviction for an offence, other than an offence with respect to the conduct to which the order relates does not take effect until the person has been discharged, whether by acquittal, by expiry of the sentence or otherwise.

(2) For greater certainty, the person need not have been accused of the offence within Canadian jurisdiction before the surrender order was made.

d) Applicable Law and Rules of Evidence

Article 8 of the Treaty establishes that the law of the requested state applies to extradition proceedings. Most of the time, this Article would apply to or trigger provisions in the criminal law, but that is not always the case. For example, in *U.S.A. v. Jnobbaptiste*,³³ owing to an intervening statutory holiday the documentation was not received from the U.S. 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

³² (1996), 91 O.A.C. 204 (Ont. C.A.), appeal to S.C.C. refused 99 O.A.C. 79n.

³³ (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."

automatic extension of the deadline to the next business day after the holiday. By the same token, Article 8 of the Treaty gives the fugitive "the right to use all remedies and recourses provided by such law" (which in Canada includes the *Charter* and the *Canadian Bill of Rights*).³⁴

Initiating the process of extradition through diplomatic channels is the subject of Article 9. Requests are accompanied by a physical description of the fugitive, a statement of the facts of the case, and the text of the laws relied on describing the offence, prescribing the punishment, and indicating any statutory limitations.³⁵ Where the request refers to a person accused but not yet convicted, the request must be accompanied by a valid warrant of arrest and by sufficient evidence, including evidence as to identity, to justify arrest and committal for trial had the offence been committed in Canada.³⁶ Where the request relates to a person already convicted, it must be accompanied by the judgment of conviction and sentence, a statement as to how much of the sentence has been served, and evidence that the person requested is the person to whom the sentence refers.³⁷

Only when the evidence tendered is sufficient to justify the person's committal for trial in the requested country will extradition be granted.³⁸ This provision is similar to the double criminality requirement, but refers specifically to the sufficiency of the evidence rather than the conduct. This is the domain of the courts rather than the Minister, as s.

³⁴ These rights will be discussed in Chapter Nine.

³⁵ Treaty of 1971, Article 9(1), (2). Time limits under Article 11(3) do not apply to requisitions made under Article 9. *U.S.A. v. McNaughton* (1988), 4 W.C.B. (2d) 156 (Ont. Dist. Ct.).

³⁶ *Ibid.*, Article 9(3).

³⁷ *Ibid.*, Article 9(4). This is a plain reading of the Article. However, the B.C. Court of Appeal took a different view in *U.S.A. v. Waddell* (1993), 87 C.C.C. (3d) 555, leave to appeal refused 88 C.C.C. (3d) vi, holding that Article 9(4) does not require the extradition request to be accompanied by the judgment of sentence.

³⁸ *Ibid.*, Article 10(1).

29(1)(a) of the Act makes 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....

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 U.S.), and certified by the principal diplomatic or consular office of the requesting country.³⁹ 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 *Extradition Act*.⁴⁰

e) Arrest and Transit

In cases of urgency, Article 11 provides for provisional arrest of the person sought, pending presentation of the request through diplomatic channels, and detention for up to 60 days.⁴¹ The provisional arrest provisions are in ss 12-14 of the new Act.

Unless there is express agreement of the requested state at the time of extradition,⁴² once a person is extradited for a particular offence, under the protection of Article 12 he cannot be detained, tried or punished for some other offence (unless it occurs after the extradition⁴³), or be extradited to a third state, unless he remains in the

³⁹ *Ibid.*, Article 10(2)

⁴⁰ *R. v. Nixon* (1984), 10 C.C.C. (3d) 376 (Ont. C.A.), leave to appeal to S.C.C. refused 55 N.R. 396n; *R. v. Voss* (1984), 12 C.C.C. (3d) 538 (B.C.C.A.), leave to appeal to S.C.C. refused 56 N.R. 319n. The Rules of Evidence in the new Extradition Act (ss. 31 - 36) are much expanded from the old Act.

⁴¹ Treaty of 1971, Article 11, amended from 45 days to 60 days by the Protocol of 1988. See *U.S.A. v. Jnobaptiste*, *supra*, note 31. Time limits under this Article do not apply to formal requisitions under Article 9 – see *U.S.A. v. McNaughton*, *supra*, note 35.

⁴² *Ibid.*, Article 12(1)(iii).

⁴³ *Ibid.*, Article 12(2).

receiving country for 30 days after being free to leave, or leaves the country and returns voluntarily.⁴⁴ Canadian legislation naturally does not govern a situation where a person has been returned to the U.S. 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 the person not be prosecuted, nor that sentence be imposed or enforced against the person, in respect of any offence or conduct other than that referred to in the order of surrender.

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).⁴⁵ This Article is supported by s. 15(2) of the Act, which specifies, "If requests from two or more extradition partners are received by the Minister for the extradition of a person, the Minister shall determine the order in which the requests will be authorized to proceed."

Once a decision on the extradition is made, the information must be conveyed promptly to the requesting state through diplomatic channels.⁴⁶ The individual concerned must also be transported promptly: if he 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

⁴⁴ *Ibid.*, Article 12(1)(i), (ii).

⁴⁵ *Ibid.*, Article 13.

⁴⁶ *Ibid.*, Article 14(1).

same offence.⁴⁷ However, the decision to release and extradite again is discretionary, not mandatory, and s. 4 of the Act specifies,

For greater certainty, the discharge of a person under this Act ... does not preclude further proceedings, whether or not they are based on the same conduct, with a view to extraditing the person under this Act unless the judge is of the opinion that those further proceedings would be an abuse of process.

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.⁴⁸ 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 prson 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.

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.⁴⁹ The new Act accommodates this requirement of the Treaty by giving authorization to the appropriate authorities of other states (s. 74) and by authorizing people who would otherwise be inadmissible to enter the country for the purposes of transit (s. 75), at the discretion of the Minister. The receiving country will pay any transportation expenses arising either from transit⁵⁰ or from successful extradition.⁵¹

⁴⁷ *Ibid.*, Article 14(2).

⁴⁸ *Ibid.*, Article 15.

⁴⁹ *Ibid.*, Article 16(1).

⁵⁰ *Ibid.*, Article 16(2).

⁵¹ *Ibid.*, Article 17(1).

However, this is the extent of any pecuniary liability to the requested state. 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.⁵²

f) Joint Jurisdiction

Where both the U.S. 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.⁵³ This is a matter for the Minister to consider, rather than the extradition court. 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.

But the decision of the Minister may invite *Charter* scrutiny by the court of appeal.⁵⁴

The new Treaty replaced all previous agreements in force between Canada and the U.S. 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:

⁵² *Ibid.*, Article 17.

⁵³ Protocol of 1988, Article VII (This addition to Article 17 seems to be a *non sequitur*).

⁵⁴ *U.S.A. v. Dynar* (1994), 23 W.C.B. (2d) 541 (Ont. Ct. Gen. Div.), revd on other grounds 101 C.C.C. (3d) 271 (Ont. C.A.), revd on other grounds [1997] 2 S.C.R. 462, 115 C.C.C. (3d) 481 (S.C.C.).

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, extradition for crimes occurring before 22 March 1976 must therefore follow the Ashburton-Webster Treaty, as amended, somehow factoring in the provisions contained in the Protocol of 1988. This complication is compounded rather than resolved by application of s. 3 of the *Extradition Act* (see below).

2. The *Extradition Act*

a) Principles

The new *Extradition Act* received first reading as Bill C-40 on 5 May, 1998 and was passed by the House of Commons on 1 December 1998 without much fanfare. In the Senate, however, the proposed Act was subjected to extensive hearings before the Committee on Legal and Constitutional Affairs. Senator Jerry Grafstein 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 [Anne McLellan] 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.⁵⁵

⁵⁵ Michael Posluns, "Topical Hansard Files: Criminal Law" (Stillwaters Group, MPosluns@accglobal.net, 1 August 1999).

The Senate eventually approved the Bill with minor amendments, and the Act received Royal Assent on 17 June 1999.

The official summary of the Act claims that it creates “a comprehensive scheme, consistent with modern legal principles and recent international developments,” that applies to all requests for extradition, including requests under a bilateral treaty. “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.

The enactment specifies the considerations for the extradition judge in deciding whether the person sought should be ordered to await surrender to the requesting state. It also specifies the considerations, including human rights safeguards, for the Minister of Justice in deciding whether to surrender the person sought.⁵⁶

The process of extradition from Canada begins with an application to the Minister from a foreign state with which there is an “extradition agreement.”⁵⁷ The Canada-U.S. Extradition Treaty is such an agreement. Under s. 3 of the Act, the extradition must be in accordance with the provisions of both the Treaty and the Act, as stated in the “General Principle”:

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

⁵⁶ “Summary” to Bill C-40, “as passed by the House of Commons December 1, 1998,” p. ii.

⁵⁷ 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)).

- (a) subject to a relevant extradition agreement, the offence in respect of which the extradition is requested is punishable by the extradition partner, by imprisoning or otherwise depriving the person of their liberty for a maximum, term of two years or more, or by a more severe punishment; and
- (b) the conduct of the person, had it occurred in Canada, would have constituted an offence that is punishable in Canada,
 - ...(ii) ...by imprisonment for a maximum term of two years or more, or by a more severe punishment, subject to a relevant extradition agreement.

The "general principle" contained in s. 3 is the cornerstone of the extradition process. However, the section does not appear to effect a resolution of the difficulty that might be encountered for criminal charges brought for offences alleged to have occurred prior to 1976 – a not uncommon phenomenon in the Age of Recrimination when past sins of the Fathers (for example) have come back to haunt them with allegations of sexual improprieties decades after the fact. In such circumstances, the treaty applicable at the time of the offence governs, and the unlawful sexual acts with children (for example) are required to be offences under the laws of both countries.⁵⁸ This is understandable, since some nations are far more permissive than others, especially in matters of sexual activity, and the pertinent law may vary from decade to decade.⁵⁹

Courts should look to the Act rather than the Treaty as their primary authority, for the purpose of the Act is to ensure that the law of Canada conforms to the Treaty, not to import every provision of the Treaty into Canadian law.⁶⁰ The courts having jurisdiction over extradition matters are specified in the definition section, but basically are the

⁵⁸ *W. (E.J.) v. Provincial Correctional Centre for Men (Acting Director)* (1986), 53 Sask. R. 112 (C.A.).

⁵⁹ See the array of cases of this nature considered by the B.C. Court of Appeal in *R. v. Ursel* (1997), 117 C.C.C. (3d) 289, 155 W.A.C. 241, 35 W.C.B. (2d) 457. See also *R. v. Anderson* (1998), 128 C.C.C. (3d) 478 (B.C.C.A.), at 479: "The appellant was convicted of an historical sexual assault occurring some 30 years ago...between 1969 and 1971."

⁶⁰ *McVey v. U.S.A.*, note 15 (S.C.C.).

superior court of each province.⁶¹ Since 1992, judges acting in the capacity of extradition judges have the same competence to hear constitutional arguments as they would have in their normal roles.⁶² Hence a superior court judge has the capacity to declare a statutory provision unconstitutional,⁶³ or to grant an appropriate remedy under s. 24 of the *Charter*.⁶⁴ Section 25 specifies that “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 the judge possesses by virtue of being a superior court judge.” Charter rights and remedies arising under this and other sections of the *Extradition Act* and the Canada-U.S. Treaty will be discussed more fully in Chapter Nine.

b) From Request to Arrest

Upon receiving a request from an extradition partner for the provisional arrest of an individual, the Minister first determines whether the offence alleged falls under s. 3(1)(a) and whether the other country will follow through with an extradition request.⁶⁵ The Minister then has the option of authorizing the Attorney General to apply to the court, *ex parte*, for a provisional arrest warrant. A judge may issue a warrant for the arrest of the person, valid throughout Canada, preferably identifying the Canadian rather than the American offence (although either will do⁶⁶) where it is considered to be in the

⁶¹ See s. 25. Under s. 2, *s.v.* “court,” the designated courts are the Ontario Court (General Division), Superior Court of Quebec, Courts of Queen’s Bench of New Brunswick and the prairie provinces, Trial Division of the Supreme Court of Prince Edward Island, and the Supreme Courts of the remaining provinces and territories, including Nunavut.

⁶² *U.S.A. v. D’Agostino* (1997), 41 C.R.R. (2d) 325 (Ont. Gen. Div.).

⁶³ *U.S.A. v. Cazzetta* (1996), 108 C.C.C. (3d) 536 (Que. C.A.), leave to appeal to S.C.C. refused 110 C.C.C. (3d) vi

⁶⁴ *U.S.A. v. Dynar* (S.C.C.), *supra*, note 54.

⁶⁵ *Extradition Act*, s. 12.

⁶⁶ *U.S.A. v. McVey* (S.C.C.), *supra*, note 15.

public interest, where the person is present or ordinarily resident in Canada or is soon to be arriving, and where an arrest warrant⁶⁷ or similar order is already in existence.⁶⁸

Upon receiving a request for extradition and being satisfied that the conditions of s. 3 are met “in respect of one or more offences mentioned in the request,” the Minister may under s. 15(1) of the Act issue an “authority to proceed” that allows the Attorney General to apply to the court for an order for committal under s. 29. If the person has not already being arrested or detained, the Attorney General follows the same procedure as for a provisional arrest warrant, or apply for a summons setting a date for appearance.⁶⁹

Within 24 hours of being arrested, or as soon as possible thereafter, the person is brought before a judge or justice of the peace. The justice of the peace can only remand the person in custody to appear before a judge (s. 17(2)). The judge may order or deny judicial interim release, following Part 16 of the *Criminal Code*;⁷⁰ that decision can be reviewed by judge of the Court of Appeal following s. 679 of the *Criminal Code*.⁷¹ Either the Attorney General or the person detained may apply for change of venue “to another place in Canada” if the interests of justice so require.⁷²

c) The Hearing

Once the judge receives an authority to proceed from the Attorney General, he must hold an extradition hearing, for the purposes of which he has the powers of a justice under Part 18 of the *Criminal Code*, the part governing the conduct of preliminary

⁶⁷ If relying on a foreign warrant, a valid foreign warrant must be produced: *Re Bongard* (1900), 5 Terr. L.R. 10, 6 C.C.C. 76 (N.W.T.S.C.), at 78.

⁶⁸ Section 14.

⁶⁹ Section 16.

⁷⁰ Sections 18-19.

⁷¹ Section 20.

⁷² Section 22.

inquiries, "with any modifications that the circumstances require." In theory, the judge then hears the case as if the fugitive were appearing before a justice of the peace on an indictable offence committed in Canada.⁷³ However, in recent years the courts have whittled away this statutory requirement at the expense of the person in the dock.⁷⁴ For example, the number of counts for which a person has been convicted in the U.S. would certainly be a factor in whether a case has been made out, and whether the individual is to be surrendered on every count. But *U.S.A. v. Knox*⁷⁵ stands for the proposition that where an accused has been convicted of only *some* of the charges in the original indictment, he can be extradited on *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 fulfil the requirements set out in section 3...."

In extradition hearings, nowhere near the level of specificity is required as in preliminary hearings, even to the point that the location, or even the State, of the alleged offence need not be properly identified.⁷⁶ Nor is the fugitive entitled to full disclosure, beyond production of the evidence used to establish a *prima facie* case.⁷⁷ 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

⁷² Section 22.

⁷³ *Armstrong v. State of Wisconsin* (1972), 7 C.C.C. (2d), 331 (Ont. H.C.J.).

⁷⁴ *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 v. R.* (1987), 33 C.C.C. (3d) 193 (S.C.C.) [Ont.].

⁷⁵ (1995) 27 W.C.B. (2d) 451 (Ont. Ct. Gen Div 095/177/069).

⁷⁶ *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.).

⁷⁷ *U.S.A. v. Dynar* (S.C.C.), *supra*, note 54 at 481.

standards that would (or should) be applied in preliminary inquiries.⁷⁸ 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.⁷⁹

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.⁸⁰ 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 is of a political character, or that the motivation for the prosecution or punishment 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),⁸¹ 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*.⁸² However, *Meier* and *Liebowitz* followed *Wisconsin v. Armstrong* (1973),⁸³ a Federal Court of Appeal decision (and therefore arguably more

⁷⁸ *U.S.A. v. Wong*, (1995) 98 C.C.C. (3d) 332, (C.A.); (1995), 101 C.C.C. (3d) vi (S.C.C.); *U.S.A. v. Wagner* (1995), 104 C.C.C. (3d) 66 (B.C.C.A.), leave to appeal to S.C.C. refused 103 C.C.C. (3d), vi; *U.S.A. v. Sanders* (1996), 31 W.C.B. 393 (B.C.S.C.). This issue will be discussed at greater length in the next chapter.

⁷⁹ *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 *U.S.A. v. Legros* (1992), 77 C.C.C. (3d) 253, which followed *Re McVey v. R.* (1987), 37 C.C.C. (3d) 444 (B.C.S.C.). *Re McVey* stands for the proposition that an extradition judge has discretion to make such a publication ban order.

⁸⁰ *Criminal Code*, s. 540(1)(a).

⁸¹ *Supra*, note 23, at 563.

⁸² *Supra*, note 23, at 169.

⁸³ *Supra*, note 23, at 271 (C.C.C.).

persuasive, although obviously 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.

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 determining whether offences are of a political nature pursuant to s. 15 beyond merely preparing a record for the Minister. In *U.S.A. v. Dickinson* (1995),⁸⁴ 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.⁸⁵ The Act sheds little light on whether judges may consider such evidence or argument in an extradition hearing, since it refers only to the Minister not surrendering an individual where in her estimation he has a valid claim that the offence or procedure is politically motivated.⁸⁶

Depositions, statements, certificates or judicial documents from the foreign state submitted as part of the record are to be received by the court in evidence under the incredibly relaxed rules of evidence contained in ss. 31-36. Authentication of documents is no longer necessary,⁸⁷ although certification of the record is required.⁸⁸ Despite Article 10(2) of the Treaty to the contrary, 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

⁸⁴ 29 W.C.B. (2d) 468.

⁸⁵ *U.S.A. v. Dickinson* (1995), 29 W.C.B. (2d) 467.

⁸⁶ See ss. 44(1)(b), 46(1)(c), (2). See the discussion on the Treaty, above.

⁸⁷ Section 33(4).

⁸⁸ Section 33(3).

the U.S. 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."⁸⁹

Whether the evidence led is by *viva voce* evidence or by affidavit, usual hearsay rules apply.⁹⁰ Still, considering the already questionable quality of affidavit evidence, which cannot be tested by cross-examination,⁹¹ the courts in Canada have an inexplicably relaxed attitude to the quality of the material upon which they are prepared to rely. In *U.S.A. v. McAllister*,⁹² 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. The new Act seems even more lax, providing at s. 34, "A document is admissible whether or not it is solemnly affirmed or under oath." 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.⁹³ Even though the person is available to testify in person, affidavits sworn by the person have been used by the court instead of insisting on *viva voce* testimony,⁹⁴ 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

⁸⁹ *U.S.A. v. Sanders*, *supra*, note 78, at 393.

⁹⁰ *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.).

⁹¹ Supported by a long line of cases following *Re Insull* (1934), 61 C.C.C. 336 (Ont. C.A.); *Wisconsin (State) v. Armstrong* (1973), *supra*, note 23 at 271; *Vardy v. Scott* (1976), 28 C.C.C. (2d) 164 (S.C.C.); *Sudar v. U.S.A.* (1981), 64 C.C.C. (2d) 575 (Fed. C.A.); *Decter v. U.S.A.* (1983), 5 C.C.C. (3d) 364 (N.S.S.C., *affd* by Appeal Division at 364n); *U.S.A. v. Smith* (1984), 10 C.C.C. (3d) 540 (Ont. C.A.); *U.S.A. v. Davenport* (1986), 32 C.C.C. (3d) 207 (B.C.C.A.), leave to appeal to S.C.C. refused (1987), 10 B.C.L.R. (2d) xxxvi; and *U.S.A. v. Miller* (1991), 66 C.C.C. (3d) 20 (Ont. C.A.), leave to appeal to S.C.C. refused 69 C.C.C.(3d) vi.

⁹² (1994), 63 Q.A.C. 65 (Que. C.A.), leave to appeal to S.C.C. refused 180 N.R. 160n.

⁹³ Section 35.

⁹⁴ *Re Deakins* (1962), 133 C.C.C. 275 (Ont. H.C.J.).

evidence gathered in Canada, to which Canadian rules of evidence apply in order for the evidence to be admissible.⁹⁵

Even where a witness is called by the agent of the United States to give *vive voce* evidence, counsel for the fugitive often has little leeway in cross-examination. For example, in *U.S.A. v. Houslander*,⁹⁶ counsel was not permitted 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 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,⁹⁷ in an attempt to explain or contradict the evidence led on behalf of the requesting country.⁹⁸

In the case of a person sought for prosecution, the judge orders committal to await surrender where "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...."⁹⁹ In the case of a convicted person sought for sentencing, there must be a correspondence between the alleged conduct and the offence indicated in the authority to proceed.¹⁰⁰ In each case, the judge must also be satisfied that the person is the same person named in the authority to proceed.

⁹⁵ Section 32(2).

⁹⁶ (1993), 12 O.R. (3d) 44 (Gen. Div.); cited with approval in *Philippines (Republic) v. Pacificador* (1993), 14 O.R. (3d) 321 (C.A.).

⁹⁷ *U.S.A. v. Alfaro* (1990), 61 C.C.C. (3d) 474 (Que. C.A.).

⁹⁸ *Berthelotte v. Institut Leclerc* (1986), 5 Q.A.C. 290 (Que. C.A.).

⁹⁹ Section 29(1)(a).

¹⁰⁰ Section 29(1)(b).

Where the evidence is insufficient, the person is discharged.¹⁰¹ However, there is no bar to the fugitive being re-arrested at a later time to face another extradition hearing.¹⁰²

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.¹⁰³ However, where a conviction has been registered in the U.S., 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.¹⁰⁴ In *U.S.A. v. Stewart*,¹⁰⁵ the former vice-president of a U.S. bank faced 10 counts of extortion under U.S. Federal Law, which considers only the subjective state of mind of the "victim." Hall J.A. of the B.C. Court of Appeal examined the nature of "extortion" under the U.S. law and found that it lacked the major objective element of threat that is found in the Canadian *Criminal Code*. The Court quashed extradition proceedings on all ten counts of extortion, but allowed the U.S.A. to proceed on the two remaining counts of fraud.

Upon committal, the judge informs the person that he has the right to appeal and that he will not be surrendered for 30 days.¹⁰⁶ The judge then sends a copy of the order of committal to the Minister of Justice along with a copy of all the evidence taken at the hearing, and has the option of sending a separate report on the case where it is deemed appropriate.¹⁰⁷

¹⁰¹ Section 29(3).

¹⁰² Section 4. See *U.S.A. v. Ford* (1916), 10 W.W.R. 1042 (Man. K.B.); *R. v. Peugeot* (1912), 1 W.W.R. 703 (Sask. S.C.).

¹⁰³ *McVey v. U.S.A.* (S.C.C.), *supra*, note 15; *U.S.A. v. Manno*, *supra*, note 15, at 544 (Que. C.A.).

¹⁰⁴ *Washington (State) v. Johnson* (1988), 40 C.C.C. (3d) 546 (S.C.C.).

¹⁰⁵ (1997), 120 C.C.C. (3d) 78 (B.C.C.A.).

¹⁰⁶ Section 38(2).

¹⁰⁷ Section 38(1).

d) Submissions, Appeal and Judicial Review

Upon committal, the person may make submissions to the Minister on any ground that would be relevant to deciding whether to surrender the individual to the requesting state.¹⁰⁸ Where the Minister makes a decision to surrender and new facts arise that may help his case, the person should apply to the Minister for an extension of time and make a new application under subsection 43(2).¹⁰⁹ Occasionally, the Court of Appeal may itself submit the file back to the Minister for reconsideration, as when a substantial number of charges have been dropped, creating a significant change of circumstances.¹¹⁰

Either party may appeal as of right on a question of law alone, and either party may appeal on a question of mixed fact and law with leave of either the court or a single judge of the court. In addition, either party may appeal with leave of the court on any other ground of appeal that appears to the court of appeal to be "a sufficient ground of appeal."¹¹¹ These provisions appear to be more liberal than the previous *habeas corpus* remedy, and more generous even than criminal appeal provisions.

While it is true that 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.¹¹²

¹⁰⁸ Section 43.

¹⁰⁹ *U.S.A. v. Brisson* (1994), 61 Q.A.C. 198 (Que. C.A.).

¹¹⁰ *U.S.A. v. Stewart* 1997, 120 C.C.C. (3d) 78 (B.C.C.A.), at 87.

¹¹¹ Section 49.

¹¹² *U.S.A. v. St.-Gelais* (1994), 90 C.C.C. (3d) 83 (Que. C.A.), leave to appeal to S.C.C. refused 90 C.C.C. (3d) vi.

The powers of the court of appeal are limited by ss. 53-55. Sections 53 and 54 pertain to an appeal from an order of committal. Section 53 provides that the court may 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 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 favour of the appellant, "if it is of the opinion that no substantial wrong or miscarriage of justice has occurred and the order of committal should be upheld." This subparagraph surely invites a *Charter* challenge.

Upon allowing the appeal, the court shall either 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."¹¹³

Section 55 covers appeals against discharge of a person or stays of proceedings on similar grounds to s. 53. Upon allowing the appeal, the court may either order a new hearing or order the committal of the person.

The court of appeal of the province in which the committal was obtained also has exclusive original jurisdiction to hear an application for judicial review of the Minister's decision to surrender.¹¹⁴ In practice, both the appeal and the judicial review are combined in a single hearing before a single panel of the court of appeal.¹¹⁵ However, compared to

¹¹³ Section 54

¹¹⁴ Section 57. This provision for judicial review was instituted in the 1992 amendment as s. 25.2.

¹¹⁵ Section 57(9).

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 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.¹¹⁶ Under s. 57(7) of the Act, the court of appeal may grant relief on any of the grounds listed under subsection 18.1(4) of the *Federal Court Act*,¹¹⁷ which includes situations where the Minister or tribunal

- (a) acted without jurisdiction, acted beyond its jurisdiction or refused to exercise its jurisdiction;
- (b) failed to observe a principle of natural justice, procedural fairness or other procedure that it was required by law to observe;
- (c) erred in law in making a decision or an order, whether or not the error appears on the face of the record;
- (d) based its decision or order on an erroneous finding of fact that it made in a perverse or capricious manner or without regard for the material before it;
- (e) acted, or failed to act, by reason of fraud or perjured evidence; or
- (f) acted in any other way that was contrary to law.

Where the court determines that relief should be granted, subsection 57(6) provides that the court of appeal may

¹¹⁶ *U.S.A. v. Whitley* (1994), 94 C.C.C. (3d) 99 (Ont. C.A.), affd (1996), 104 C.C.C. (3d) 447 (S.C.C.).

¹¹⁷ R.S.C. 1985, c. F-7.

- (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

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.¹¹⁸

Section 56 pertains to applications for leave to appeal to the Supreme Court of Canada, empowering the Court to defer appeal hearings or hearings of leave applications until after the Minister has decided whether to surrender, or until after the court of appeal has conducted a judicial review of the Minister's decision, as the case may be.

Since 1 December 1992, the statutory right to appeal and judicial review have replaced *habeas corpus* except where the Minister has failed to surrender the person within 45 days after the order of surrender or final decision of the court is made.¹¹⁹

Several provisions in the Act are entirely new. For example, s. 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. Section 66 contains convoluted provisions for "temporary surrender" of someone serving a sentence in Canada "so that the extradition partner may prosecute the person."¹²⁰

¹¹⁸ *Kindler v. Canada (Minister of Justice)* (1987), 34 C.C.C. (3d) 78, affd 46 C.C.C. (3d) 257, affd 67 C.C.C. (3d) 1 (S.C.C.) [Fed.]; *Idziak v. Canada (Minister of Justice)* (1992), 97 D.L.R. (4th) 577, affirming 67 D.L.R. (4th) 639, affirming 63 D.L.R. (4th) 267, rehearing in S.C.C. refused 9 Admin L.R. (2d) 1n.

¹¹⁹ Section 69. Originally, the writ of *habeas corpus* was the only remedy akin to an appeal or judicial review. See sections 19(a) and 23 of the *Extradition Act* (R.S.C., 1952, c. 322).

¹²⁰ Section 66(1).

Part 3 of the Act (sections 77-83) governs extradition to Canada, which is beyond the scope of this thesis. Part 4 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. For example, the *Canada Evidence Act* has a new s. 46 which allows 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.¹²¹ A similar amendments 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.¹²²

Judicious use of such new technology (so to speak) may obviate many of the problems encountered in the past with affidavit evidence, which currently is often unimpeachable only because the deponents are not subject to cross-examination.

¹²¹ *Extradition Act*, s. 89.

¹²² *Ibid.*, s. 95.

CHAPTER EIGHT

THE LIMITATION OF JUDICIAL DISCRETION IN EXTRADITION HEARINGS

1. The “Preliminary Inquiry” Test

The presumption that a fugitive will receive a fair trial if returned to the requesting country is nowhere better demonstrated than in the “Preliminary Inquiry” test that initially developed in response to key sections of the old *Extradition Act*.¹ Section 13 of that Act specified: “The fugitive ... shall be brought before a judge, who shall ... hear the case in the same manner, as nearly as may be, as if the fugitive was brought before a justice of the peace, charged with an indictable offence committed in Canada.” Section 18(1)(b) specified: “The judge shall issue a warrant for the committal of the fugitive... in the case of a fugitive accused of an extradition crime, if such evidence is produced as would, according to the law of Canada, ... justify the committal of the fugitive for trial, if the crime had been committed in Canada.” From these two sections, a whole mythos has developed, not only about how extradition hearings are to be conducted, but about how *preliminary inquiries* are to be conducted.

At the time Parliament adopted the complex provisions of Part XVIII of the *Criminal Code*, the criminal preliminary inquiry was a tool used to determine if there was

¹ R.S.C. 1985, c. E-23, ss. 13 and 18; replaced in the new Act by s. 24(2).

a prima facie case against the accused sufficient that a reasonable jury, properly instructed, could convict.² The key section establishing the test was s. 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.

The Supreme Court of Canada held in *Caccamo v. R.* (1975)³ that the "sole purpose" of the preliminary inquiry was to satisfy the justice that there was sufficient evidence to put the accused on trial; the Crown therefore had the right to be selective as to what evidence was adduced, having the discretion to lead only enough evidence to meet that test. This followed the principle enunciated by the Manitoba Court of Appeal in 1918 that the usual rule is reversed in preliminary inquiries: any doubt with respect to the sufficiency of the evidence should be resolved in favour of the Crown.⁴ 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.⁵ However, *R. v. Skogman* (1984),⁶ also a decision of the Supreme Court of Canada, stands for the proposition that the 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 the accused an opportunity to make discovery.

² *Re U.S.A. and Smith* (1984), 10 C.C.C. 540 (Ont. C.A.) at 550, 552.

³ 29 C.R.N.S. 78 (S.C.C.).

⁴ *Re Rosenberg* (1918), 29 C.C.C. 309 (Man. C.A.).

⁵ *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).

⁶ (1984), 41 C.R. (3d) 1 (S.C.C.).

The Crown simply had to show that there was sufficient evidence that a jury, properly instructed, could convict. The defence could cross-examine Crown witnesses, but it was not in the interests of the accused to lead evidence, or even to protest innocence: like a police statement, anything that the accused said would be taken down on the record, and be used against the accused.

Not that the accused does not have the *right* to lead evidence and call witnesses. He decidedly does, by virtue of s. 541; in fact if the justice does not allow the accused the opportunity to call witnesses, the order to stand trial will be quashed.⁷ But the court is required to give very strong suggestions that the accused say nothing. The judge is required to read this statutory warning to the accused at the preliminary inquiry:

"Do you wish to say anything in answer to these charges or to any other charges which might have arisen from the evidence led by the prosecution? You are not obliged to say anything, but whatever you do say may be given in evidence against you at your trial. You should not make any confession or admission of guilt because of any promise or threat made to you but if you do make any statement it may be given in evidence against you at your trial in spite of the promise or threat."

In other words, "Sure, you have the right to talk; but don't!"⁸

The "preliminary inquiry test" accorded with the provisions of the old *Extradition Act*.⁹ But soon Part XVIII was to be qualified beyond all recognition – with the unwitting assistance of an ambiguous judgment to be found in the most influential extradition case of them all. No judge, Crown counsel or criminal law practitioner in Canada is unfamiliar with the famous "Sheppard Test."

⁷ *R. v. Ward* (1976), 31 C.C.C. (2d) 466 (Ont. H.C.), affd (1977), 31 C.C.C. (2d) 466n (Ont. C.A.).

⁸ *Criminal Code*, s. 541(2).

⁹ *U.S.A. v. Houslander* (1993), 13 O.R. (3d) 44 (Gen. Div.); *U.S.A. v. Alfaro* (1990), 61 C.C.C. (3d) 474 (Que. C.A.).

2. *U.S.A. v. Sheppard*

The close statutory connection between the extradition hearing described in the old *Extradition Act* and the preliminary hearing procedure in the *Criminal Code* led to *United States v. Sheppard*¹⁰ 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, and substantially altered the way preliminary inquiries, not to mention extradition proceedings, were conducted in this country. Provincial court judges were quick to use *Sheppard* as authority for the proposition that their task was not to weigh evidence, but merely to determine whether there was evidence sufficient to put before a jury. This effectively reduced their role to a simple screening process that belied the complexity of the provisions of Part XXVIII of the *Criminal Code*.

It is well to remember that *Sheppard* is a pre-*Charter* case, and that it was a judicial cliff-hanger in the sense that it was a split 5-4 decision reversing two unanimous decisions in the courts below. Martland, Grandpre, Judson and Pigeon JJ. supported the majority decision written by Ritchie J. But the jurisprudential “heavyweights” of the day, Chief Justice of Canada Bora Laskin and Dickson J., soon to become Chief Justice of Canada, along with Beetz J., adopted the minority decision written by Spence J. The minority supported the unanimous judgment of the three-member panel of the Federal Court of Appeal, a decision written by Chief Justice Jaccett with Pratte J. and Hyde D.J. approving.¹¹ Furthermore, the initial decision in the Quebec Superior Court denying

¹⁰ (1976), 30 C.C.C. (2d) 424, [1977] 2 S.C.R. 1067 (S.C.C.)

¹¹ *Re U.S.A. and Sheppard* (1974), 20 C.C.C. (2d) 575 (F.C.A.).

extradition was that of Acting Chief Justice Hugessen, in his capacity as extradition judge.¹² Thus eight distinguished judges had ruled that Sheppard should not be extradited on the evidence before the extradition judge, and only five (albeit the majority of the Supreme Court of Canada panel) ruled against him.

The difference of opinion in the two Supreme Court of Canada judgments in *Sheppard* seemed practically semantic. Yet the impact of the case on subsequent decisions has been enormous.

Sheppard involved allegations of conspiracy to import and distribute narcotics. The only substantive evidence before the extradition judge was an affidavit by a co-accused, Albert E. Herrmann, a German citizen, who deposed in part:

"I make this affidavit...after the United States Attorney's office promised to dismiss all but one of the narcotics charges against me.... The final narcotic charge against me would be dismissed upon my...testimony in criminal prosecutions against my co-conspirators."¹³

In the extradition hearing, Hugesson A.C.J. stated, "I find that I do not have before me evidence which would justify the commitment of the defendant for trial if the alleged crime had been committed in Canada."¹⁴ Jackett C.J., in dismissing the U.S. application to set aside Hugessen A.C.J.'s decision, stated:

I agree with the extradition Judge that one type of case where an extradition Judge should refuse to grant such a warrant is where a trial Judge would feel obliged to direct a jury to bring in a verdict of acquittal and I agree, also that "where the Crown's evidence is so manifestly unreliable or of so doubtful or tainted a nature as to make it dangerous or unjust to put the accused to his defence on the basis thereof" is such a case.¹⁵

¹² *Re U.S.A. and Sheppard (No. 2)* (1974), 19 C.C.C. (2d) 35 (Que. S.C.).

¹³ *Re U.S.A. and Sheppard* (S.C.C.), *supra*, note 4, at 435-436.

¹⁴ *Re U.S.A. and Sheppard (No. 2)* (Que. S.C.), *supra*, note 12, at 40.

¹⁵ *Re U.S.A. and Sheppard* (F.C.A.), *supra*, note 11, at 576.

That is the opinion overturned in the Supreme Court of Canada. *Sheppard* in fact stands for the converse proposition, that "the weighing of evidence ... forms no part of the function of a 'justice' acting under s. 475 of the *Criminal Code*¹⁶ or that of an extradition Judge in exercising his powers under the *Extradition Act*."¹⁷ Ritchie J. added:

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 in 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.¹⁸

3. Lowering the Standard of Evidence: *U.S.A. v. Wagner*

In practice, the quality of the evidence in an extradition hearing in the wake of *Sheppard* has become far lower than that expected in a preliminary inquiry. Evidence at a preliminary inquiry is necessarily *viva voce* pursuant to s. 540 of the *Code*, the witnesses being placed under oath and subject to cross-examination. In extradition proceedings, by contrast, the evidence usually consists of unchallengeable affidavit evidence¹⁹ submitted by prosecutors as *prima facie* accurate statements of fact and foreign law.²⁰

At the same time, the jeopardy to the alleged fugitive is far greater in an extradition hearing than in a preliminary inquiry, since the extradition hearing results in the accused being removed from the jurisdiction of the province and sovereign domain of Canada for trial. Since the receiving state by definition regards the extradited accused as

¹⁶ Now s. 548, with some modifications.

¹⁷ *U.S.A. v. Sheppard*, *supra*, note 10, at 434, per Ritchie J.

¹⁸ *Ibid.* at 427.

¹⁹ Occasionally challenged successfully, as in *U.S.A. v. Turner* (1992), 75 C.C.C. (3d) 150 (Ont. Gen. Div.), where the applicant failed to tell the whole truth with respect to government misconduct that had led to quashing of the indictment against a co-accused in the same case.

²⁰ *Smith*, *supra*, note 2, at 544; *McAllister v. U.S.A.* (1994), 63 Q.A.C. 68; leave to appeal to S.C.C. refused 919940, 180 N.R. 160 (S.C.C.).

being a fugitive from justice, the chance of being released from custody in that jurisdiction before trial is remote, even though in Canada the individual may have enjoyed relative freedom under the generous provisions for judicial interim release contained in the *Criminal Code* and the *Extradition Act*.²¹

Since the rules of procedure associated with the preliminary inquiry prevail at an extradition hearing, the practice is that the accused leads no evidence beyond that which arises from cross-examination of prosecution witnesses.²² This is fundamentally unfair, if the accused person happens to have an alibi – for the court is compelled to accept only evidence that demonstrates conduct that could be put before a jury in support of the alleged charge. In the case of *U.S.A. v. Wagner*,²³ that is exactly what happened. And it led to his incarceration for four years in an American jail before his eventual acquittal.

The U.S. pursued five counts based on two informations, the incidents occurring late at night in Bellevue and Redmond, Washington, with women victims. On both occasions, Wagner, a Canadian Indian, had iron-clad alibis: at the time of the first incident, a home invasion, he had been working the midnight shift at a factory, had punched in the clock, and had been engaged with his foreman in conversation. At the time of the second incident a year later, he was between work shifts at his home on the Tseycum Reservation on Vancouver Island, Canada.²⁴

²¹ *U.S.A. v. McVey* (1992), 77 C.C.C. (3d) 1, [1992] 3 S.C.R. 475; *U.S.A. v. Tilley* (1996), 183 A.R. 158 (Q.B.); *Doyer v. Centre de Prevention de Montreal*, [1992] R.L. 1 (Que.C.A.).

²² *R. v. Al-Amoud* (1992), 10 O.R. (3d) 676 (Ont. Co. Ct. (Gen. Div.)), at 682, per Then J. (the affidavits supplied as part of the record from the extraditing country were received at face value without the benefit of cross-examination, a concept that appears to invite a challenge of jurisdictional error).

²³ (1995), 104 C.C.C. (3d) 66, 111 W.A.C. 119 (B.C.C.A.), leave to appeal to S.C.C. refused 104 C.C.C. (3d) vi, 137 W.A.C. 80n, 204 N.R. 74n.

²⁴ *Ibid.*, at 68.

The first incident took place late at night on 28 August 1988, in a suburban Bellevue apartment. The elderly woman victim woke up, startled by the intruder. Her initial call to the police was with respect to an intruder who had woken her up in the middle of the night. She told police that she had awakened to see the intruder rifling through her purse. Later, she told the police that the intruder had assaulted her. Later still, she said the intruder tried to rape her.²⁵ Eventually, the police showed her an unaddressed window envelope bearing the return address of a Seattle bank, which she identified as one that was in her purse.

Although the woman had only seen her assailant in the dead of night, she said she thought he was Mexican. She said he talked with an accent, presumably Spanish. Wagner does not speak with an accent. Nonetheless, he was sufficiently Mexican-looking that the police decided that David Wagner was worth interrogating. They decided to pay him a visit at work in Redmond. A co-worker told Wagner that they had arrived.

Not knowing why they were there, but feeling that he had been treated unfairly by them in the past, Wagner fled out the back door.²⁶ That, to the police, was a sure sign of a guilty mind. On a search warrant, they raided Wagner's mother's house. His mother, Mary Wagner, swore in an affidavit and testified under oath in the extradition hearing (and later at trial in the U.S.) that she watched a police officer rip a button off her son's coat in the closet. Then he compared it to another button on the same coat. "'Look'ee here!' he said. 'A perfect match!'" Wagner's sister, Muriel Wagner, a school teacher, swore in an affidavit and testified at the hearing (and also at trial in the U.S.) that Wagner

²⁵ *Ibid.*

²⁶ Affidavit evidence of David Peters from client files.

had picked up the mail that morning, and one of the letters was a statement from her Seattle bank – in a window envelope. The envelope, she testified, went missing after the police visit.²⁷ From the window envelope entered as evidence, supposedly the same one identified by the elderly woman, a police specialist was able to lift a single fingerprint – that of David Wagner.

Five years after the break-in, on 26 July 1993, the elderly woman was asked to attend the police station to view a photo lineup. One of the photographs in the six-photo montage was that of Wagner. She picked out his picture.²⁸ The photo montage was not made available either to counsel or to the court.²⁹

Canadian alibi witnesses who are compellable to appear before a court in B.C. are not compellable to appear in the U.S. Nor is the affidavit evidence of Canadian witnesses admissible at a criminal trial. In the second incident in *U.S.A. v. Wagner*, at least eight witnesses, including Wagner's employer armed with company work records, were able to swear that the accused was working on Vancouver Island on the day before and after a woman was abducted in her own car and robbed in Redmond, Washington at 2 a.m. on 14 June 1989.³⁰ A week after the robbery, the victim selected Wagner's mug shot from a police photo lineup – a photographic montage that again was not made available at the hearing,³¹ despite defence demands for disclosure.

²⁷ *Ibid.*

²⁸ *U.S.A. v. Wagner*, *supra*, note 23, at 68.

²⁹ *Ibid.*, at 70.

³⁰ *Ibid.*, at 68-69; affidavits sworn before the author by Wagner's fellow employees; transcript of extradition hearing before Oppal J., 5 January 1995, Victoria (S.C.B.C.). Since the employer was prepared to testify at the extradition hearing and introduce detailed work records into evidence, it was deemed redundant to call the other co-workers as witnesses. Nor would it have made any difference, since defence evidence – including that of the employer – was disregarded by Oppal J.

³¹ *Ibid.*, at 68-70.

In fact, as the police discovered years later, the complainant had made a mistake when she identified her assailant and captor as the accused from an eight-exposure photo lineup prepared by the police in Redmond, Washington, 200 kilometers and a long ferry ride away from Mr. Wagner's home on the Tseycum Reservation on Vancouver Island.

Wagner's "mug shot" may have been an obvious choice to put in a photo montage, under the circumstances. He had a record in Washington. The second victim had said she thought her assailant was Vietnamese, and Wagner looked vaguely oriental. She stated that the robber had told her, in an accent, "You don't know what it's like over there!"³² Only after he said that had she formed the assumption that he was Vietnamese. Suffice to say, Wagner does not speak with a foreign accent, either Vietnamese or Mexican. But since the victim had made an identification, however mistaken, Wagner was doomed to suffer through the extradition process.

The only reference to identification in the *Extradition Act* concerns proof that the person presented in court is the person named in the arrest order.³³ Since both victims, at the request of police, had picked Wagner's name out of a police photo lineup, there was no doubt as to the identity of the "suspect." It was not up to the police, but up to a court to determine if a mistake had been made at the police station, or if, as was eventually found by the Court of Appeals in Washington, there was abuse of process on the part of police officers over-eager to match a crime to a face.³⁴

Despite the obvious weakness of the identification evidence, the strong countermanding evidence of the Canadian witnesses avowing and documenting that

³² Victim statement to police in authenticated record.

³³ Section 37.

³⁴ Conversation with Wagner, his U.S. attorney, and Mary Wagner, who attended all his trials and appeals.

Wagner was in Canada at the time of the alleged offence was discounted by the extradition judge. Oppal J. stated that although the testimony and time records of Wagner's employer were "compelling," he was not allowed to weigh the evidence and was required to accept the authenticated record at face value. The photographic lineup evidence, Oppal J. found, constituted "some" evidence, despite the "compelling" evidence that Mr. Wagner could not have been in Redmond at the time of the crime.³⁵ Bound by the rules for preliminary inquiries, the judge allowed the extradition, ignoring the fact that the accused would likely be unable to prove his alibi from a position of incarceration without the great expense and inconvenience of transporting Canadian witnesses to the U.S. for trial – witnesses who were not compellable to go to the U.S. to testify.³⁶ The jeopardy suffered by the accused was heightened substantially by his being prevented from proving an alibi that he was in Canada at the time the offence occurred.³⁷

That a Canadian court, in the face of clear "compelling" evidence that the alleged fugitive was actually in Canada at the time of the alleged offence, should nonetheless be compelled by the legislation as interpreted by the courts to give up one of its citizens to a foreign country on the basis of scant and deficient affidavits that import a defective identification process, surely offends "the Canadian sense of what is fair, right and just"

³⁵ Transcript, *supra*, note 30.

³⁶ Interestingly, in the reverse situation, the U.S. Extradition Code allows for the U.S. government to finance the obtaining of commission evidence or the transportation of witnesses from the U.S. to the extraditing country at government expense. No such provision exists in Canada, although it is technically possible for commission evidence to be obtained in Canada by the new provisions in the *Criminal Code* and *Canada Evidence Act* for video links. The U.S. is not obliged to cooperate with that process, however, and video evidence may not be compelling to a U.S. jury. The new Act does not remedy the situation since there is no provision for assistance to accused persons in the form of legal aid. However, it does allow for video- and audio-links for the gathering of evidence, which may, with international cooperation, resolve some of the evidentiary difficulties that have been encountered in extradition proceedings.

³⁷ *Schmidt v. The Queen* (1987), 33 C.C.C. (3d) 193, [1987] 1 S.C.R. 500 (S.C.C.).

and therefore violates s. 7 of the *Charter*.³⁸ Oppal J. in *Wagner* all but conceded this point, but found that s. 18 of the old *Extradition Act* was saved by s. 1 of the *Charter*.³⁹

On appeal, Ryan J.A. applied the *Sheppard* test to *Wagner* in a novel way.

Quoting Ritchie J., she emphasized the phrase of his judgment that referred to "any evidence":

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 in 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.*⁴⁰

Clearly Ritchie J. was using the words "any evidence" here in the sense of "any *body* of evidence"; otherwise his remarks about sufficiency would be meaningless. But in *Wagner*, Ryan J. held that the court was bound by *Sheppard* to surrender the fugitive in an extradition proceeding where there was *any* admissible evidence that could go before a jury. The Court recognized but ignored the strong alibi evidence proving that the accused was on Vancouver Island, at the time of a robbery and abduction in Redmond:

...The court had only the photograph of Mr. [Wagner] 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. [Wagner] had presented powerful alibi evidence to support his story that he was in Victoria at the time of the 1989 offences.⁴¹

³⁸ *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. See James McCann, "United States v. *Jamieson*: the Role of the Canadian Charter in Canadian Extradition Law" (1997) 30 *Cornell Int. L. J.* (No. 1) 139.

³⁹ Transcript, *supra*, note 30.

⁴⁰ *Supra*, note 23, at 70-71.

⁴¹ *Ibid.*, at 70.

country, Mr. [Wagner] had presented powerful alibi evidence to support his story that he was in Victoria at the time of the 1989 offences.⁴¹

The Court of Appeal ignored the fact that the complainant had stated, in the same statement, that she believed her assailant to be Vietnamese, and quoted the assailant as saying, "You don't know what it's like over there...", an unlikely remark from a Canadian Indian from a reservation in Saanich, and therefore not inculpatory in the least.

Ryan J. proceeded to cite with approval the remarks of Hinds J. in *U.S.A. v. Waddell*,⁴² who in turn quoted with approval passages from pp. 149-150 of the third edition of *LaForest's Extradition to and from Canada*:⁴³

"[*Sheppard*] makes it clear that committal must follow if there is any evidence upon which a jury could convict. A judge is not entitled to withdraw a case from the jury merely because the evidence is manifestly unreliable or so doubtful or tainted in nature as to make it dangerous to put to the jury. When presented with such evidence, therefore, the duty of an extradition judge is to commit."

"Later, at p. 150, the following appears:

"In reaching the decision, the judge may not weigh or consider different views that may be taken of the evidence. If there is a view of the case that, if adopted by a jury, would warrant its convicting the fugitive, the judge must commit him for extradition. The duty of the extradition judge is merely to consider whether the evidence is sufficient to warrant the committal of the fugitive. *The duty of considering the weight of the evidence is that of the court at the trial in the demanding country.*"

(Emphasis added by Ryan J.A.)

"On the basis of the case law as it stands today," Ryan J.A. held, "...the extradition judge was correct in determining that the extraditing state had met the requirements of the *Sheppard* test."⁴⁴

⁴¹ *Ibid.*, at 70.

⁴² (1993), 87 C.C.C. (3d) 555, 62 W.A.C. 1, 22 W.C.B. (2d) 515 (B.C.C.A.).

⁴³ (Aurora: Canada Law Book, 1991).

⁴⁴ *U.S.A. v. Wagner*, *supra*, note 23, at 75.

Once Mr. Wagner was surrendered, it quickly became clear that the complainant had misidentified him from the photographic lineup, and the charge in question was eventually stayed. However, it would be a cynical position indeed to suggest that this outcome is proof that the trust of the U.S. justice system is justified. Mr. Wagner had spent more than a year in a Canadian jail and two years on stringent bail conditions in which he was confined to his house trailer while fighting the extradition. But that was mere inconvenience compared to his treatment in America.

At his trial a year after his extradition, the prosecutor was allowed to lead the tainted evidence, including the envelope (which had Wagner's fingerprint on it) and the button. Wagner was convicted. A year later, his conviction was overturned on appeal on the basis that there had been no continuity of evidence. He was granted a new trial, at which the tainted evidence was excluded. He was acquitted. It was determined that the police had failed to keep any form of continuity on the exhibits, the evidence of identity was scanty (like the robbery/abduction, the alleged break and enter had been at night), the police had been seen "planting" evidence, as Mary and Muriel Wagner had testified over and over again, and Mr. Wagner had a strong alibi: he had punched in for work on the night of the break-in, as his foreman swore in an affidavit and later attested at trial.

All of this evidence was available either in affidavit form at the time of Wagner's extradition hearing, or in *viva voce* evidence presented by Wagner's mother, sister, and employer;⁴⁵ but although it was heard and tendered in evidence, but was either ruled inadmissible or given little or no weight, owing to preliminary hearing guidelines that, in situations such as extradition hearings, are far from fair.

⁴⁵ *Ibid.*, at 69.

Mr. Wagner was finally acquitted of all charges in July, 1999, and returned to Canada – four years after being surrendered. He had spent the whole time in a remand jail, since he was considered to be a “high flight risk.” After all, he was a fugitive.⁴⁶

4. Impact of the New Act

Parliament could not have anticipated the effect of extradition legislation as reflected in the many criminal cases which have nothing whatsoever to do with extradition that have purported to follow *U.S.A. v. Sheppard*.⁴⁷ In British Columbia at least, the evidentiary standard for preliminary hearings is now *any* admissible evidence, raising the question whether preliminary inquiries serve any useful function at all, especially since they cannot usually be used effectively even as a form of discovery in extradition matters. This problem could have been eliminated at least in extradition cases by appropriate drafting of Bill C-40, the new *Extradition Act*. However, sections 24(2) and 29(1)(a) of the new legislation perpetuate the difficulty:

Extradition hearing

24. (1) The judge shall, on receipt of an authority to proceed from the Attorney General, hold an extradition hearing.

Application of Part XVIII of the Criminal Code

(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.

Order of committal

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

- (a) in the case of a person sought for prosecution, there is evidence admissible under the Act of conduct that, had it occurred in Canada, *would justify committal for trial in Canada* on the offences set out in

⁴⁶ Personal correspondence and consultations with David Wagner, Mary Wagner, Muriel Wagner, and Mr. Wagner's Canadian counsellor and U.S. attorney and advocates. Client files. Recounted with permission.

⁴⁷ *Supra*, note 10.

the authority to proceed and the judge is satisfied that the person is the person sought by the extradition partner....

Sections 32 (1)(c), 33 and 35 relax the rules for admissibility of evidence originating outside Canada provided that it "is relevant to the tests set out in subsection 29(1) if the judge considers it reliable." By contrast, evidence originating in Canada must satisfy the rules of evidence under Canadian law to be admissible (s. 32(2)), with notable exceptions regarding 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).

Evidence of identification (s. 37) includes:

- (a) the fact that the name of the person before the court is similar to the name that is in the documents submitted by the extradition partner; and
- (b) the fact that the physical characteristics of the person before the court are similar to those evidenced in a photograph, fingerprint or other description of the person.

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, or even life-shattering, the jeopardy to the accused.

But the new *Extradition Act* goes even further. By giving huge discretion to the Minister in sections 44-47, judges sitting as extradition courts have effectively been cut out of the loop. 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 of the Minister.⁴⁸ They cannot consider whether the request is made for an improper purpose, such as persecution by reason of race, religion, nationality, ethnic origin, language, colour, sex, sexual orientation, age, mental or physical disability or status. Those quasi-political considerations are also within the discretion of the Minister,⁴⁹ as is the consideration of whether the person might face the death penalty for his deeds if returned back home.⁵⁰

However, even matters that would seem *prima facie* relevant to judicial expertise are by implication removed from the domain of extradition hearing judges by the new Act by virtue of the fact that they have been declared to be 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."⁵¹ The primary consideration, here, is "the laws of Canada," which is surely the domain of the superior court judge sitting as an extradition court. Surely judges are in a far better position than the beleaguered Minister to determine whether a person has been convicted *in absentia* and wasn't able to have his case reviewed,⁵² whether the person was under the age of 18 at the time of the alleged

⁴⁸ *Extradition Act* (1999), s. 44(1)(a).

⁴⁹ *Ibid.*, s. 44(1)(b).

⁵⁰ *Ibid.*, s. 44(2).

⁵¹ *Ibid.*, s. 47(a).

⁵² *Ibid.*, s. 47(b).

offence and does not have the protection of legislation like the *Young Offender's Act*,⁵³ whether he faces criminal proceedings in Canada for the same conduct,⁵⁴ and whether none of the conduct alleged occurred within the territorial jurisdiction of the requesting country.⁵⁵

It will be objected that all these issues involve, at least to a slight degree, questions of foreign law. But as Duff J. demonstrated in *Re Collins (No.3)*,⁵⁶ there is a perfectly sound way for judges in extradition hearings to admit evidence as to foreign law: by 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. As it stands, though, that would entail looking at foreign law, which is the domain of the Minister. Similarly, the judge cannot determine whether the conduct in respect of which extradition is sought is a non-criminal military offence, for that too entails looking at foreign law.⁵⁷

Even some areas of the old Act and Treaty that would seem on a plain reading to grant judges discretion have been closed to them under the new Act. For example, in the area of offences or prosecution claimed to have been of a political character, the old Act provided:

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

⁵³ *Ibid.*, s. 47(c).

⁵⁴ *Ibid.*, s. 47(d).

⁵⁵ *Ibid.*, s. 47(e).

⁵⁶ (1905), 10 C.C.C. 80, 11 B.C.R. 443, 2 W.L.R. 164 (B.C.S.C.).

⁵⁷ *Ibid.*, s. 46(b).

that the proceedings are being taken with a view to prosecute or punish the fugitive for an offence of a political character.

That provision, obviously giving the judge broad discretion, is nowhere to be found in the new Act. That is now the domain of the Minister.⁵⁸ Perhaps the early legislators of the first Canadian *Extradition Act* had more faith in the courts than today's legislators. Or less faith in the office of the Minister of Justice.

5. Act of Commission: *U.S.A. v. Stewart*

Since they must presume the fairness of the trial process in the requesting country, extradition judges and courts of appeal are not inclined to be concerned about the procedures a fugitive has encountered or may face, especially in lands such as the U.S., where democratic principles and legal protections are well formulated and applied. Such considerations are regarded by the courts as "political" matters best left to the Minister of Justice to determine, as we have seen. However, in practice, the Minister gives short shrift to the very issues that have been delegated to her in the new Act.

Just as the courts have fallen in the habit of deferring to the Minister, the Minister, in turn, is just as likely to say that all the legal ramifications, including *Charter* rights, have already been considered by the extradition judge. "Passing the buck" back and forth in this way may lead to serious injustice.

Only occasionally have the courts risked interfering with a ministerial decision and suggested that the Minister reconsider.⁵⁹ Such was the case of Ron Stewart, a former

⁵⁸ *Ibid.*, ss. 44(1)(b) and 46(1)(c).

⁵⁹ *U.S.A. v. Burns* (1997), 116 C.C.C. (3d) 524 (B.C.C.A.). This was the ultimate remedy endorsed by the House of Lords in *Ex Parte Pinochet (No. 3)*, [1999] 2 All E.R. 97 (H.L.), when the House of Lords remitted the matter back to the Secretary of State for "reconsideration."

vice-president of a savings bank in Sacramento, California, who was dismissed from his position in 1990 at a time of corporate upheaval just before the bank changed hands. He returned to Canada, where he had formerly held permanent resident status, with his Canadian wife and two Canadian-born sons. An architect by training, he secured a job as a building inspector in Victoria, B.C., and in the ensuing years became extremely popular in the community.

In 1991, Stewart was asked to appear in Sacramento to talk to his lawyer and an assistant deputy attorney; once there he was brought before a grand jury and made to testify without benefit of counsel (in the U.S., lawyers are required to sit outside the hearing room during grand jury sessions). In the course of the interrogation, the prosecutor asked Stewart if it was possible that two contractors, who had been hired periodically by the bank for which Stewart worked, may have thought that they would not get contracts if they refused lend him money or complete work on his house. He acknowledged that that was possible: who, after all, can read the mind of another?⁶⁰

Under U.S. federal laws of extortion, all that needs to be proved is that an accused generated a subjective fear in the complainant. In this case, the "complainants" had been accused of fraud; they had allegedly altered invoices that they handed in to Stewart for his approval, adding in amounts sufficient to cover the cost of renovations to Stewart's house. Stewart claimed that he was not aware of the alterations to the invoices. One of the co-accused negotiated a period of probation and the other a short jail sentence in

⁶⁰ Transcript of grand jury hearing submitted as part of the authenticated record in *U.S.A. v. Stewart*.

exchange for their cooperation in securing a conviction against Stewart on 12 counts of fraud and extortion.⁶¹

In the course of the extradition hearing, the extradition judge ruled that a transcript of the grand jury hearing was inadmissible since the circumstances surrounding the taking of evidence, specifically the absence of a lawyer in the court, did not measure up to Canadian, and in particular *Charter*, standards. However, the judge ordered surrender on the basis of affidavit evidence which relied on the grand jury evidence. On appeal, Hall J.A. allowed the appeal relative to the 10 counts of alleged extortion, stating that the evidence presented did not amount *prima facie* to extortion in Canadian terms. He remitted the matter back to the Minister for reconsideration, as required by s. 10(2) of the old Act.⁶² Thus the Court looked behind the affidavit evidence and examined foreign law, only to find that the U.S. grand jury process did not measure up to Canadian standards – and, in the area of extortion, nor did American law.

As we saw in Chapter One, the assumption on the part of extradition and appeal judges in Canada that it was not necessary to examine the character of the foreign law seemed to work an obvious injustice in later proceedings in *Stewart*. There is no charge in Canada that corresponds with the charge of “bank fraud” that the former bank official still faced in the U.S. However, the evidence supported a charge of simple fraud under \$5,000, had the conduct occurred in Canada, a “hybrid” offence, meaning that the Crown could proceed either by summary conviction or by indictment. It was therefore open to

⁶¹ *U.S.A. v. Stewart* (VO2830), “Affidavit of Daniel S. Lindhardt in Support of Extradition,” in authenticated record filed in Appeal Book, pp. 21-25.

⁶² *U.S.A. v. Stewart*, (1997), 120 C.C.C. (3d) 78 (B.C.C.A.), at 81, 86. See also *DeFosses v. Canada (Minister of Justice)*, (1996), 12 O.F.T.R. 294; *U.S.A. v. Turner*, *supra*, note 13 (affidavit was ruled

the Court to find that, had Stewart been prosecuted in Canada, he would only face the summary conviction maximum sentence of 6 months. Even if it was held that the evidence supported conviction for an indictable offence, he faced a maximum of two years. However, under the specialized U.S. federal bank fraud laws, Stewart faced a maximum sentence of a \$1 million fine, or 30 years, or both.⁶³ The only person who could do anything about this apparent disparity, by using her discretion not to surrender Stewart, was the new Minister of Justice, Anne McLellan.

Ms. McLellan was not inclined to exercise her discretion in the matter, despite the fact that the file had been referred back to her by the B.C. Court of Appeal, and despite the fact that she received some 300 letters written by a substantial cross-section of persons in the community – mostly professional architects, engineers, doctors, professors, lawyers, accountants, teachers, and ministers, as well as contractors and other businessmen – concerned that if Mr. Stewart was surrendered to the U.S., he would face the stiff Bank Act penalties and be incarcerated as a “fugitive” until his trial.⁶⁴

The Minister’s decision to surrender him regardless (“there are no overriding humanitarian or other considerations in this case,” Anne McLellan opined⁶⁵) was endorsed on appeal by the B.C. Court of Appeal despite Donald J.A. holding that “in applying s. 7 of the *Charter*, the Minister was required to be correct....It is the reviewing court’s duty to substitute its view for the Minister’s if it finds that she is wrong.”⁶⁶

inadmissible since it failed to disclose the U.S. government’s misconduct in the case); *Re Peltier*, *supra*, note 40 (U.S. government documents inadmissible since they were not properly authenticated).

⁶³ Title 18 U.S.C. 1344. In Superseding Indictment, Appeal Book (VO2830), pp. 33-34; affidavit of David Lindhardt, *supra*, note 47, at 21-23; Amended Appeal Book (VO3227) pp. 101-102.

⁶⁴ Appeal Book (VO2917), pp. 33-177; Appeal Book (VO3227), pp. 44-97. Compare the case of Richard Witney, *infra*, note 79, who received only 60 letters of support.

⁶⁵ Minister’s decision, at Amended Appeal Book (VO3227), p. 102.

⁶⁶ *Stewart v. Canada (Minister of Justice)* (1998) 131 C.C.C. 423 (B.C.C.A.), at 434-436.

After years of fighting extradition, with substantial support from the press and from the greater Victoria community, Stewart declared that he could no longer afford the expense of defending himself. Calculating that he would be in jail for more than a year while awaiting trial in the U.S., through his counsel he negotiated a one-year jail term, (eight months of real time) and took a one-year leave of absence from his prestigious job as planning official in Victoria to serve it. He still enjoys substantial support in the Victoria community.⁶⁷

6. Act of Omission: *U.S.A. v. Schrang*

A Canadian-born C.E.O. of an American corporation supplying millions of dollars worth of specialized military equipment to the U.S. Army will not be welcome home to Canada if the corporation goes bankrupt and the municipality in which the corporation is located sues for fraud and mischief. That is the proposition advanced in *U.S.A. v. Schrang*.⁶⁸ Schrang had been an employee for Neese Coated Fabrics Inc. in St. Louis, Missouri for years before being given an offer to buy out the company that he could not refuse. Part of the arrangement kept his former boss on the payroll as general manager until Schrang felt comfortable in his new role of owner.

It could be argued that Schrang should have smelled a rat. However, he acquired a huge warehouse and factory for his investment, including millions of yards of tent fabric – and millions of gallons of hazardous chemicals. The sole function of the company was

⁶⁷ Correspondence with Ron and Alexandra Stewart, and client files. Recounted with permission.

⁶⁸ (1997), 114 C.C.C. (3d) 553 (B.C.C.A.).

to put the chemicals on the fabric to make coated or treated tent fabric to U.S. military specifications.⁶⁹

For a little more than a year, operations continued the way they had before Schrang had acquired the company. He relied upon his general manager, who continued run the operation in the same way as he had for years. However, it soon became clear that, although millions of dollars worth of product was going out, corresponding revenue simply was not coming in.

For reasons that were to become apparent at the extradition hearing, neither the U.S. military nor its agents ever paid Neese for the treated fabric that Neese had supplied, and the corporation was rapidly becoming insolvent in more ways than one: undercapitalized, the company had run out of some chemicals, but could not afford to replace the ones it needed. It had to substitute other substandard chemicals. The company had run out of fabric, too, and again there was no money to buy more. Nor could the beleaguered Schrang afford the tens of thousands of dollars to dispose of the many barrels of remaining chemicals. He couldn't even afford to pay the rent.

More to the point, he couldn't afford to pay his employees. And so in June, 1990, a little more than a year after acquiring the company, he had no option but to shut it down. Schrang walked away from the company, virtually bankrupt.

It was in this context that the initial complaints against Mr. Schrang arose.⁷⁰ Two disgruntled employees swore out complaints against Schrang and the company. They deposed that they believed that Neese was shortchanging its main customer. They stated

⁶⁹ *Ibid.*, at 558.

⁷⁰ *Ibid.*, at 558-559.

in sworn affidavits that they had worked for Neese for more than a year, under Shrang, and that during that time Neese had not performed tests that they said were required for each shipment. They said that Neese did not have equipment to conduct the tests; however, since a test certificate had to go out with each shipment, "at the appellant's direction they prepared and submitted fabric test certificates which were false. They say the appellant knew the shipment of fabric did not meet the required test criteria and knew that the test certificates were false."⁷¹

Unknown Mr. Shrang, the U.S. military had been doing tests of its own.

The respondent adduced evidence that upon receipt by the U.S.A. military, random samples of the coated tent fabric were subjected to tests to ascertain compliance with the contract's specifications. According to the indictment, over \$3 million worth of coated fabric supplied by Neese was defective.

There was no evidence that the U.S.A. military paid for this material, either before or after the defects were discovered.⁷²

In October, 1990, despairing of subletting the factory or selling the company, Schrang locked up the premises of the St. Louis factory as best he could (he later admitted that he had had difficulty securing one door that led to an alley),⁷³ and walked away from his investment. With his wife and two children, he drove to Canada, where he and his wife taught on an Indian Reservation at Nitinat Lake on Vancouver Island.

In December, 1990, a sheriff's officer attended the St. Louis factory to execute a court order against Schrang for unpaid rent. Inside the abandoned warehouse, the officer found "several hundred 55-gallon drums. Some of the drums were leaking. Some of the drums were marked as containing chemicals and flammable substances. He could smell

⁷¹ *Ibid.*, at 559.

⁷² *Ibid.*

⁷³ *Ibid.*, at 560.

chemicals.”⁷⁴ He informed the health department, and an environmental health officer posted the building with hazardous-substance warning signs. The health officer noted that the electricity had been shut off.

In February, 1991, vandals set fire to the abandoned factory, causing serious damage to both building and contents. The fire marshall found that the water had been shut off, rendering the sprinkler system useless. At the request of the fire investigator, Schrang returned to St. Louis, briefly, to explain his circumstances.⁷⁵ When asked about the chemical content of the drums, Schrang confessed ignorance, saying that the fire marshall should speak to his general manager, the former owner, who had acquired the chemicals in question before Schrang bought the company. After the meeting, Schrang returned to Canada.

That fall, more than 100 warrants were issued against Schrang for various health and building code infractions with respect to the “hazardous wastes” and the fire. Schrang’s lawyer told the St. Louis city attorney that Schrang could not pay for the hazardous waste cleanup: he was broke.⁷⁶ Later, vandals again broke into the building and set fire to it.

The U.S.A. requested the extradition of Schrang from Canada on a grand jury indictment charging him with conspiracy to defraud, two counts of making fraudulent statements, and two environmental offence. It was argued that the first three offences would, in Canada, amount to fraud, false pretences, falsifying documents, or selling

⁷⁴ *Ibid.*, at 559.

⁷⁵ *Ibid.*, at 559-560.

⁷⁶ *Ibid.*, at 560.

defective goods to the Crown. The other two, it was argued, would amount to mischief or regulatory negligence under the *Waste Management Act*.⁷⁷

The question was, who had been defrauded? Schrang arguably was the legal “operative mind” of the corporation once he purchased it, but the former owner *cum* general manager knew much more about day-to-day operations than did Schrang. There was no evidence corroborating the speculation of the disgruntled employees with respect to alleged contracts containing terms and conditions such as supplying certificates. As Finch J.A. pointed out in his long review of the facts, there was no hard documentary evidence: no contract, no purchase orders, no evidence of searches for licences or permits, no evidence of the terms upon which Neese was to be paid, and no evidence that anyone had ever paid anything to Neese. So where was the evidence of fraud?

In my respectful view, the evidence put before the extradition judge in this case was insufficient to establish the crime of fraud under s. 380. The evidence certainly shows an intent to deceive, and it may be inferred that the recipients of the defective goods and false test reports were intended to accept as true that which was false, and to act on it by making payment. But there is no evidence that they did so. They were apparently not deceived, and the appellant did not “induce a course of action” or induce the U.S.A. military...to “act to their injury”. The element of deprivation...has not been shown.⁷⁸

At most, there was evidence of attempted fraud. But that was enough, said Finch:

The corresponding charges of fraud in the U.S.A. are based on a criminal statute which does not require proof of economic loss, or risk of prejudice to economic interest. The elements of the U.S.A. charges relating to fraud would conform very closely to a Canadian charge of attempted fraud. To commit the appellant for attempted fraud would not lessen the evidentiary onus on the prosecution below that which would have to be shown to convict in the U.S.A.

I therefore do not think there is any unfairness now in permitting the U.S.A. to put forward attempted fraud as a crime on which the appellant could be committed for trial if the conduct complained of had occurred in Canada. It is not

⁷⁷ *Ibid.*, at 556.

⁷⁸ *Ibid.*, at 565-566.

necessary to consider the other possible Canadian offences for which counsel for the respondent contended.⁷⁹

Just as Hall J.A. looked at the foreign law in *Stewart* to determine that U.S. extortion laws did not parallel Canadian extortion laws, so Finch J.A. had looked at foreign law in *Schrang*, to come to a remarkably similar conclusion: in this case, that the American law of fraud, unlike the Canadian law, does not require economic loss. Following *Stewart*, Finch J.A. could simply have struck down that part of the committal, saying that an integral element of the charge was missing. But instead, after considering the foreign law, he concluded that, since the U.S. charge closely resembled attempted fraud in Canada, the committal order would stand.⁸⁰

Finch J.A. then turned his attention to the remaining two charges. Counts 4 and 5 basically amounted to charges of storing and disposing of hazardous wastes without a permit. Schrang's lawyer argued that there was no evidence that all appropriate searches for permits had been completed, and proof of a thorough search would have to be conducted to support the charges. Furthermore there was no evidence that Schrang "wilfully" did anything, let alone wilfully destroy or damage property, the substance of the mischief charge at s. 430(1)(a) of the *Criminal Code*.

"But," said Finch J.A., "this argument overlooks the language of s. 430(1)(b) by which mischief is committed by wilfully rendering property dangerous.

It is clear from the affidavit material adduced that these premises appear to have been highly dangerous before either fire occurred, due to the presence of flammable materials stored in an unsafe way.⁸¹

⁷⁹ *Ibid.*, at 566.

⁸⁰ *Ibid.*, at 566, 569.

⁸¹ *Ibid.*, at 568.

Although Schrang had absolutely no previous criminal record, in walking away from the company store, he had committed an indictable – and extraditable – offence.⁸²

7. The “Blue Carrot” Case

Fortune was travelling in precisely the opposite direction in the case of Richard Witney, a Quebec-born Canadian who had walked away from a three-day furlough from a Massachusetts jail and returned to Canada after serving 14 months of a four-to-ten year jail term for armed robbery of a Plymouth County supermarket. He faced an additional sentence of up to 10 years in the U.S. for escaping lawful custody. Prior to the 1972 supermarket robbery (to which he and his co-accused, Norman Dionne, both pled guilty), Witney already had a criminal record in Canada for breaking and entering, house breaking, and creating a disturbance.⁸³

From this bleak past, Richard Witney the “fugitive” managed to rehabilitate himself. “Since his escape,” the senior counsel for the International Assistance Group wrote to Minister of Justice Allan Rock, “Mr. Witney has lived in Ottawa-Hull, Edmonton and most recently Victoria, B.C. During this time, he has worked in the restaurant and catering business.” He had even received “an award for honesty.”⁸⁴ As the media never tired of telling B.C. listeners, Richard Witney was now the charismatic owner-operator of the popular Blue Carrot Café in downtown Victoria. The Victoria

⁸² Schrang’s appeal to the Supreme Court of Canada was refused. See 117 C.C.C. (3d) vi, 154 W.A.C. 158*n*.

⁸³ “Re Extradition - Richard Witney - summary of case and of submissions,” memorandum dated 19 January 1995 to Minister of Justice from Kimberly Prost, Senior Counsel, International Assistance Group, via W. H. Corbett, Senior General Counsel, Criminal Law Section of Justice Canada (hereinafter “Witney summary”), pp. 2-3. Memorandum supplied courtesy Robert Moore-Stewart, legal counsel to Mr. Witney.

⁸⁴ *Ibid.*, at 3. In theory, the 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

Times-Colonist dubbed Witney's extradition proceedings "The Blue Carrot Case," a moniker quickly adopted by other media, including the CBC.⁸⁵ The free publicity didn't hurt business in the least.

The extradition request had been initiated by the U.S. by diplomatic note on 30 December 1993, more than 20 years after Witney had been sentenced and 19 years after his escape. The U.S. wanted him to serve the remainder of his sentence, and to stand trial for escaping lawful custody. The extradition hearing was heard by Bouck J. of the Supreme Court of British Columbia on 4 November 1994. Bouck J. committed Witney for surrender, dismissing Witney's primary s.7 *Charter* defence of delay, holding that s. 7 did not apply in this case since the delay was caused by American, not Canadian, authorities who were not bound by the *Charter*. On the same day, Witney filed a notice of appeal.⁸⁶

Documents from Massachusetts in the authenticated record gave the impression that the U.S. authorities had been looking for Witney for years:

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. In March of 1992, at the encouragement of an RCMP officer, a package was sent by officials in Massachusetts to the RCMP Federal Enforcement Branch with all the information on Mr. Witney. In October of 1992, the RCMP identified a possible address for a Richard Witney in British Columbia and this information was communicated on October 13, 1992 to the officials in Massachusetts. The state officials then contacted officials in the Office of International Affairs with a view to preparing the necessary documentation for the extradition request.⁸⁷

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.

⁸⁵ CBC Newsworld Coast to Coast covered Mr. Witney's case. *Ibid.*, at 6.

⁸⁶ Witney summary, pp. 1-2.

⁸⁷ *Ibid.*, pp. 2-3.

However, as Witney's counsel, Robert Moore-Stewart, took pains to point out, and as Senior Counsel Kimberly Prost communicated to the Minister in a later memorandum,⁸⁸

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.⁸⁹

The *Dionne* case was a precedent that the Minister could hardly ignore. Norman Dionne had been co-accused with Witney in the armed robbery of the supermarket. Both were identified in a lineup by store employees.⁹⁰ While both pleaded guilty as charged, only Dionne had been "armed" – with a toy gun.⁹¹ Unlike Witney, Dionne had been charged in 1972 with two counts of armed robbery, for two separate incidents, only one of which was alleged to have involved Witney; yet both men had received identical sentences. Like Witney, Dionne walked away from a furlough – after serving 21 months of his four-to-ten year sentence. He, too, had a Canadian criminal record, but had applied for and received a pardon for all Canadian convictions in 1982.

In Dionne's case, American authorities were aware of where he lived, and in 1987 sent a diplomatic note seeking his extradition.⁹² The Canadian authorities sought supplementary materials necessary to support the requisition, but these were not supplied right away – in fact, not for another three years. In the meantime, the U.S. had officially withdrawn its extradition request.

⁸⁸ 1 March 1995. Hereinafter "Supplementary summary."

⁸⁹ *Ibid.*, p. 1.

⁹⁰ Witney summary, p. 2.

⁹¹ Supplementary summary, p. 1.

⁹² Witney summary, pp. 4-5.

In December of 1990 they issued a new diplomatic note, once again seeking his extradition. Officials in the State of Massachusetts indicated that the reason for the delays in seeking the return of Mr. Dionne were administrative in particular a lack of resources dedicated to location of fugitives combined with a large number of escapees. Once a fugitive unit was established and Mr. Dionne was located the problem then lay in preparing a packet in support of the request.⁹³

In Dionne's case, 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, as he advised Dionne's counsel on 17 August 1993.

In his corresponding letter to counsel in the Witney case, dated 23 March 1995, Minister of Justice Allan Rock referred to the 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),⁹⁴ "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*⁹⁵ "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.⁹⁶

⁹³ *Ibid.*, p. 5.

⁹⁴ Although he did not specifically refer to them, Rock was alluding to the line of cases represented by *Kindler v. Canada (Minister of Justice)* (1991), 67 C.C.C. (3d) 1 (S.C.C.) [Fed.]; *U.S.A. v. McVey* (1992), *supra*, note 21; and *U.S.A. v. Whitley* (1994), 94 C.C.C. (3d) 99, (Ont. C.A.), affirmed (1996), 104 C.C.C. (3d) 447, [1996] 1 S.C.R. 467 (S.C.C.). *Charter* issues arising from these and other cases are the subject of the next chapter.

⁹⁵ (1989), 48 C.C.C. (3d) 196 at 266.

⁹⁶ Letter from Allan Rock, Minister of Justice, to Robert Moore-Stewart dated 23 March 1995 (courtesy Mr. Moore-Stewart), p. 2.

Allan Rock concluded his letter to Witney's counsel with this poignant warning with respect to extradition, no doubt intended for a larger audience: "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*...."⁹⁷

⁹⁷ *Ibid.*, emphasis added.

CHAPTER NINE

THE SIDELINING OF *CHARTER* RIGHTS AND PROTECTIONS

1. Legal Rights: *Schmidt v. The Queen* (et cetera)

"The country seeking surrender under a treaty must be trusted with the trial of offences."¹ So proclaimed G.V. LaForest, J, in *Schmidt v. The Queen* which, along with *U.S.A. v. Allard and Charette*,² was the first major Canada-to-U.S. extradition case to reach the Supreme Court of Canada on *Charter* issues.³ In that case, Helen Susan Schmidt, a Canadian, was alleged to have snatched a two-year-old girl off a sidewalk in Cleveland and to have taken her 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 U.S. federal law. By the time of the extradition proceedings she had already been tried and acquitted of the federal

¹ *Schmidt v. The Queen* (1987), 33 C.C.C. (3d) 193, 58 C.R. (3d) 1, 39 D.L.R. (4th) 18, [1987] 1 S.C.R. 500 (S.C.C.), at 209 per LaForest J. For similar remarks in a pre-*Charter* context, see *Re Peltier*, [1977] 1 F.C. 118 (T.D.). Also *U.S.A. v. Peltier* (1976), News Release from Minister of Justice dated 17 December 1976.

² (1987), 33 C.C.C. (3d) 501, [1997] 1 S.C.R. 564 (S.C.C.). Note that the third case in the series released on 14 May 1987 was *Argentina (Republic of) v. Mellino* (1987), 33 C.C.C. (3d) 334, [1987] 1 S.C.R. 536. In both *Allard* and *Mellino*, LaForest J. referred to *Schmidt* on the substantive issues, making this the preeminent case on extradition up to that time. The narrow *Charter* question in the *Allard* appeal, in which the U.S. requested the surrender of two alleged hijackers who had allegedly commandeered an American plane in New York and had flown it to Havana, Cuba, was decided on the basis that the five year delay was caused by the U.S., not Canadian, authorities, and that the *Charter* extended only to Canadian officials.

³ By 1984, many *Charter* cases had been heard at the superior court level, and by various courts of appeal. *Re U.S.A. v. Smith* (1984), 10 C.C.C.(3d) 540 (Ont. C.A.) was heard by the same panel of judges as *Schmidt*, and the judgment was released on the same day (27 January 1984). It was reported contemporaneously with the Ontario Court of Appeal decision in *Schmidt* ((1984), 10 C.C.C. (3d) 564), and stands for the proposition that in extradition hearings, there is no *Charter* right to cross-examination of witnesses on their affidavits, and that neither the guarantee to a fair hearing in s. 11(d) of the *Charter*, nor the similar guarantee in s. 2(e) of the *Canadian Bill of Rights*, apply to extradition hearings, since such hearings do not "determine the guilt or innocence of a fugitive" (*Smith, supra*, at 547-553). In *Schmidt*,

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.⁴

A week after her acquittal, on 6 August 1982, Ms. Schmidt returned home to Canada. However, the State of Ohio sought her extradition pursuant to the provisions of the Canada-U.S. Extradition Treaty, and she was arrested in Kirkland Lake, Ontario on 30 August 1982. Before the extradition judge and the Court of Appeal she unsuccessfully pled a version of *autrefois acquit* on the grounds that in Canada she would be protected from such seeming double jeopardy by sections 7 and 11(h) of the *Charter* and sections of the *Criminal Code* dealing with *res judicata* and *autrefois acquit*.⁵ Article 4(1)(i) of the Canada-U.S. Treaty provides:

- (1) Extradition shall not be granted in any of the following circumstances:
 - (i) When the person whose surrender is sought is being proceeded against, or has been tried and discharged or punished in the territory of the requested State for the offense for which his extradition is requested.

In his judgment, LaForest J. noted that *res judicata* and double jeopardy were defences that could be raised at trial in the U.S. It is in this context that his comment about trusting the requesting country arose. But he went further:

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 rigours of our system.⁶

LaForest cited with approval the Ontario Court of Appeal decision in *Re Federal Republic of Germany and Rauca* (1983), 4 C.C.C. (3d) 385.

⁴ *Schmidt, supra*, note 1, at 202-203.

⁵ Now sections 12 and 607.

⁶ *Schmidt, supra*, note 1, at 214 (C.C.C.).

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.⁷ 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.⁸

In point of fact, many states specifically protect fugitives from this kind of double jeopardy in their treaties.⁹ But the *Schmidt* case was quite different from the fact pattern in a case such as, say, *U.S.A. v. Andrews*,¹⁰ where Andrews was committed for surrender to face burglary charges in the U.S. even though he had been acquitted in Canada on different charges – possession of stolen property illegally obtained in the same alleged burglary. Here, the *conduct* of Schmidt in a single incident had generated two different charges that would have amounted to a single offence in Canadian law – an offence for which she had been acquitted in the U.S.

Six of the panel of seven Supreme Court judges agreed that “in extradition as in other matters,” the actions of the Government of Canada “are subject to scrutiny under the Charter (s.32).

Equally, though, 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....

...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

⁷This principle was first set down in *Re Burley* (1865), 1 C.L.R. 34 (Chamb.), at 50.

⁸*Schmidt*, *supra*, note 1, at 209-210.

⁹Argentina, for example. See *Republic of Argentina v. Mellino*, *supra*, note 2.

¹⁰(1991), 65 C.C.C.(3d) 345 (Man.C.A.).

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.¹¹

Wilson J. parted company with the rest of the panel, 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.”¹²

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.¹³

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.”¹⁴ However, the contrary judgment 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)¹⁵ 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.

¹¹ *Schmidt, supra*, note 1, at 197, 211, 214.

¹² *Ibid.*, at 200.

¹³ *Ibid.*, at 199.

¹⁴ *Ibid.*, at 198.

¹⁵ “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.”

Here no trial is being conducted by the Government of Canada. If a trial is to be held, it will be 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....¹⁶

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.¹⁷

The courts 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.¹⁸

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."¹⁹

¹⁶ *Schmidt, supra*, note 1, at 211-212.

¹⁷ *Ibid.*, at 214.

¹⁸ *Ibid.*, at 215.

¹⁹ *Ibid.*

The concept of giving a *treaty* a “*fair and liberal interpretation*” favouring the requesting country and honouring Canada’s obligations by extraditing the individual²⁰ is obviously at odds with the principle of giving the *Charter* “a *large and liberal interpretation*.”²¹ Peter W. Hogg pointed out a similar conundrum in his classic text *Constitutional Law of Canada*:²² “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)²³ 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.”²⁴

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 federalist notion that Canada should put its international obligations

²⁰ *Schmidt, supra*, note 1, at 514-515 (S.C.R.); *U.S.A. v. Allard, supra*, note 2.

²¹ *Edwards v. A.G. Canada*, [1930] A.C. 124 at 136, per Lord Sankey. See Peter Hogg, *Constitutional Law of Canada*, 3rd ed. (Toronto: Carswell, 1992), pp. 811 ff. See also *Hunter v. Southam*, [1984] 2 S.C.R. 145, at 156; *R. v. Big M. Drug Mart*, [1985] 1 S.C.R. 295, at 344; *Re B.C. Motor Vehicle Act*, [1985] 2 S.C.R. 486, at 509; *Re Provincial Electoral Boundaries (Sask.)*, [1991] 2 S.C.R. 158, at 179.

²² Hogg, *supra*, note 21, at pp. 811-812.

²³ [1979] 2 S.C.R. 1016, at 1029-1030.

²⁴ Hogg, *supra*, note 21, at p. 812, citing *Min. of Home Affairs v. Fisher*, [1980] A.C. 319 (P.C. Bermuda), at 328.

ahead of the rights and freedoms of the individual, even where such individuals are Canadian citizens.²⁵

Following *Schmidt*, it has been held, more-or-less consistently, that Section 7 of the *Charter*, which guarantees life, liberty and security of the person, cannot be applied to curb Canada's international obligations in the face of a treaty.²⁶ 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.²⁷ In practice, courts now confine arguments under s. 7 to the person's situation and treatment in Canada, including any irregular behavior on the part of Canadian officials,²⁸ and such matters as judicial interim release.²⁹

The rights listed in s. 11 of the *Charter* apply specifically to a person "charged with an offence." Since *Schmidt*, this phrase has been narrowly interpreted as being "charged with an offence *in Canada*," and has been held to be inapplicable to extradition cases.³⁰ Similarly, it has been held that the "cruel and unusual treatment and punishment" described in s. 12 applies to treatment and punishment *in Canada*.³¹ This is because s. 32 of the *Constitution Act, 1982* limits application of the *Charter* to acts of the federal and provincial governments of Canada. Only in situations where agents or employees of the

²⁵ *Schmidt*, *supra*, note 1.

²⁶ *U.S.A. v. Tilley* (1996), 35 C.R.R. (2d) 168, 183 A.R. 158 (Alta. Q.B.), at 160.

²⁷ *U.S.A. v. Cazzetta* (1996), 108 C.C.C. (3d) 536 (Que. C.A.); leave to appeal to S.C.C. refused (1996), 110 C.C.C. (3d) vi (S.C.C.), at 551 (per Chamberland J.A.), 561 (per Fish J.A.).

²⁸ *U.S.A. v. Alfaro* (1990), 61 C.C.C. (3d) 474 (Que. C.A.) at 479.

²⁹ *Schmidt*, *supra*, note 1, at 215, 218.

³⁰ *Ibid.*; *U.S.A. v. Langlois* (1989), 50 C.C.C. (3d) 445 (Ont. C.A.) at 448, following LaForest's decision in *Schmidt*.

³¹ *Re Ng* (1988), 93 A.R. 204 (Q.B.); (1991), 67 C.C.C. (3d) 61, [1991] 2 S.C.R. 858 (S.C.C.); *Ng v. Canada* (1989), 97 A.R. 241 (Alta. C.A.), leave to appeal to S.C.C. refused [1989] 2 S.C.R. ix; *Kindler v. Canada (Minister of Justice)*, (1991), 67 C.C.C. (3d) 1 (S.C.C.) [Fed.], at 25.

Government of Canada or one of the provinces, in the course of duty, are located outside the country (including, for example, police officers taking statements while engaged in narcotics or other investigations overseas) will *Charter* obligations extend beyond the territorial jurisdiction of Canada. Hence, statements taken from a suspect by American police officers in California without giving a *Charter* warning that the suspect had the right to counsel were considered to be admissible evidence in a Canadian court as not violating *Charter* protections, whereas had the same statements been taken in the same location by the R.C.M.P. in the same manner, without a *Charter* warning, they would not have been admissible.³²

2. Mobility Rights: *U.S.A. v. Cotroni* (et alia)

The *Extradition Act* provides that a superior court judge sitting as an extradition judge is a court of competent jurisdiction for the purposes of determining applications under the *Charter*.³³ Section 6 of the *Charter* guarantees Canadian citizens the right to remain in Canada. Extradition of Canadian citizens is obviously an infringement of this provision. Yet time and again the Supreme Court of Canada, and other, lower courts, have held that the violation of s. 6 of the *Charter* is justified as a "reasonable limit" under s. 1.³⁴ This was an *obiter* issue in *Schmidt*, since her counsel had not sought relief under s.

³² *R. v. Harrer* (1995), 101 C.C.C.(3d) 193, 42 C.R. (4th) 269, [1995] 3 S.C.R. 562 (S.C.C.); *R. v. Terry* (1996), 106 C.C.C. (3d) 508, 48 C.R. (4th) 137, [1996] 2 S.C.R. 207 (S.C.C.).

³³ S. 25, formerly s. 9(3). See *Schmidt*, *supra*, note 1, at 212-214. See also *Allard*, *supra*, note 2; *Republic of Argentina v. Mellino*, *supra*, note 2, at 334; *U.S.A. v. Kindler v. Canada (Minister of Justice)*, *supra*, note 31; *U.S.A. v. Cotroni*, [1989] 1 S.C.R. 1469, 48 C.C.C. (3d) 193 (S.C.C.) [Que.]; *Re McVey* (1992), 77 C.C.C. (3d) 1, [1992] 3 S.C.R. 475 (*sub nom* *McVey v. United States of America*); *Idziak v. Canada (Minister of Justice)* (1992), 77 C.C.C. 65, [1992] 3 S.C.R. 631; *U.S.A. v. Lepine*, [1994] 1 S.C.R. 286, 87 C.C.C. (3d) 385; *R. v. Harrer*, [1995] 3 S.C.R. 562, 101 C.C.C. (3d) 193; *U.S.A. v. Dynar* (1997), 115 C.C.C. (3d) 481.

³⁴ *Schmidt*, *supra*, note 1. *U.S.A. v. Allard*, *supra*, note 2; *U.S.A. v. Cotroni*, *supra*, note 32; *Kindler v. Canada*, *supra*, note 31. For a relatively strong argument that the courts should apply the *Charter* to extradition cases, see J.G. Castel and Sharon A. Williams, "The Extradition of Canadian Citizens and

6, but LaForest J. cited with approval the decision of the Ontario Court of Appeal in *Re Federal Republic of Germany and Rauca* (1983),³⁵ which, as LaForest J. paraphrased it, “recognized that extradition intruded on a citizen’s right under s. 6 to remain in Canada, although it also found that the beneficial aspects of the procedure in preventing malefactors from evading justice, a procedure widely adopted all over the world, were sufficient to sustain it as a reasonable limit under s. 1.”³⁶

This was the corner-stone of LaForest’s majority decision in *U.S.A. v. Cotroni*, *U.S.A. v. El Zein* (1989),³⁷ when he quoted himself endorsing the *obiter Rauca* decision in *Schmidt*. “This court,” he said, “though in *obiter*, endorsed the approach taken in *Rauca*....I turn, then, to examine whether the assumption made in *Schmidt* that extradition can be justified under s. 1 of the Charter can be supported.”³⁸

Cotroni and El Zein were both Canadian citizens who were charged in the U.S. with participating in a conspiracy to possess and distribute heroin in the U.S. All of their actions relating to the allegations took place in Canada, and at no time did either of them leave Canada.³⁹ The alleged exchange of drugs for money took place in Canada, and Cotroni’s personal involvement was limited to giving instructions to accomplices in both countries by telephone from Montreal.⁴⁰ American drug enforcement laws purported to extend beyond the territorial boundaries of the U.S. when the object of the illegal activity

Sections 1 and 6(1) of the *Canadian Charter of Rights and Freedoms*” (1987) 25 Can. Y. B. Int. L. 263; Amanda Spencer, “Fugitive Rights: The Role of the Charter in Extradition Cases” (1993) 51 U.T. Fac. L. Rev. 54; Sharon A. Williams, “Extradition from Canada since the Charter of Rights” in Jamie Cameron, ed., *The Charter’s Impact on the Criminal Justice system* (Scarborough, Ont.: Carswell, 1996) 387.

³⁵ 4 C.C.C. (3d) 385.

³⁶ *Schmidt*, *supra*, note 1, at 212-213.

³⁷ *Supra*, note 33, at 213-214.

³⁸ *Ibid.*

³⁹ *Ibid.*, at 197, 209-210.

⁴⁰ *Ibid.*, at 209.

is to import drugs into the U.S. Since Canada has similar drug laws, it was common ground that Canadian authorities could have charged the duo with drug and conspiracy offences under the *Narcotic Control Act* and *Criminal Code*.⁴¹ On this ground, as well as the s. 6(1) *Charter* issue, the Quebec Court of Appeal had quashed the initial order of committal. The U.S.A. appealed. In the course of argument, counsel for the appellant quoted from *Hansard* in a bid to show a limitation to the purpose of s. 6(1):

Mr. Tassé [Deputy Minister of Justice]: Perhaps I might mention that we do not see Clause 6 as being an absolute right: I will give you an example of a situation where a citizen would, in effect, lose his right to remain in the country: that would be by virtue of an order under the Extradition Act: if someone committed an offence in another country and he is sought in this country, he could be surrendered to the other country.⁴²

Understandably, LaForest J. accorded this interesting tidbit minimal weight.⁴³ He said that constitutional issues must be approached from a broad perspective: "Rights under the Charter must be interpreted generously so as to fulfill its purpose of securing for the individual the full benefit of the Charter's protection."⁴⁴ It follows that when s. 6(1) of the Charter says that Canadian citizens have the right to remain in Canada, that is exactly what it means. LaForest J. then allowed us a glimpse of his Justice Department background, spelling out an agenda that he was to follow in judgment after judgment until his retirement ten years later:

As against this somewhat peripheral Charter infringement must be weighed the importance of the objectives sought by extradition – the investigation, prosecution, repression and punishment of both national and transnational crimes for the protection of the public. These objectives, we saw, are of pressing and

⁴¹ *Ibid.*, at 197-198.

⁴² *Ibid.*, at 211, LaForest J. citing "Debates of the House of Commons," January 1981, 41-118.

⁴³ Following *Re B.C. Motor Vehicle Act*, [[1985] 2 S.C.R. 486 at 508-509 (Commons committee debates can only be accorded minimal weight in interpreting the *Charter*).

⁴⁴ *Cotroni, supra*, note 33, at 212.

substantial concern. They are, in fact, essential to the maintenance of a free and democratic society. In my view, they warrant the limited interference with the right guaranteed by s. 6(1) to remain in Canada.

Extradition as a major tool for combatting international crime could only be effectual if it could rely on the coordinated efforts of law enforcement agencies and the judiciary. To allow a general exception for Canadian citizens would "interfere unduly with the objectives of the system of extradition."⁴⁵

Subsequently, the same outcome was reached in many other extradition decisions involving Canadians caught in the narcotics game.⁴⁶ Even when the penalties faced in the U. S. were harsh by Canadian standards (for example, a 20-year minimum for conspiracy to import narcotics in some states of America), the Supreme Court of Canada, led by LaForest J., stuck to the guns of government policy. America, in the interests of throwing cold water on the high-stakes narcotics game, had upped the ante so that there was now serious liability for anyone caught playing the game. If the U.S. was prepared to follow through by absorbing the exorbitant costs of prosecution and eventual long-term imprisonment of the players, why should Canada object? And if the players happened to be Canadian citizens, so be it. They'd bought into the game at their own peril.

Several judges in various courts of appeal had serious misgivings about this policy, pointing out that it sells Canadian citizens short on their right to remain in their homeland, especially when charges could be pressed in Canada, as in *Cotroni*, or where

⁴⁵ *Ibid.*, at 222.

⁴⁶ See *U.S.A. v. Whitley* (1994), 94 C.C.C. (3d) 99 (Ont. C.A.); affirmed (1996), 104 C.C.C. (3d) 447, [1996] 1 S.C.R. 467; *Ross v. U.S.A.* (1994), 93 C.C.C. (3d) 500 (B.C.C.A.), affirmed [1996] 1 S.C.R. 469; *U.S.A. v. Ding* (1996), 31 W.A.C. (2d) 307 (B.C.C.A.); *U.S.A. v. Kwok* (1998), 127 C.C.C. (3d) 353 (Ont. C.A.), leave to appeal to S.C.C. granted at 131 C.C.C. (3d) vi.

the American charges bore no apparent resemblance to those in America.⁴⁷ Some judges were sympathetic on humanitarian grounds even to American offenders facing long jail terms, even where they had no connection to Canada whatsoever other than it being a haven. For a while, this skewed the equation, especially the case of *U.S.A. v. Jamieson*.⁴⁸

Daniel Jamieson was an American who had fled to Canada after being committed to trial on a charge of trafficking cocaine in Michigan. Despite the fact that Jamieson had no prior criminal record, he faced a mandatory sentence of between 20-30 years in prison. Fish J.A. for the majority of the Quebec Court of Appeal thought that "the majority of (though of course not all) reasonably well-informed Canadians would consider that appellant faces a situation in Michigan that shocks the conscience and is simply unacceptable."⁴⁹ A united Supreme Court of Canada panel did not agree,⁵⁰ and eventually reversed the decision. But in the meantime, other courts of appeal wondered whether Canadian citizens shouldn't be given more of a break by Canadian courts than American citizens, such as Jamieson, in the same situation.

*U.S.A. v. Lepine*⁵¹ concerned a Canadian involved in a foiled plot to transport vast amounts of cocaine from Colombia to the U.S. in a refurbished plane, but no part of the plan was executed in Canada, and although Sopinka J. alluded to s. 6(1), that was not a

⁴⁷ In *U.S.A. v. Doyer* (1993), 85 C.C.C. (3d) 192, [1993] 4 S.C.R. 497; and *U.S.A. v. Manno* (1996), 112 C.C.C. (3d) 544 (Que. C.A.), leave to appeal to S.C.C. refused 206 N.R. 320n, the Quebec Court of Appeal looked at whether the crime of "continuing criminal enterprise" was an extradition crime since it is unknown to Canadian law. Looking behind the label, the Supreme Court of Canada in *Doyer* discerned that running a major narcotics distribution network for a substantial profit was sufficiently criminal to warrant extradition. Although the Quebec Court of Appeal had balked at this conclusion in *Doyer*, it came on side in *Manno*. But *Doyer* and *Manno* were Americans, and did not trigger s. 6 *Charter* concerns: it was a matter of going home to face the music.

⁴⁸ *U.S.A. v. Jamieson* (1994), 93 C.C.C. (3d) 265 (Que.C.A.).

⁴⁹ *Ibid.*, at 284.

⁵⁰ *Canada (Minister of Justice) v. Jamieson*, [1996] 1 S.C.R. 465 (S.C.C.).

⁵¹ *U.S.A. v. Lepine*, *supra*, at note 33

determinative issue. However *U.S.A. v. Whitley*,⁵² involved the Canadian king-pin of a marijuana smuggling operation. It was so similar to *Cotroni* on its facts that the Ontario Court of Appeal felt bound to follow *Cotroni*. In doing so, Laskin J.A., for the Court, reviewed the factors determinative of whether to prosecute or extradite that had been outlined by the Manitoba Court of Appeal in *U.S.A. v. Swystun*,⁵³ a judgment that had been cited with approval by LaForest J. in *Cotroni*:

- 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 the 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;
- whether the evidence is mobile;
- the number of accused involved and whether they can be gathered together in one place for trial;
- in what jurisdiction were most of the acts in furtherance of the crime committed;
- the nationality and residence of the accused;
- the severity of the sentence the accused is likely to receive in each jurisdiction.

In *Whitley*, the final two factors did not outweigh the others, despite the fact that *Whitley* was a Canadian facing 20 years in prison. *Whitley*'s situation was bound to invite comparison with *Jamieson*, which at that time had not yet reached the Supreme Court of Canada; however Laskin J.A. adroitly distinguished *Jamieson* on its facts.

In *Ross v. U.S.A.*⁵⁴ Lambert J.A. of the B.C. Court of Appeal was of the opinion that it was unreasonable to send Ross back to the U.S. when he was fully prepared to plead guilty in Canada to any offence the prosecutor thought appropriate.

⁵² *Supra*, note 46.

⁵³ (1987), 50 Man. R. (2d) 129 (Man.C.A.), at 227-228.

⁵⁴ *Supra*, note 46.

I do not think that Mr. Ross, as a Canadian citizen, should be required to pay the extraordinary heavy penalty that the legislators in Florida have decided is required to tackle the drug problem in Florida....

My conclusions under ss. 1, 6 and 7 of the Charter are intertwined. I will set them out.

In my opinion, the surrender of Mr. Ross, a Canadian citizen, who is prepared to plead guilty in Canada to offences at least as serious as the offences with which he is charged in Florida, arising from the same set of circumstances, and who will, if surrendered, face a minimum sentence of 15 years and a minimum time in prison of six years in Florida, and five years if transferred to Canada, is *simply unacceptable*.

And in my opinion, it is *clearly unreasonable to conclude that prosecution of Mr. Ross in Canada*, when he is prepared to plead guilty to offences at least as serious as the offences with which he is charged in Florida, *is not a realistic option*, and that, accordingly, Mr. Ross's constitutional rights must be overridden to satisfy the demands of justice in Florida.

In my opinion, in the circumstances of this case, surrender of Mr. Ross to the Florida authorities does not infringe his constitutional rights to remain in Canada as little as reasonably possible and, accordingly, the infringement of his constitutional right to remain in Canada under s. 6 of the Charter cannot be justified under s. 1 of the Charter.⁵⁵

Taylor and Finch, J.J.A., distinguishing *Jamieson* on its facts, disagreed with Lambert J.A., and the appeal was dismissed. Similar conclusions were reached by the same court in *U.S.A. v. Ding*⁵⁶ and *Sanders v. Canada (Minister of Justice)*.⁵⁷

Following *Cotroni*, the Ontario Supreme Court General Division in various judgments⁵⁸ held that consideration of whether s. 6(1) protects an individual from extradition was the prerogative not of the extradition Court but of the Minister of Justice. The Ontario Court of Appeal decisions were not determinative of this issue at first,⁵⁹ although in *U.S.A. v. Kwok* (1998)⁶⁰ that particular court seems finally to have resolved

⁵⁵ *Ibid.*, at 526.

⁵⁶ *Supra*, at note 46.

⁵⁷ (20 February 1998), Vancouver CA021654 (B.C.C.A.).

⁵⁸ For example, *U.S.A. v. Dynar*, *supra*, at note 34; *U.S.A. v. D'Agostino* (1997), 41 C.R.R. (2d) 325.

⁵⁹ *U.S.A. v. Leon* (1995), 96 C.C.C. (3d) 568 (Ont. C.A.)

⁶⁰ *Supra*, note 46.

the issue, at least for Ontario, stating that "Section 6(1) mobility rights are not engaged at the committal stage of the extradition proceedings. They are only engaged in the Minister's decision to surrender."⁶¹ Whether the Supreme Court of Canada agrees has yet to be determined.

3. Death Penalty Assurances and the *Charter*

Charles Ng was alleged to have helped murder 19 women and buried them in a suburban back yard in California. The State of California made it clear that if Ng was returned, prosecutors would seek the death penalty. Article 6 of the *Treaty on Extradition between Canada and the U.S.*⁶² states that the Minister *may* refuse to surrender an accused to a requesting country where he is likely to face the death penalty. Although the wording of the Treaty clearly allows for the exercise of discretion on the part of the Minister, the purpose of Article 6 is unambiguous: since accused persons would not face the death penalty in Canada, Canada should be wary about sending fugitives back to American jurisdictions which do not blink at the prospect of executing of such individuals by electrocution, hanging, cyanide gassing or lethal injection.

The Ng⁶³ and *Kindler*⁶⁴ cases were sufficiently gruesome on their facts that the Supreme Court of Canada easily decided that punishment for such crimes was a matter

⁶¹ *Ibid.*, at 367.

⁶² Can. T.S. 1991 No. 37.

⁶³ *Supra*, note 31. See Jeff Morrow, "Ng's Outraged Counsel" (1992) 16 Can. Lawyer (No. 1) 38.

⁶⁴ *Supra*, note 31. 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, "Extradition to the United States Even at Risk of Death Penalty and Death Row Phenomenon Not Considered to Violate the CCPR/ *Kindler v. Canada*" (1993) 14 Human Rights L.J. (No. 9-10) 307; Sharon Williams, "Extradition to a State that Imposes the Death Penalty" (1990) 28 Can. Y.B. Int. L. 117; John Pak, "Canadian Extradition and the Death Penalty: Seeking a Constitutional Assurance of Life" (1993) 26 Cornell Int. L.J. (No. 1) 239; Allan Manson, "Kindler and the Courage to Deal with American Convictions" (1992) 8 C.R. (4th) 68.

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 the death penalty.⁶⁵ Kindler had escaped lawful custody after being convicted of first degree murder, conspiracy to commit murder and kidnapping; he had had a trial before a judge and jury. Ng had not yet faced trial. Yet the Supreme Court held that the Minister had not erred in refusing to seek assurances that they would not be executed, pursuant to the provisions of Article 6 of the Canada-U.S. Extradition Treaty, declaring that, on these fact situations, it does not "sufficiently shock the conscience of Canadians" and is not "simple unacceptable" to send such person back to the U.S. to face trial – and possibly the death penalty. Following that precedent, in *R. v. Campbell*⁶⁶ 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. Similarly in *Gervasoni v. Canada (Minister of Justice)*,⁶⁷ the Minister declined to obtain formal assurances under the Treaty.

In *Gervasoni*, the Minister claimed to have determined through informal diplomatic channels that the United States would not be seeking the death penalty for Gerald Gervasoni, who had been charged in the State of Florida with first degree murder in the strangulation death of his girlfriend. Gervasoni had lived for 12 years on Saltspring Island, B.C., subsequent to the alleged murder. He had taken on a new identity and had become a popular member of the Junior Chamber of Commerce, well known for his

⁶⁵ *Ibid.*; *Re Ng*, *supra*, note 31.

⁶⁶ (1996), 91 O.A.C. 204 (C.A.); leave to appeal to S.C.C. refused (1997), 99 O.A.C. 79 (S.C.C.).

⁶⁷ (1996), 119 W.A.C. 141 (B.C.C.A.), leave to appeal to S.C.C. refused 137 W.A.C. 240*n*, 204 N.R. 398*n*.

participation in amateur sports, including baseball and hockey. He was finally identified by a television viewer watching a program about the murder on *America's Most Wanted*.

On the strength of informal consultations with the U.S., without obtaining anything in writing pursuant to Article 6, the Minister ordered Gervasoni to be surrendered. The B.C. Court of Appeal held that the Minister was entitled to rely upon the informal representations provided by the requesting state, "as he sees fit," since it was a discretionary political decision.⁶⁸ However, in the course of the decision the Court indicated that it was sure that there would be diplomatic intervention at some level if the U.S. 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.⁶⁹

The Florida prosecutor in that case had a reputation as a hard-nosed individual who allegedly put notches in his belt with every successful execution. A journalist from Osceola County covering the Gervasoni extradition hearing reported that the assistant district attorney kept on his office wall photographs of the hapless individuals who had been electrocuted consequent to his prosecution (seven by 1996), and that he sometimes wore a yellow neck tie embroidered with a stylized electric chair.

⁶⁸ *Ibid.*, at 147.

⁶⁹ *Ibid.*, at 147-148.

Whether these alleged quirks were merely tasteless black humour or true sadism seemed moot when the prosecutor 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. That statement, widely reported in the press, triggered a protest to the Minister of Justice in Canada and a round of quiet diplomacy at the highest level, which eventually led the prosecutor to reverse himself.⁷⁰ The Court of Appeal had suggested that there would be a diplomatic protest should the informal agreement not be honoured, and indeed it did come to that before the prosecutor in Florida, some six months after the extradition, finally acquiesced by declaring that the State would not be seeking the death penalty.⁷¹

Subsequently, in *Chong v. Canada (Minister of Justice)*,⁷² the Ontario Court of Appeal urged the Minister to obtain assurances from the Tennessee government in writing rather than relying on oral assurances. And in *U.S.A. v. Burns and Rafay*,⁷³ 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.

Burns and 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

⁷⁰ *U.S.A. v. Gervasoni* (11 March 1996), V02563 and V02641 (B.C.C.A.)

⁷¹ Section 44(2) of Bill C-40 still makes the refusal to surrender on this basis discretionary on the part of the Minister. By s. 40(4), where the Minister surrenders a person subject to assurances or conditions, "the order of surrender shall not be executed until the Minister is satisfied that the assurances are given," but there still is no provision for this to be set out in writing by diplomatic note or other agreement that might be binding on the receiving party.

⁷² (1996), 91 O.A.C. 319 (C.A.); leave to appeal to S.C.C. refused (1997), 99 O.A.C. 79 (S.C.C.)

⁷³ (1997), 116 C.C.C. 524 (B.C.C.A.).

suspected the two teenagers, they did not have enough evidence, and so enlisted the assistance of the R.C.M.P. 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. At the extradition hearing, the admissions were led as evidence before Callaghan J., who found that the admissions had been given voluntarily and the procedure by which they were obtained did not violate the *Charter*.⁷⁴ Burns and Rafay appealed the narrow issue of admissibility of the statement to the B.C. Court of Appeal, the Crown conceding that without the statements, the evidence would not be sufficient to satisfy the *Sheppard* test for committal: the rest of the evidence was circumstantial.⁷⁵ The panel held that the s. 10(b) *Charter* rights of Burns and Rafay had not been infringed since they had not been "detained." The extradition judge had therefore made no error in admitting the evidence.

The State of Washington had 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."⁷⁶ The Minister of Justice, at that time Allan Rock, 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.

⁷⁴ *Ibid.*, at 530.

⁷⁵ *U.S.A. v. Burns* (1997), 117 C.C.C. (3d) 454, leave to appeal to S.C.C. refused 124 C.C.C. vi.

⁷⁶ Cited at *Burns*, *supra*, note 73, at 530-531.

Burns and Rafay applied for judicial review of the Minister's decision in the Court of Appeal. Speaking for the majority,⁷⁷ Donald J.A. stated with a touch of irony: "I do not accept the contention that s. 6(1) is not involved in this problem. 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."⁷⁸

In reviewing the written decisions of the Minister, Donald J.A. 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

⁷⁷ McEachern C.J.B.C. agreed with Donald J.A., but gave additional reasons (at 543-547). Holinrake J.A. dissented, saying that it was not open to the Court of Appeal to interfere with the exercise of ministerial discretion (at 547-551).

⁷⁸ *Ibid.*, at 535. In the wake of F.B.I. admissions in 1989 that the agency used fraudulent affidavit evidence against Leonard Peltier to secure his extradition from Canada, a computer website has been set up in Peltier's defence. Peltier, the American Indian Movement leader who was alleged to have killed two F.B.I. agents in a shootout at Wounded Knee on 26 June 1975, was in the end not given the death penalty, but has remained in custody for 24 years with no prospect of parole on the horizon, his most recent application for parole on 4 May 1998, having been denied. <http://members.xoom.com/freepeltier/index.html>; <http://members.aol.com/TurquoiseWm/JusticeforLeonardPeltier.html>; see also <http://bioc02.uthscsa.edu/natnet/archive/nl/9307/0103.html>; lpdcccfd@web.apc.org; <http://lawlibdns.wuacc.edu/humlaw/msg00057.html>; and <http://www.lpsg-co.org/index.html>. See *Re Extradition Act re Peltier*, (1976), 32 C.C.C. (2d) 121 (B.C.S.C.), application for review by Fed. C.A. dismissed 18 June 1976; also *Re Peltier*, [1977] 1 F.C. 118 (T.D.), reversing the judgment of Hinkson, J (4 March 1976), unreported.

merits without being fettered by rules designed to deal with an imagined case load.⁷⁹

Donald J.A. distinguished *Ng* and *Kindler*: those cases both concerned Americans attempting to escape justice at home by fleeing to Canada; to allow them to do so would be to provide "an attractive haven for fugitives." But in *Burns*, "When the applicants returned to Canada after the killings they came to a place where they were ordinarily resident and in doing so they exercised a right of citizenship; guaranteed by s. 6(1) of the *Charter*. They came home." He added:

The Minister disparages the applicants' reliance on their rights of citizenship and treats the applicants as though they were aliens. It is appropriate to speak of a "safe haven" in regard to aliens; but inappropriate, in my view, to use such terminology for citizens in their own country. One's country is properly to be considered a haven, and access to its constitutional protections is a feature of citizenship....

It is one thing to send Americans back to America to face their own system of justice, but I think it is a profoundly different thing for a Canadian Minister to expose a citizen of Canada to a penalty we have abolished here.⁸⁰

In *Kindler*, LaForest J. had voiced the opinion that the government as a matter of policy "has the right and duty to keep out and to expel aliens from this country if it considers it advisable to do so."⁸¹ This he characterized as an obligation existing "independently of extradition":

If an alien known to have a serious criminal record attempted to enter into Canada, he could be refused admission.... If it were otherwise, Canada could become a haven for criminals and others whom we legitimately do not wish to have among us.... It would be strange if Canada could expel lesser criminals but be obliged by the *Charter* to grant sanctuary to individuals who were wanted for crimes so serious as to call for the death penalty in their country of origin.⁸²

⁷⁹ *Burns*, *ibid.*, at 539.

⁸⁰ *Ibid.*, at 543-544.

⁸¹ *Supra*, note 31, at 834 (S.C.R.).

⁸² *Ibid.*

But by extension, the same considerations do not apply to Canadian citizens in similar situations. As Donald J. emphatically stated, they are seeking refuge by coming *home*. They could not be sent back by a process of deportation or *refoulement*, since they are guaranteed the right to remain at home. If their right to remain in Canada under s. 6(1) of the *Charter* and the right not to be exiled under s. 2(a) of the *Canadian Bill of Rights* are to mean anything at all, then Canadians must be protected from the ultimate exile: an extradition process that is a one-way passage to execution.

While McEachern C.J.B.C. concurred with Donald'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 i[s] at the head of the direct line of responsibility for the prosecution of the fugitives in the extradition proceedings.⁸³

It would seem that the new legislation was drafted with a view to 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 are currently 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 Chief Justice.

⁸³ *Ibid.*, at 544.

The Minister, Anne McLellan, responded to the directive of the Court that she seek Article 6 assurances by seeking leave to appeal to the Supreme Court of Canada, stating 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.”⁸⁴

The Supreme Court of Canada per Lamer C.J.C., Cory and McLachlin JJ., granted leave to appeal on 4 December 1997,⁸⁵ but although argument on the case has been heard, the Court had not handed down a decision as of August 1999.

4. *Gwynne v. Canada (Minister of Justice)*

Despite Donald J.A.’s assertion in *Burns* that “where there is life there is hope,” in the eyes of some members of the Canadian judiciary, there are some punishments worse than death. Even LaForest J. recognized torture as falling into this category, as he stated in his judgment in *Kindler*:

There are, of course, situations where the punishment imposed following surrender – torture, for example – would be so outrageous to the values of the Canadian community that the surrender would be unacceptable.⁸⁶

In her strong dissent in *Gwynne v. Canada (Minister of Justice)* (1998),⁸⁷ Southin J.A. of

⁸⁴ C.L. 18 July 1997 at http://canada.justice.gc.ca/News/Communiques/1997/burraf_en.html

⁸⁵ 119 C.C.C. (3d) vi – not to be confused with the same panel’s refusal on 27 November 1997 to grant leave to appeal in the unanimous judgment of the B.C. Court of Appeal to dismiss an application by Burns and Rafay to exclude statements obtained by undercover police officers by alleged trickery. See 124 C.C.C. (3d) vi. *Canadian Criminal Cases* had misreported the successful leave application as being an appeal from 117 C.C.C. (3d) 454 (which was really the motion to exclude the statement), instead of an appeal from 116 C.C.C. (3d) 524. See “Corrigendum” at 124 C.C.C. (3d) vi.

⁸⁶ *Supra*, note 31, at 9-10 (C.C.C.).

⁸⁷ 103 B.C.A.C. 1 and 169 W.A.C. 1 (B.C.C.A.), leave to appeal to S.C.C. refused at 227 N.R. 298 (per L’Heureux-Dubé, Gonthier and Bastarache, JJ.).

the B.C. Court of Appeal attempted to expand this category to include “psychological torture” in a situation where a Canadian Metis of 57, having already spent 9 years of a 120 year sentence under appalling conditions in Alabama penitentiaries before escaping and “coming home” to Canada, faced more than 110 years of additional incarceration in the same system to finish his sentence for two counts of attempted extortion. “On the evidence in this case, prisoners such as the applicant live in Alabama prisons in a continuing state of fear,” Southin J.A. said. “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.”⁸⁸ The sentencing judge had factored in a Canadian criminal record to conclude that Gwynne was an habitual offender. Southin J.A. noted:

I do not overlook that the applicant has not been a good man, either in this country or in the United States of America. If one believes that social conditions contribute to what men become, then Canada bears the responsibility for his affront to the people of the State of Alabama. But that does not justify returning him there.

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 require it to be served under the conditions disclosed in the evidence is, in the year 1998, fundamentally unacceptable.⁸⁹

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 endemic pattern that has since led to

⁸⁸ *Ibid.*, at 46.

⁸⁹ *Ibid.*, at 46-47.

class action litigation against the school by former students.⁹⁰ 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.⁹¹ “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.”⁹²

Southin J.A. reviewed the history of the Alabama penal system, “where violence and terror reign,”⁹³ and prison facilities “are barbaric and inhumane.”⁹⁴ The courts of Alabama had tried to intervene but encountered “indifference and incompetence” on the part of the Board of Corrections.⁹⁵ The specifics of what Gwynne experienced are outlined in an affidavit appended to the dissenting judgment,⁹⁶ details described even by Goldie J.A. for the majority as “subjectively shocking.”⁹⁷ But Goldie J.A. was quick to quote McLachlin J.’s statement in *Kindler* that ““in determining whether...the extradition in question is “simply unacceptable”, the judge must avoid imposing his or her own subjective views on the matter...””; rather, the court 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.””⁹⁸

⁹⁰ *Ibid.*, at 20; Supreme Court of Canada filed Application for Leave, p. 145.

⁹¹ *Ibid.*, at 21.

⁹² *Ibid.*, at 23.

⁹³ *Ibid.*, at 25.

⁹⁴ *Ibid.*, at 26.

⁹⁵ *Ibid.*, at 27.

⁹⁶ *Ibid.*, at 47-65.

⁹⁷ *Ibid.*, at 12.

⁹⁸ *Ibid.*, at 9, per Goldie J.A. quoting McLachlin J. in *Kindler*, *supra*, note 31 at 55.

“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.”⁹⁹

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, and so did the subsequent attempts by McLachlin J. to clarify matters with yet further tests. For there is no way to “objectively assess the attitudes of Canadians” for anything as remote from the day-to-day experience of Canadians as the death penalty, or torture, or 110 years of incarceration in Alabama. Objective assessment of Canadian attitudes can only be made in the context of careful statistics or mass marketing strategies; it is the stuff of business administration, not law. And bald objective assessment of “Canadian” attitudes certainly is not the domain, or even properly a tool, of justice.

Canadian judges are prized precisely for their ability to make judicial assessments that are neither strictly objective nor strictly subjective, but a hybrid of both. Surely the determination of justice involves a balance between subjective value judgment and objective measurement. Judges are not administrators. They are jurists. They are as close as we have in contemporary society to magi, magisters, “wise men”. Their subjective judgments must count for something, especially once they have proved themselves at the bar and on the bench for many years to achieve the status of justices of

⁹⁹ *Ibid.* See also p. 29, per Southin J.A.

the courts of appeal or of the Supreme Court of Canada. For judges at that level to say or even think that their subjective opinions count for naught is either an admission of incompetence or merely an indulgence in false modesty. But to act as if their subjective values counted for nothing is nothing less than an abrogation of responsibility.

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. For the majority, Goldie J.A. started his reasons for judgment by buying into the argument of the Minister with respect to “specialty”:

“While escape from custody is an extraditable offence, the United States has not requested the extradition of Mr. Gwynne on that count. 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.

“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.”¹⁰⁰

This is about as specious an argument as a lawyer is likely to encounter in extradition matters, and it is shocking that the majority of the Court of Appeal should have cited it with approval without a blink. Of course Mr. Gwynne will 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 a potential 110 years. The corrections and parole system will impose its own form of trial and punishment on Mr. Gwynne for escaping lawful custody, which may mean denying him parole for the

¹⁰⁰ *Ibid.*, at 4.

rest of his life. As Goldie J.A. himself remarked later in his judgment, “the prospects of parole...may have been diminished almost to the point of irrelevance by virtue of his escape.”¹⁰¹ The Minister’s smug reference to “specialty” protection in this context is nothing short of insulting to the intelligence.

After reviewing the standard of deference accorded the Minister in *Schmidt*,¹⁰² *Kindler*,¹⁰³ and *Whitley*,¹⁰⁴ 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.¹⁰⁵

In fact, Goldie J.A. has it backwards. The Minister is poorly-equipped to weigh anything, especially when, as here, the Minister specifically declined to give Gwynne an oral hearing: “Such hearings are exceptional by nature and I have determined that I can properly make a decision on surrender in this case without hearing oral submissions.”¹⁰⁶ Again, the slippery nature of making paper submissions comes through, as the “oral hearing” applied for suddenly becomes merely “hearing oral submissions” – an entirely different process.

Courts of appeal have the mechanism for hearing oral submissions as a matter of course, and both extradition courts and (theoretically, at least) courts of appeal have the mechanism for genuine “oral hearings” entailing the production of vive voce evidence – surely a requirement for a weighty decision, especially when, under the Act, the Minister

¹⁰¹ *Ibid.*, at 8.

¹⁰² *Supra*, note 1 at 208, 217.

¹⁰³ *Supra*, note 31, at 57-58.

¹⁰⁴ *Supra*, note 46, at 109-110.

¹⁰⁵ *Gwynne, supra*, note 87, at 7.

¹⁰⁶ *Ibid.*, at 70.

pointedly does not cover the same areas of concern as the extradition judge and is given vast areas of discretion for which she and her staff are untrained and ill equipped.

Admitting that the comparison is “difficult to make,” Goldie J.A. went on to draw parallels between dangerous offender provisions in Canada and habitual offender sentencing in Alabama.

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.¹⁰⁷

The sole criterion was whether the harsh sentence was “imposed by law.”¹⁰⁸ 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 of the night to allow vengeful inmates to attack sleeping fellow inmates with clubs or knives¹⁰⁹ – a brazen form of “extrajudicial punishment.”

Gwynne’s introduction to the system began with a compulsory haircut. One person objected to getting his hair cut. “The guards immediately set on him with the billy clubs, knocked him unconscious, dragged him into the barber shop and shaved his head

¹⁰⁷ *Ibid.*, at 7-8.

¹⁰⁸ *Ibid.*, at 8.

¹⁰⁹ *Ibid.*, at 57.

bald. That was my introduction to Alabama's penal system."¹¹⁰ He described Holman Prison as an old tomb infested with cockroaches, spiders, snakes, rats and mice – and with communal toilets exposed to the cell block, offering no privacy whatsoever. On his second day, one inmate was allowed by guards to chase another around with a knife for several minutes before they intervened by clubbing the fellow with the knife senseless and dragging him off to segregation.¹¹¹ He deposed that young white males were particularly vulnerable to sexual attack by black prisoners.

There was a young fellow who came in and I can remember every day when we'd come home from work and there would be a dozen prisoners lined up waiting to have a go at him. He was afraid to fight back. The only way of really stopping it would have been to take a knife and stab one of them to let them know that he can't be fooled with and the young man just didn't have it in him to do that. He was afraid, he was frightened, he'd never been in prison. A dozen prisoners standing around you with knives can be a pretty fearful thing.¹¹²

Gwynn was transferred to West Jefferson maximum security penitentiary, where the violence escalated, "not only from the inmates but in particular on the part of the staff, the guards. They were as brutal as brutal can be.... Several times my wife had to call the Canadian Embassy to try and keep me safe."¹¹³ One person who had got particularly filthy at work tried to get an early shower, but after lathering himself was refused permission to rinse. When he tried to rinse off the soap, "The guards dragged him out, beat him for several minutes with their billy clubs and tore patches of hair off his head. His scalp was bleeding, his face was bleeding. They used his towels to mop up the blood."¹¹⁴ Gwynne described the brutal beating by a huge guard, estimated as 6'2" and

¹¹⁰ *Ibid.*, at 48.

¹¹¹ *Ibid.*, at 49.

¹¹² *Ibid.*, at 51.

¹¹³ *Ibid.*, at 51-52.

¹¹⁴ *Ibid.*, at 52.

300 lbs, of a friend of his, Bonny Spears, who at 5'4" was particular small and slight of frame.

The guard stopped, undid the handcuffs, hit Bonny Spears, knocked him down on the sidewalk, straddled Bonny, and was punching him in the face, knocking Bonny's head against the sidewalk behind him. The sergeant and two other guards came over, watched for several more seconds while the guard kept punching Bonny in the face, picked the inmate up, and dragged him off to segregation. We were told by other inmates who were in segregation and one guard eventually, that guards would go in everyday and beat Bonny. They evidently ruptured his spleen, they ruptured his liver. Bonny was in bad shape. He asked the guards to please take him to the hospital,. One guard relayed this message to another. The other said, "Let the son of a bitch die." This was heard by inmates. Bonny Spears died from the beatings. He just died.¹¹⁵

If that does not constitute torture and "extrajudicial" punishment, what does?

Gwynne swore that he himself was placed in "a dog run" – an outside small fenced enclosure – in winter weather close to freezing for eight hours straight with nothing but a short sleeved shirt and pants.

I stayed huddled trying to stay warm. I walked as much as I could. When I could no longer walk because of the cold I would sit down on the floor, which was a cold cement floor. The wind was shipping in on me. For two days after that experience I couldn't walk. My hip joints were so sore I just couldn't hardly walk.¹¹⁶

This surely constitutes an almost classic form of torture.

"If you send me back," Gwynne deposed, "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.¹¹⁷

¹¹⁵ *Ibid.*, at 57.

¹¹⁶ *Ibid.*, at 61.

¹¹⁷ *Ibid.*, at 64-65.

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.¹¹⁸

This is the other shoe, poised in the air, ready to drop.

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."¹¹⁹ And he gives as an example of this the Bill of Attainder: "Such a parliamentary punishment was intended to impose...consequences such as forfeiture, deprivation of rank or title, and the loss of civil rights generally."¹²⁰ Goldie J.A. does not explain how he can conclude that such matters merit being "simply unacceptable" while a 120-year jail term under appalling conditions, including guard-sanctioned floggings and beatings, does not.

¹¹⁸ *Ibid.*

¹¹⁹ *Ibid.*, at 10.

¹²⁰ *Ibid.*

“Despite the apparent subjectivity of the phrase ‘shocks the conscience,’” Goldie J.A. continued, “the case at bar presents circumstances subjectively abhorrent but which are not, in my view contrary to the principles of fundamental justice.”¹²¹

It is this which brings me to conclusions which differ from those of my colleague.

In the case at bar we are invited to examine and condemn the criminal justice system of Alabama. We are invited to conclude it is not only inhumane, careless of human life and dignity, but also incapable of change.

I think, with the greatest respect, that is not an invitation we should accept.

First, there are some potential difficulties with the nature of the precedent this court would be setting....

...What we are asked to do is to signify this court’s displeasure with the rate of enforcement of the law in the United States. I think, with respect, that is a singularly unsuitable task and an unsatisfactory underpinning for a conclusion Mr. Gwynne’s s. 7 *Charter* rights will be violated by his surrender for the completion of his sentence in the Alabama prison system.¹²²

But that decidedly was *not* what the Court was asked to do. The Court was asked to rule that the Minister’s decision to surrender Gwynne, under the truly unique circumstances of his case, violated his right to fundamental security of the person *now*, not in some ideal world in which Alabama could get its penal houses in order. The comments of Donald J.A. in *Burns* seem *a propos*, for sentences of 120 years of incarceration under brutal conditions are even more rare – and reprehensible – than the death penalty. In *Gwynne*, as in *Burns*, “The Minister seems to be struggling with an illusory problem,”¹²³ in this instance that extradition cases involving sentences of 120 years of incarceration under brutal conditions are so numerous that there is a serious danger that a precedent might be set. Like *Burns*, *Gwynne* “is the first case of its kind....Such cases will be few in number. Each deserves to be considered on its own

¹²¹ *Ibid.*

¹²² *Ibid.*, at 10-12.

¹²³ *Burns*, *supra*, note 73, at 539.

merits without being fettered by rules designed to deal with an imagined case load.”¹²⁴

Far from there being a danger of establishing a precedent – an inappropriate consideration, in the circumstances of this case – there is *no* danger of *Gwynne* establishing a precedent since with such an horrendous sentence the case would be readily distinguishable on its facts from any other imaginable case. And any case approximating *Gwynne* surely deserves to be considered – and judicially assessed – on its merits.

Southin J.A. pointed out the terrible track record of the Alabama correctional service, even when under court order to remedy many of the deficiencies identified in a suit alleging “cruel and unusual punishment.”¹²⁵ In 1976, an Alabama judge found:

The conditions in which Alabama prisoners must live, as established by the evidence in these cases, bear no reasonable relationship to legitimate institutional goals. As a whole they create an atmosphere in which inmates are compelled to live in constant fear of violence, in imminent danger to their physical well-being, and without opportunity to seek a more promising future.

The living conditions in Alabama prisons constitute cruel and unusual punishment.¹²⁶

If the Alabama courts regard Alabama penal conditions as constituting cruel and unusual punishment – a situation which had clearly not been ameliorated by the 1990’s, according to the uncontested evidence accepted by the Court of Appeal – what is to prevent Canadian courts from making the same finding and providing protection to the individual under s. 12 of the *Charter*? It is hard to imagine, in fact, a more appropriate use of a constitutional provision which states, “*Everyone* has the right not to be subjected to *any* cruel and unusual treatment or punishment.”¹²⁷

¹²⁴ *Ibid.*

¹²⁵ *Ibid.*, at 24, where Southin J.A. quotes *Pugh v. Locke* (1976), 406 F.Supp. 318.

¹²⁶ *Ibid.*, at 25.

¹²⁷ *Charter*, s. 8. Emphasis added.

The Alabama district court judge went so far as to say that state officials “operate prison facilities that are barbaric and inhumane,” and listed 11 requirements the penal system would have to meet by court decree.¹²⁸ In *Newman v. Alabama (State)*,¹²⁹ the same court revisited the issue and found that, far from complying with the court’s decree, the Alabama prison system had stagnated for six years, to the point that it was necessary to appoint a “receiver for the Alabama prisons.”¹³⁰ In an astute political move, the Governor was ready with an application to act as receiver, despite the fact that he had been named as a party in the original application of *Pugh v. Locke*.¹³¹

Had the B.C. Court of Appeal the courage to act on, or even factor in, its subjective convictions, justice might have been done and seen to be done in the case of Michael Lucien Gwynne. As it is, the *Gwynne* case stands with *Wagner* and *Peltier* as being one more black mark on the record of the Court in extradition matters. Mr. Gwynne had served more than nine years of cruel and unusual punishment under “barbaric” conditions, until his escape in September 1993. Surely nine years of hard time – the hardest time imaginable – is more than enough punishment for two counts of attempted extortion, no matter what Gwynne’s Canadian record. To send Gwynn back to Alabama for exposure to more of the same brutal treatment for 110 years is an affront to the “conscience of Canadians.” If it is not an affront to the conscience of the Court, perhaps it is because in the cynical nineties, the Court has become so preoccupied with objective standards at the expense of subjective values that it has lost its conscience.

¹²⁸ *Ibid.*, at 26-27.

¹²⁹ (1979), 466 F. Supp 628.

¹³⁰ *Gwynne, supra*, note 87, at 27.

¹³¹ *Ibid.*, at 24.

Passing the buck back to the Minister does not lessen the seriousness of the abrogation of responsibility by the Court in this matter, for with the sole exception of the related cases of *Dionne* and *Witney*,¹³² it is well established that the Minister typically has failed to exercise his or her discretion in such circumstances, rather using Court of Appeal decisions to further bolster the position of blanket surrender of fugitives without any genuine exercise of discretion, whatever the eventual fate of those surrendered.

Perversely, a staff lawyer with the Department of Justice, Clyde Bond, has gone on record as being dissatisfied with the British Columbia judiciary on extradition matters, even going so far as to “forum shop” as far away as Manitoba to avoid the B.C. courts. In the case of *U.S.A. v. Down* (1998),¹³³ a native of B.C. wanted by the U.S. happened to travel to Manitoba on Thanksgiving weekend, 1997. Based on information that he was visiting Manitoba, the Department of Justice sought and obtained a warrant from a Manitoba Court of Queen’s Bench judge. Down was apprehended in Saskatchewan, on his way home, but was returned to Manitoba to face extradition. Through his counsel, he applied for change of venue to B.C. Oliphant A.C.J.Q.B. ruled that Down should have a change of venue from Manitoba to B.C. since he was convinced by the evidence and submissions of counsel “that this is a case of forum shopping on the part of the Crown as agent for the U.S.A.”¹³⁴ He stated that it was not necessary for him to make a ruling that Manitoba had become the jurisdiction for the extradition hearing as a result of “fraud on the part of the authorities...committed upon the court in the obtaining of the warrant for

¹³² See Chapter 8, *supra*.

¹³³ 124 C.C.C. (3d) 289 (Man. Q.B.).

¹³⁴ *Ibid.*, at 299.

apprehension of Mr. Down,” as alleged by Down’s counsel. He could make his determination, in fact, from the position taken by the Crown lawyer:

According to Mr. Bond, whether or not it is fair to Mr. Down to hold this extradition hearing in Manitoba, as opposed to British Columbia, is irrelevant and must not be considered by me....It is obvious from what Mr. Bond said that the U.S.A. is displeased with the progress being made or, more appropriately, the lack of progress in related litigation in the courts of British Columbia.

As noted earlier in these reasons, Mr. Bond complained that if these proceedings are transferred to British Columbia, they will “languish.” He expressed a concern that the victims in the U.S.A. are senior citizens and that delay is prejudicial to the requesting state. I infer from that statement that there is a concern that at least some of the elderly “victims” will pass away if the extradition proceedings are transferred to British Columbia where they will “languish”....

I cannot think of a legitimate reason why the extradition hearing should take place in Manitoba. There are several valid reasons why the proceedings should be conducted in British Columbia....

I do not share the lack of confidence expressed by counsel for the U.S.A. in the ability of the court in British Columbia to deal with this matter in an expeditious manner. That is where the hearing belongs and that is where it shall be conducted.¹³⁵

In ordering the transfer, Oliphant A.C.J.Q.B. relied on an obscure Newfoundland extradition case, *Re Dejerkie* (1975),¹³⁶ which is authority for the proposition that jurisdiction can be waived from one jurisdiction to another, in that case from Newfoundland to Quebec.

Not least of the reasons for transferring the Down case to B.C. was the fact that Mr. Down’s witnesses were all in B.C. Although the Justice Department staff lawyer argued that Mr. Down was not entitled to call evidence, or at least was severely limited in terms of the evidence he was allowed to lead, and that the extradition judge “must not” consider what was fair,¹³⁷ Oliphant A.C.J.Q.B. ruled that it would be “grossly unfair” to

¹³⁵ *Ibid.*, at 299-300.

¹³⁶ 24 C.C.C. (2d) 164 (Nfld. Dist Ct.)

¹³⁷ *U.S.A. v. Down*, *supra*, note 132, at 299.

Mr. Down to face extradition in Manitoba when all other elements of the case were either in Vancouver or nearby Seattle.

Fairness is one of the cornerstones of our system of justice in Canada, whether criminal or otherwise. A system of justice that is not fair is not a system of justice at all. Fairness and justice go hand in hand. You cannot have one without the other. Fairness to Mr. Down in these extradition proceedings is, in my opinion, a relevant matter for consideration. When Mr. Bond says that fairness is irrelevant here, with all due respect to him, we part company.¹³⁸

¹³⁸ *Ibid.*, at 300.

CHAPTER TEN

BALANCE OF POWER: THE MINISTER OF JUSTICE vs. THE COURTS

1. The Loss of [the Presumption of] Innocence

Today, persons caught up in the extradition process have few of the protections and rights of other persons accused of crime in Canada. The Minister of Justice and the courts have made it clear that anyone living in Canada alleged by the U.S. to be a “fugitive”¹ can be extradited, on “any” evidence, no matter how minuscule,² even on the mere basis of similarity of name and countenance,³ even though the person has not set foot in the extraditing country,⁴ and even where the person can prove that he was in Canada at the time of the alleged crime being perpetrated in the U.S.⁵

Since the test is whether there is *any* evidence that may be admissible in a court proceeding, rather than *sufficient* evidence to warrant proceeding to trial, the chances of extradition suddenly impacting on unsuspecting Canadians is much greater than most Canadians realize. Current Canadian extradition policy and practice at least potentially compromises the liberty and physical and economic security of all Canadian citizens and permanent residents who travel abroad.

¹ Although Canada has removed the term “fugitive” from the new *Extradition Act*, it remains in the U.S. Code, Title 18, c. 209 – Extradition, s. 3184 (“Fugitives from foreign country to United States”), s. 3186 (“Secretary of State to surrender fugitive”), and s. 3191 (“Witnesses for indigent fugitives”).

² *U.S.A. v. Wagner* (1995), 104 C.C.C. (3d) 66, 111 W.A.C. 119 (B.C.C.A.), leave to appeal to S.C.C. refused 104 W.A.C. 80n, 204 N.R. 74n, [1996] 2 S.C.R. xi.

³ *Extradition Act*, s. 37 (a) and (b) specifies this in statute form.

⁴ *U.S.A. v. Cotroni* (1989), 48 C.C.C. (3d) 193, [1989] 1 S.C.R. 1469 (S.C.C.).

⁵ *U.S.A. v. Wagner*, *supra*, note 2.

Extradition proceedings, so easily brought by the requesting state, are horrendously expensive to defend, usually leaving an accused person penniless, so that the individual faces prosecution in an alien land, often without the possibility of making bail, and certainly without the means to afford an attorney to ensure a sound defence.⁶ The presumption of innocence, such an important safeguard to the criminal judicial system in Canada, is not a protection where an extradition claim is made, for once accused, an individual is branded with prejudicial labels that make him a poor risk for surety or bail even where money is not a major factor.

The former Canadian *Extradition Act* contained loaded language prejudicial to anyone who fell under its cloud. Until the new Act was assented to on 17 June 1999, the official name of the Canadian *Extradition Act* was "*An Act respecting the extradition of fugitive criminals.*" The American Code pertaining to extradition still uses the term "fugitive," and this continues to influence the entire process. *Fugitive* is a label that has stuck, a label that it will take more than a change in legislation to unglue. It will be used for a long time to come to refer to persons accused of crimes who may not even have been aware that they were charged when they left (read "*fled*") the country where the offence was alleged to have occurred.

The primary definition of the adjectival form of "fugitive" is "running away or intending flight."⁷ Hence, the very title of the former Act presumed guilt, instability and flight risk. Under s. 2 of that Act,

"fugitive" or "fugitive criminal" means a person being or suspected of being in Canada, who is accused or convicted of an extradition crime committed within the jurisdiction of a foreign state.

⁶*U.S.A. v. Stewart* (1997), 120 C.C.C. (3d) 78 (B.C.C.A.)

⁷*Miriam Webster's Collegiate Dictionary*, 10th ed., s.v. "fugitive."

A fugitive is "a person who flees or tries to escape." *Black's Law Dictionary*, 5th edition is even more explicit:

Fugitive. One who flees; used in criminal law with the implication of a flight, evasion, or escape from arrest, prosecution, or imprisonment. See **Extradition**....

Whether used as a noun or as an adjective, the word "fugitive" as it appeared in the old Act and in the current U.S. Code takes on the appearance of permanency for individuals so branded, a phenomenon that Seaton J.A., speaking for the B.C. Court of Appeal, noted with concern in *R. v. Reutcke*⁸ when he remarked, "The Act seems to make every one who has ever been convicted [a] fugitive for life. This cannot be." Perhaps bowing to public pressure, the drafters of the new *Extradition Act* dropped all references to the concept of "fugitive," although the full implications of its removal, and the attendant effect of removing the *appearance* of prejudice, may take a long time to impact on the attitudes of a sometimes hidebound judiciary.

The person sought by the "extradition partner" may indeed be a literal "fugitive" in the sense that he has fled from a system of justice in another country, having escaped lawful custody before or after trial,⁹ or having crossed the border while on some form of judicial interim release, whether parole,¹⁰ furlough¹¹ or release on bail.¹² On the other

⁸ (1984), 11 C.C.C. (3d) 386 (B.C.C.A.) Seaton J.A. added that this interpretation was unreasonable: when applied to persons already convicted of a crime, the term can reasonably only apply to those who have yet to complete their sentences.

⁹ *Kindler v. Canada (Minister of Justice)* (1991), 67 C.C.C. (3d) 1, [1991] 2 S.C.R. 779; *Gwynne v. Canada (Minister of Justice)* (1998), 103 B.C.A.C. 1 (B.C.C.A.).

¹⁰ *Gervasoni v. Canada (Minister of Justice)* (1996), 72 B.C.A.C. 141 (B.C.C.A.), leave to appeal refused, [1996] 2 S.C.R. vii.

¹¹ *U.S.A. v. Witney* (23 March 1995) unpublished Minister's Reasons supplied by Witney's counsel, Robert Moore-Stewart.

¹² *Ross v. U.S.A.* (1994), 93 C.C.C. (3d) 500 (B.C.C.A.).

hand, the person may simply have moved to a new locale before an alleged crime came to light.¹³ Sometimes the move to another country in itself may have seemed suspicious enough to authorities to trigger allegations of wrongdoing that are subsequently dealt with by extradition.¹⁴ Under the new Act, the current extradition process is still ultimately concerned with “committal” (in lay terms “consignment to a penal or mental institution”), and “surrender” (“to yield to the power, control, or possession of another upon compulsion or demand”), as in s. 29(1) of the Act: “A judge shall order the committal of the person into custody to await surrender....” Nowhere in this unforgiving language is there a hint of the presumption of innocence.

2. The Presumption of Fairness

In general, the issue of protection of the legal rights of fugitives in a requesting country is deemed to have been thoroughly canvassed by each nation in the course of treaty negotiations. Thus the tendency has been for extradition judges not to concern themselves with the laws or procedures of receiving countries. To do so would be impolite, if not impolitic. An analogy not exactly parallel but invited by the legislation¹⁵ is that of a Provincial Court judge in a preliminary inquiry questioning whether the accused will eventually receive a fair trial by judge and jury upon reaching the superior court. For a lower court judge publicly to question the fairness of a higher court would

¹³ *U.S.A. v. Stewart*, *supra*, note 6 (charges brought against Stewart years after he moved to Canada with his family).

¹⁴ *Ibid.*; *U.S.A. v. Wagner*, *supra*, note 2, at 68-69 (Wagner was in Canada when a second set of charges arose based on weak photo lineup identification. Wagner was included in the lineup only because of police suspicion arising from his evading arrest on earlier charges); *U.S.A. v. Schrang* (1997), 87 B.C.A.C. 241, 114 C.C.C. (3d) 553 (C.A.) (Schrang’s move to Canada seemed suspicious to U.S. authorities, who had been investigating his company for allegedly using substandard materials in U.S. Army apparel designed to protect troops against chemical warfare.)

¹⁵ *Extradition Act*, s. 24(2).

be unthinkable.¹⁶ Similarly, extradition judges, whose task in Canada is defined by the criminal preliminary inquiry process, are compelled by the legislation to accept the presumption of a fair hearing in the receiving country as a matter of faith, for as LaForest stated in *Schmidt v. The Queen*, that country “must be trusted with the trial of offences.”¹⁷ However, even in jurisdictions where the principles of democracy, presumption of innocence and the rule of law are recognized, it is all too often a misplaced faith.

Especially is this so where there may be a racial or political element to the extradition that may escape the sometimes blinkered Canadian courts or the Executive. This was the situation in the Robbins case, where, following his surrender to the British consul at the request of President Adams, Robbins was taken to Jamaica, and without anything approximating a trial (he was presumed guilty by the very fact of his extradition from America), was hanged in chains and gibbeted.¹⁸ It was the situation in the Nelson Hackett case, where a black slave was returned to slavery in Arkansas.¹⁹ It was the situation in the case of John Anderson, where the entire South was galvanized by the knowledge that the runaway slave had escaped to Canada. In 1856, an attorney from New Orleans proclaimed,

“We shall have Anderson and make an example of him.... We are going to have Anderson by hook or by crook; we will have him by fair means or foul; the South is determined to have that man.”²⁰

Feelings ran so high that Laura Haviland, who had assisted Anderson after his arrival in

¹⁶ In what amounted to a tempest in a teapot, McClung J. of the Alberta Court of Queen’s Bench was moved to apologize after being widely criticized in the press in March, 1999 for openly criticizing a judgment of L’Heureux-Dube J. of the Supreme Court of Canada in a letter to the editor of the *National Post*.

¹⁷ (1987), 33 C.C.C. (3d) 193 (S.C.C.), at 209.

¹⁸ See Chapter 3, *supra*, *passim*.

¹⁹ See Chapter 5, *supra*.

²⁰ Patrick Brode, *The Odyssey of John Anderson* (Toronto: The Osgoode Society, 1989), p. 14.

Canada, wrote to Lord Elgin suggesting a trial before a British court rather than giving Anderson up to the Americans, where the *Fugitive Slave Act* (1850) was still in force to ensure the return of runaway slaves to their owners.²¹ Five years later, in *Re Anderson*,²² the Upper Canada Queen's Bench would have sent Anderson back to Missouri to face almost certain death had public pressure, the Privy Council, John A. Macdonald and a legal technicality not intervened.²³

These days, prejudice in extradition proceedings is more likely to be directed against members of First Nations, whether the motives are political or racial. In 1976, it was the situation faced by American Indian Movement leader Leonard Peltier when the F.B.I., by their own eventual admission, misrepresented the facts and the evidence to Department of Justice officials in Canada in order to effect extradition, thereby obtaining control of the man they alleged had killed two of their own in a shootout. He has been in jail ever since.²⁴ It was the situation faced by David Wagner, a Canadian and member of the Tseycum band of First Nations whom the police in Redmond, Washington, despised so much that they planted evidence in a bid to ensure his conviction. Despite clear alibi evidence, he was sent back to spend the next four years in jail before being able to clear his name.²⁵ The patent injustice perpetrated by the Minister and the courts in *Wagner* reeks as much as the *Robbins* case two centuries ago. Yet the new legislation does absolutely nothing to ameliorate this type of injustice. In fact it perpetuates it.

²¹ Laura S. Haviland, *A Woman's Life-work: Labours and Experiences* (Chicago, 1887), cited in Brode, *supra*, note 20, p. 14.

²² (1860), 20 U.C.Q.B. 124 (Q.B.), at 124.

²³ *Re Anderson* (1861), 11 U.C.C.P. 9.

²⁴ *U.S.A. and Peltier, Re* (1976), 32 C.C.C. (2d) 121 (B.C.S.C.).

²⁵ *Supra*, note 2.

These cases raise still more questions. To what extent does deception taint extradition proceedings? To what degree are the representations made by U.S. authorities likely to be governed by the misplaced notion that the end justifies the means? Is the low standard of proof required for surrender under the *Extradition Act* adequate, considering that the accused, as in the *Wagner* case, 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?

Recently, the Minister of Justice and the Supreme Court of Canada have been inclined to surrender persons facing the death penalty for alleged murder, as well as persons charged with narcotics offences in the U.S., even when they are Canadian citizens, and even when they have expressed a willingness to plead guilty to equivalent charges in Canada in order to stay in their homeland. Some appeal court judges have tried to resist this tendency, almost in vain, as in *Ross v. U.S.A.* and *U.S.A. v. Burns*.²⁶

3. Increased Ministerial Discretion

Even in cases not involving the death penalty, successive Ministers of Justice have shifted subtly to a harder line in their approach to the subject of extradition. In 1995 in *U.S.A. v. Witney*,²⁷ for example, the then Minister of Justice, Allan Rock, received some 60 letters from the community expressing support for the convicted robber, who had escaped from lawful custody in the U.S. years earlier. These, and the success of the

²⁶ *U.S.A. v. Burns* (1997), 116 C.C.C. (3d) 524, 8 C.R. (5th) 393, 152 W.A.C. 59, 45 C.R.R. (2d) 30 (B.C.C.A.); *Ross v. U.S.A.*, *supra*, note 12.

²⁷ Unpublished reasons of the Minister of Justice, Allan Rock, 23 March 1995 supplied by Robert Moore-Stewart, counsel for Mr. Witney. See note 11, *supra*.

convicted robber in business after his escape from jail were sufficient to raise a humanitarian concern, given Mr. Witney's longstanding reputation as a restaurateur in Victoria. Three years later, in *U.S.A. v. Stewart*,²⁸ Rock's successor, Anne McLellan, received 300 letters from the community expressing similar sentiments with respect to a building inspector in Victoria, a man without a criminal record who faced a maximum sentence of 30 years in prison and a million dollar fine for alleged bank fraud in the amount of \$3,600, a charge brought against Stewart by two persons already convicted of the crime. The new Minister of Justice was unmoved by the suggestion of Hall J.A. that she should reconsider, given that the substance of the extradition – ten counts of extortion – had been squelched by the B.C. Court of Appeal. She was unmoved by entreaties from her own constituents in Alberta, some of whom were related to Stewart by marriage. She was unmoved by wave after wave of entreaties from a broad cross-section of the professional community in Victoria – *his* community – not to send Stewart back, since even if he were eventually to be acquitted he would face at least a year of incarceration as he awaited trial. The bank that was the complainant, in what now amounted to one count of fraud and one count of conspiracy to commit fraud in the total specified amount of \$3,600, had already received by default-order in excess of US\$53,000 of the Stewarts' life savings and pension funds that were held in Mr. Stewart's name, rendering him unable to afford an American lawyer. Yet still the Minister was unmoved.

The new legislation does nothing to remedy the *prima facie* injustice of sending an individual to a foreign jurisdiction where his freedom is bound to be jeopardized by the fact that he is regarded from the outset as a "fugitive" who is presumed to have evaded or

²⁸ *Supra*, note 6.

at least avoided prosecution in the first place. Typically, all resources of the fugitive will have been exhausted by the extradition process in Canada, leaving no resources for defence of the allegations in the receiving jurisdiction, and leaving no means of raising bail.

4. Redeeming the Role of the Judiciary

Owing to an apparent misreading of the judgment of Ritchie J. in *U.S.A. and Sheppard* by Anne LaForest in *LaForest's Extradition to and from Canada* quoted with approval in successive cases in the B.C. Court of Appeal, the standard of evidence and proof for extradition hearings has been reduced from "sufficient" evidence, as was intended by Ritchie J., to "any" admissible evidence. This has resulted in unfairness to fugitives since the judicial prong of the two-prong extradition process, the extradition hearing, 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.

Typically, *Charter* rights are not applied to extradition hearings except with respect to matters that transpire in Canada. Thus the fugitive faces great jeopardy without any of the significant legal protections that he would have were he an ordinary offender in Canada. Although the Minister of Justice may seek assurances or conditions from the receiving state with respect to the ways in which an accused will be received and treated, in practice this rarely happens. The Minister typically has resisted any pressure to exercise her discretion in favour of a fugitive, even in cases where the death penalty is involved. Rather than giving a liberal, broad and expansive interpretation to the *Charter*, courts

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.²⁹

It can be seen from the analysis of the new *Extradition Act* in the previous chapters that the Minister has more discretion than ever in the regulation of extradition matters, and the courts have less – so little, in fact, that their function in the process is no longer truly judicial but merely administrative. To use an analogy from a different Estate, in the extradition process the Courts are now reduced to proof readers, rather than editors. All of the editorial decisions are made at the top, by the Minister of Justice, who is virtually unimpeachable.

Most of the decisions of the Supreme Court of Canada in the past decade have fueled the notion that the Executive has the final say over the ways in which Canada meets her “international obligations.” The Minister of Justice and justices of the courts alike have lost sight of a possibly even higher duty – the duty to weigh and assess the evidence at every level, and to be just and fair to individuals who are charged with offences in other lands or who may face punishment, as in the *Gwynne* case,³⁰ far more heinous than the initial crime.

There is a need in extradition proceedings to reassert the fundamental doctrine of presumption of innocence. This means that the courts must be protective of their jurisdiction over *Charter* rights to the bitter end, until it is clear that they have heard the

²⁹ For a parallel argument regarding the U.S. extradition process, see Lis Wiehl, “Extradition Law at the Crossroads: the Trend toward Extending Greater Constitutional Procedural Protections to Fugitives Fighting Extradition from the United States” (1998) 19 Michigan J. of Int. L. (No. 3) 729.

³⁰ *U.S.A. v. Gwynne* (1998), 103 B.C.A.C. 1, 169 W.A.C. 1 (B.C.C.A.), leave to appeal refused 227 N.R. 298.

details not just of the requesting state's requisition for surrender, but of the individual's defences. This is particularly true in cases where individuals have clear alibis but – ridiculous as it may sound – the courts are prevented by policy from considering any evidence of that sort. Defence evidence, including alibi evidence, evidence that the alleged offence is of a political nature – in fact all of the stated categories of sections 44-47 of the Act – are said to be the domain of the Minister.

It is mandatory under the Act that the Minister *not* surrender individuals if she is “*satisfied*”: satisfied that the surrender would be unjust or oppressive,³¹ satisfied that prosecution in the requesting nation is barred by virtue of limitation or proscription under the foreign law,³² satisfied that the person is sought for a non-criminal military or political offence,³³ satisfied that the person is being prosecuted, punished, or prejudiced by virtue of race, religion, nationality, ethnic origin, language, colour, political opinion, sex, sexual orientation, age, mental or physical disability, or status.³⁴ Under the new scheme established by the Act, all these momentous mandatory decisions are made by the Minister *after* the courts have held their “objective” hearing into whether there is any evidence that would support a trial of the matter had the events occurred in Canada. The extradition hearing is essentially an administrative step which allows the Minister to say that the judiciary has “ruled” on the issue of legality of the extradition. Thereafter, the Minister has a free reign to determine if he or she is “satisfied.”

³¹ *Extradition Act* (1999), s. 44(1)(a).

³² *Ibid.*, s. 46(1)(a).

³³ *Ibid.*, s. 46(1)(b),(c).

³⁴ *Ibid.*, s. 44(1)(b).

The trouble is, the Minister is rarely if ever satisfied. Nor does any satisfactory mechanism exist for satisfying her. Alan Rock paid absolutely no attention to the representations made on behalf of Wagner by his mother and sister, for example. Had there been a mechanism in place for genuinely hearing such concerns, it would have been open to the Minister to conclude that the planting of evidence by police officers in Washington was an example not only of abuse of process, but also of blatant racial prejudice against Wagner. If the Minister cannot draw this conclusion from the facts presented, how is she ever going to exercise her considerable discretionary powers in favour of a person wrongfully accused? And where it is demonstrated that the Minister has indeed failed to exercise her discretion, to the long-term detriment of an accused, should there not be substantial compensation of some sort, especially for a gainfully employed Canadian citizen removed from his homeland to be incarcerated for years in an alien land where he has been branded “fugitive”? Would that not help keep the Minister responsible in the proper and thorough exercise of her “discretion”?

A similar “discretionary” policy theoretically applies to many more categories than the usual human rights violations now listed as part of the Act. The Minister, not the courts, has the discretion to refuse to make a surrender order if she is “satisfied” that the person was a minor;³⁵ faces the death penalty upon being returned to the requesting state;³⁶ has already been acquitted of or convicted for the same offence; was convicted *in absentia* of the offence for which he is sought; is being prosecuted by Canada on the same facts; or where it is discovered that the offence did not take place in the jurisdiction of the

³⁵ *Ibid.*, s. 47(c).

³⁶ *Ibid.*, s. 44(2).

requesting nation.³⁷ These issues can more properly be determined by judicial inquiry rather than by mere political reflection.

Since the mechanism to conduct a judicial inquiry already exists in the form of an extradition hearing, why not use the extradition hearing for genuine exercise of the time-honoured principle of *audi alteram partem*, which implies hearing *both* sides? Persons facing extradition not only need to be aware of the case being made against them, but must be “given an opportunity to answer it.”³⁸ That implies that the courts hearing the answer must be able to act upon the totality of the evidence, not just the evidence led to support the extradition. As Rand J. stated in the groundbreaking *L’Alliance des Professeurs* case,³⁹

Audi alteram partem is a pervading principle of our law, and is peculiarly applicable to the interpretation of statutes which delegate judicial action in any form to inferior tribunals: in making decisions of a judicial nature they must hear both sides, and there is nothing in the statute here qualifying the application of that principle.

Where the principles of administration of justice are concerned, what applies to “inferior tribunals” should have even greater sway in the “superior courts” they are said to mimic.

However, under the new statute, all that has to be determined by the Minister is whether the Minister is *satisfied* that the representations made along the lines of the statutory exceptions are true. How is this to be done? Not by examining the individual in an eyeball-to-eyeball confrontation (as is quite effectively accomplished in, say,

³⁷ *Ibid.*, s. 47.

³⁸ *Canadian Cable Television Assn. V. American College Sports Collective of Canada Inc.* (1991), 4 Admin. L.R. (2d) 61, [1991] 3 F.C. 626 (F.C.A.), at 72, per MacGuigan J.A. See also *Kane v. University of British Columbia*, [1980] 1 S.C.R. 1105; *Downing v. Graydon* (1978), 9 C.C.E.L. 260 (Ont. C.A.), at 264, per Blair J.A.; *Ontario (A.G.) v. Grady* (1988), 34 C.R.R. 289 (Ont. H.C.), at 317, per Callaghan, A.C.J.

³⁹ [1953] 2 S.C.R. 140.

Immigration and Refugee Board hearings and by similar hearing in other quasi-judicial tribunals), but simply on the basis of "submissions" made to the Minister on paper by lawyers, along with supporting documentation, if any. It is literally a "paper" decision. The Minister never sees, hears or in any way engages the individual in dialogue, never truly *listens*. Nor is she or her staff properly equipped to act judicially, as is required in a situation where evidence must be weighed to determine if the individual is telling the truth. The Minister is incapable of *de facto* hearing the other side.

Unfortunately, even were the Minister of Justice equipped to hear the evidence of both sides, they would not be able to assess it objectively, for her staff is not trained for that task. As can be demonstrated from other similar tasks assigned to Justice Department staff lawyers, such as assessments for ministerial review under s. 690, which may take from 3-5 years to process, they serve primarily as glorified prosecutors, and all too often are employed as, or see their primary role as, tacticians in the art of obfuscation, without any proclivity to hear or assess the evidence of "the other side."⁴⁰

The Judiciary, not the Executive, has the skill and knowledge and experience to make any kind of determination that entails the weighing of evidence. Such a process should not be made by a paper decision of the Minister and her staff, as is done now, because genuine justice under those circumstances is impossible to achieve in the best of all possible worlds. Rather, the assessment of defence evidence should be a significant part of *the extradition hearing*. It is necessary to unfetter the discretion of the courts and

⁴⁰ See Michael Harris, *The Judas Kiss: The Undercover Life of Patrick Kelly* (Toronto: McClelland and Stewart, 1995), and his *Justice Denied: The Law Versus Donald Marshall* (Toronto: Macmillan, 1986). See also Joyce Milgaard, *A Mother's Story: The Fight to Free My Son David* (Toronto: Doubleday, 1999); and Carl Karp and Cecil Rosner, *When Justice Fails: The David Milgaard Story* (Toronto: McClelland and Stewart, 1998).

allow them to listen to the evidence of alibi and excuse and the various statutory defences that, by virtue of the existence of the statute, have become questions of law.

There is a remarkable irony in the assertion of LaForest J. in *U.S.A. v. Schmidt* that countries seeking surrender under a treaty “must be trusted with the trial of offences.” This statement implies that we must trust foreign judges. But under the scheme imposed by the *Extradition Act*, we don’t even trust our own.

If justice is to be done and is to be seen to be done in the area of extradition, then the courts will begin to unfetter their own discretion in the years to come. They will reverse the effects of LaForest J.’s reliance upon the bona fides of foreign criminal processes where extradition is concerned. With the help of the Legislature, they will rein in the Minister, and allow the individual accused of a foreign crime some genuine latitude to raise a defence, especially obvious ones like alibi or the categories contained in the Treaty and the Act. They will ensure that “international obligations” do not sit so heavily on the institutionalized conscience of the Government of Canada that the rights of the individual are ignored.

CANADA-USA EXTRADITION: A SELECT BIBLIOGRAPHY**A. Articles**

- Baribeau, Louis, "Le Gouverneur General Doit Respecter les Regles de l'Equite Procedurale" (1997) 5 Presse Jur. (No. 15) 10.
- Bedrick, Benjamin N., "United States Extradition Process: Changes in Law to Address Constitutional Infirmary" (1997) 15 Dickinson J. of Int. L. 385.
- Blanchflower, Michael C., "Case Commentary" (1989) 31 Crim. L.Q. 197.
- _____, "Examination of the Law of the Requesting State in Extradition Proceedings," (1992) 34 Crim. L.Q. 277.
- _____, "Interpretation and Application of Extradition Crime in the Extradition Act" (1992) 34 Crim. L.Q. 158.
- _____, "Misidentification of Extradition Law: *Pacificador v. Philippines (Republic of)*; *U.S.A. v. Wong*" (1996) 38 Crim L. Q. 447.
- Brown, Kellee and Sophia Muirhead, "Extradition: Divergent Trends in International Cooperation" (1992) 33 Harvard Int. L.J. 223.
- Castel, J.G. and Sharon A. Williams, "The Extradition of Canadian Citizens and Sections 1 and 6(1) of the *Canadian Charter of Rights and Freedoms*" (1987) 25 Can. Y.B. Int. L. 263.
- Costi, Alberto, "Le Refus d'Extrader dans les Affaires 'Zein' et 'Cotroni': Decision Deraisonnable ou Violation des Obligations Internationales du Canada?" (1986) 20 R.J.T. 485.
- Curley, Matthew M., "Untying a Judicial Knot: Examining the Constitutional Infirmitities of Extrajudicial Service and Executive Review in U.S. Extradition Procedure" (1996) 49 Vanderbilt L.Rev. 1239.
- Daisley, Brad, "Accused Killers Granted Reprieve from Extradition" (1997) 17 Lawyers Wkly. (No. 12) 24.
- Dugard, John and Christine Van den Wyngaert, "Reconciling Extradition with Human Rights" (1998) 92 American J. of Int. L. 187.
- Gibson, Dale and Lee Gibson, "Railroading the Train Robbers: Extradition in the Shadow of Annexation" (1990) 30 Man L.J. 69.

- Gilbert, Geoff, "Extradition" (1993) 42 Int. and Comparative L. Q. 442.
- Manson, Allan, "*Kindler* and the Courage to Deal with American Convictions" (1992) 8 C.R. (4th) 68.
- Marocco, Frank N., "To Extradite or Deport?: That Is the Question." (1992) 4 Imm. & Cit. (No. 3) 4.
- McCann, James, "*United States v. Jamieson*: the Role of the Canadian Charter in Canadian Extradition Law" (1997) 30 Cornell Int. L. J. (No. 1) 139.
- McHam, Monica L., "All's Well that Ends Well: a Pragmatic Look at International Criminal Extradition" (1998) 20 Houston J. of Int. L. (No. 2) 419.
- Michell, Paul, "Domestic Rights and International Responsibilities: Extradition Under the Canadian Charter" (1998) 23 Yale J. Int'l L. 141.
- Morrow, Jeff, "Ng's Outraged Counsel" (1992) 16 Can. Lawyer (No. 1) 38.
- Nadeau, Frederic, "Dans une Affaire de Trafic Destupezants: Les Methodes Policieres Americains Sont Acceptables" (1997) 5 Press Jur. (No. 13) 2.
- O'Reilly, James W., "Case Commentary" (1992) 37 McGill L.J. 873.
- Pak, John, "Canadian Extradition and the Death Penalty: Seeking a Constitutional Assurance of Life" (1993) 26 Cornell Int. L. J. (No. 1) 239.
- Patel, Rita, "One More Effect of NAFTA – a Multilateral Extradition Treaty?" (1995) 14 Dickinson J. of Int. L. (No. 1) 153.
- Phillips, R. Stuart, "The Political Offence Exception and Terrorism: Its Place in the Current Extradition Scheme and Proposals for Its Future" (1997) 15 Dickinson J. of Int. L. (No. 2) 337.
- Robbins, Carol J., "Extradition" in *Canadian Enclopedic Digest* (West. 3d) v. 14, Title 62 (Scarborough: Carswell, 1987) 62:1.
- Schabas, William A., "*Kindler* and *Ng*: Our Supreme Magistrates Take a Frightening Step into the Court of Public Opinion" (1991) 51 R. du. B. 673.
- Spencer, Amanda, "Fugitive Rights: the Role of the Charter in Extradition Cases" (1993) 51 U.T. Fac. L. Rev. 54.
- Stonehouse, Robert C., "Extradition" in *Canadian Enclopedic Digest* (Ont. 3d) v. 12, Title 61 (Scarborough: Carswell 1987) 61-1.

UN Human Rights Committee, "Extradition to the United States Even at Risk of Death Penalty and Death Row Phenomenon Not Considered to Violate the CCPR/*Kindler v. Canada*" (1993) 14 Human Rights L. J. (No. 9-10) 307.

Weaver, John C., "Black Man, White Justice: the Extradition of Matthew Bullock, an African-American Residing in Ontario, 1922" (1996) 34 Osgoode Hall L.J. 627.

Wiehl, Lis, "Extradition Law at the Crossroads: the Trend toward Extending Greater Constitutional Procedural Protections to Fugitives Fighting Extradition from the United States" (1998) 19 Michigan J. of Int. L. (No. 3) 729.

Williams, Sharon A., "Extradition from Canada since the Charter of Rights" in Jamie Cameron, ed., *The Charter's Impact on the Criminal Justice System* (Scarborough, Ont.: Carswell, 1996) 387.

_____, "Extradition to a State that Imposes the Death Penalty" (1990) 28 Can. Y.B. Int. L. 117.

Wing, Michael R., "Extradition Treaties: the United States Supreme Court Approves Extraterritorial Abduction of Foreign Criminals" (1993) Georgia J. of Int. and Comparative L.

B. Books

Abbell, Michael, *International Extradition* (volumes 4 and 5 of *International Judicial Assistance*) ILI (ISBN 0-935328-79-3)

Bassiouni, M. Cherif, *International Extradition: United States Law and Practice* 3rd ed. (Dobbs Ferry, NY: Oceana Publications, 1996).

_____, and Edward M. Wise, *Aut Dedere aut Judicare: the Duty to Extradite or Prosecute in International Law* (Norwell: Kluwer Academic Publishers, 1995).

Benjamin, L.N., *The St. Albans Raid: Investigation into the Charges against Lieut. Bennett H. Young and Command, for Their Acts at St. Albans, Vt., on the 19th October, 1864* (Boston: A. Williams, 1865).

Benson, Larry D., *International Extradition: a Bibliography* (Public Administration Series: Bibliography) (Monticello: Vance Bibliographies, 1990).

Beyerly, Elizabeth, *Public International Law: a Guide to Information Sources* (London: Mansell, 1991).

Biron, Henry Chartres and Kenneth E. Chalmers, *The Law and Practice of Extradition* (Littleton, Colo.: Rothman & Co., 1981).

Booth, V. E. Hartley, *British Extradition Law and Procedure* (Germantown, Md.: Sijthoff & Noordhoff, 1981).

British Institute of International and Comparative Law, *Survey of Extradition and Fugitive Offenders Legislation in Commonwealth Jurisdictions* (London: Commonwealth Secretariat, 1977).

Brode, Patrick and the Osgoode Society, *The Odyssey of John Anderson* (Toronto: University of Toronto Press, 1989).

Canada Department of Justice, *Correspondence Respecting the Extradition of M. Lamirande from Canada* (London: Harrison, 1867).

Canada Department of Justice, *Regulations and Despatches Respecting Extradition Proceedings* (Ottawa: J. de Labroquerie Tache, King's Printer, 1917).

Chaussy et al., *Extradition for Drug-Related Offences* (New York: U.N., 1986).

Church, Wm. S., *A Treatise on the Writ of Habeas Corpus* (Holmes Beach: Gaunt Inc., 1997).

Collins, David, *"The Chesapeake": the Case of David Collins, et al.* (Saint John, N.B.: J.&A. Macmillan, 1864).

Ferley, Joyce M., *Law and Procedure of Extradition* (Crayford, Kent, U.K.: Shaw & Sons, 1994).

Devlin, Bernard and Samuel James Watson, *St. Albans Raid* (Montreal: Owler & Stevenson, 1865).

Gaynor, John F., *In the Matter of the Application of the United States of America for the Extradition of John F. Gaynor and Benjamin D. Greene, Fugitives from Justice* (Montreal, P.Q.: Extradition Commissioner, 1905).

Gilbert, Geoff, *Aspects of Extradition Law* (volume 17 of *International Studies in Human Rights*) (Norwell: Kluwer Academic Publishers, 1991).

_____, *Transnational Fugitive Offenders in International Law: Extradition and Other Mechanisms* (volume 55 of *International Studies in Human Rights*) (Norwell: Kluwer Academic Publishers, 1998).

Jones, Alun, *Jones on Extradition* (London: Sweet & Maxwell, 1995).

Kavass, I.I. and A. Sprudz, *Extradition Laws and Treaties* (Buffalo, N.Y.: Hein, 1979).

La Forest, Anne Warner and Gerard V. LaForest, *La Forest's Extradition to and from Canada* (Aurora, Ont.: Canada Law Book, 1991).

Moore, John Bassett, *A Treatise on Extradition and Interstate Rendition* (Littleton: Rothman and Co., 1996).

Sen, B., *A Diplomat's Handbook of International Law and Practice* 3rd rev. ed. (Boston: Martinus Nijhoff Publishers, 1988).

Shearer, I. A., *Extradition in International Law* (Dobbs Ferry: Oceana Inc., 1971).

Spear, Samuel, *The Law of Extradition: International and Inter-State* (Littleton: Rothman & Co., 1983).

Stanbrook, Ivor and Clive Stanbrook, *The Law and Practice of Extradition* (Chichester: Rose, 1980).

Teatero, William, *John Anderson, Fugitive Slave* (Kingston, Ont.: Treasure Island Books, 1986).

United Nations Organization, *Manual on the Model Treaty on Extradition* (International Review of Criminal Policy No. 45) (Vienna: Centre for Social Development, 1995).

United States Congress Senate Committee on Foreign Relations, *Consular Conventions, Extradition Treaties, and Treaties Relating to Mutual Legal Assistance in Criminal Matters (MLATS)* (Committee on Foreign Relations, U.S. Senate, 102nd Congress, 2nd Session, 8 April 1992) (Washington: U.S. G.P.O., 1992).

United States Department of Justice, *The James Earl Ray Extradition File: Papers Submitted to Great Britain for the Extradition of James Earl Ray to Face Trial for the Murder of Martin Luther King, Jr.* (New York: Lemma Corp., 1971).

Van den Wijngaert, Christine, *The Political Exception to Extradition: the Delicate problem of Balancing the Rights of the Individual and the International Public Order* (Norwella: Kluwer Academic Publishers, 1980).

Vredevelt, et al., *International Extradition* (Washington: Int'l Law Inst. 1995).

Yarnold, Barbara M., *International Fugitives: a New Role for the International Court of Justice* (Westport: Greenwood Publishing Group, 1991).