

Special Issue: The Case for Reform of Canada's Extradition System

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Introduction: The Case for Reform of Canada's Extradition System

By: Alex Neve and Sharry Aiken

Extradition is a critically important legal process that helps ensure that criminals, including individuals accused of responsibility for grave human rights violations, are not able to evade justice by escaping to another country. However, with a view to processing extradition requests quickly and efficiently without mounting a full-fledged criminal trial, the potential for unfair proceedings that deprive individuals of essential due process and other legal protections, leading to wrongful or unsound decisions to extradite, is very real.

In recent years, there has undoubtedly been more political debate and media coverage of Canada's extradition system than there has been in a very long time. That is largely due to two high profile cases that have garnered considerable public attention.

Over the course of 2018-2022, court hearings associated with the US extradition request of Chinese national Meng Wanzhou dominated national headlines. The Chinese government politicized the case by arbitrarily arresting two Canadians in China, Michael Kovrig and Michael Spavor, detaining them in harsh conditions in contravention of international human rights norms. The request for Meng Wanzhou's extradition was ultimately abandoned when the underlying charges against her were dismissed in the United States.

However, still ongoing, since 2008, is the endless Kafkaesque case of Canadian national Hassan Diab, who is sought by France in relation to a 1980 terrorist bombing in Paris. Dr. Diab was extradited in 2014 after lengthy legal proceedings, but was released from prison in Paris and allowed to returned to Canada in early 2018 when the case against him was initially dismissed by French judges due to a lack of evidence. That has not marked the end for Dr. Diab. as he now faces the highly exceptional possibility of being extradited a second time.

These two cases have framed many of the inadequacies and peculiarities of the *Extradition Act*. And while Meng Wanzhou and Hassan Diab's cases have been very much in the public eye, numerous other cases have also illustrated the degree to which, in the view of many experts, the current approach to extradition in Canada is significantly weighted in favour of the extraditing state, with

insufficient due process safeguards in place to uphold the rights of the person being sought.

Responding to that concern, a 2021 report submitted to the government, Changing Canada's Extradition Laws: The Halifax Colloquium's Proposals for Law Reform, offers a blueprint for extradition reform. The Halifax Proposals stemmed from a consultation with academics, practitioners and civil society advocates spearheaded by Dalhousie University law professor Robert Currie. The first article in this special issue, authored by Professor Currie, provides an overview of the reform proposal.

These concerns have also been closely examined in a study conducted in 2023 by the House of Commons Standing Committee on Justice and Human Rights, Reforming Canada's Extradition System, which has called for substantial reforms to the *Extradition Act* and the extradition process including, notably, that:

> "… the Government of Canada undertake comprehensive reform of the Extradition Act as soon as possible and consider making changes to the extradition process not requiring legislation, in the interim, in order to avoid further injustices in extradition proceedings."

The government's response, tabled with the Standing Committee by Minister of Justice and Attorney General Arif Virani in October 2023, "recognizes the importance of ongoing review of the Canadian extradition system" but without any commitment or timeline to conduct the "comprehensive reform" the Committee had recommended.

And as this special issue was being finalized an Ontario Superior Court judgement was handed down, staying an extradition to the United States on grounds of abuse of process. The ruling clearly illustrated the crucial issues related to justice and the rule of law that are at stake in extradition cases. It was likely the first time an extradition from Canada has been stayed on abuse of process grounds since 2012.

This special issue of the PKI Global Justice Journal looks closely at a range of issues related to this ongoing debate about the need for reform of Canada's extradition system. The time is clearly opportune for doing so.

Professor Robert Currie, with the Schulich School of Law at Dalhousie University, opens this special issue, with an overview of the concerns about fairness and human rights protection that have arisen about Canada's extradition system, particularly following a major overhaul of the *Extradition Act* in 1999. He lays out key areas in need of reform and offers recommendations that have been developed through a consultative colloquium he has conducted with key experts and stakeholders.

High-Profile Ottawa-based criminal lawyer Don Bayne has tirelessly represented Hassan Diab throughout his lengthy extradition ordeal, which began in 2008 and continues at the time of publication. Don sat down for an interview with the Global Justice Journal's' intern, Claire Millard. The edited version of that interview points to the many ways that the Diab case highlights weaknesses with Canada's current extradition law and many of the areas that require reform.

Professor Joanna Harrington, with the University of Alberta's Faculty of Law, draws on the Meng Wanzhou case to illustrate three areas of concern about Canada's extradition system. First, she notes that there is a considerable lack of public understanding of the extradition system and a deficit of publicly available data about extradition requests. Second, she explores concerns that the reputation of extradition and in particular its insufficient safeguards for fairness has become a substantial shortcoming. Finally, Professor Harrington explores the extent to which the case may represent "aggressive extension of U.S. extraterritorial criminal jurisdiction" and how that should be accommodated within Canada's extradition system.

Robert Frater, K.C, a retired Canadian Department of Justice lawyer who was lead counsel on behalf of the US government in the Meng Wanzhou case. His extensive experience, in that case and many others, offers a valuable perspective for examining the role of government lawyers in Canadian extradition cases, given the unique role they play of effectively representing foreign governments in proceedings which in many cases involve Canadian citizens. He does not believe that "the extradition system is badly broken and in need of serious overhaul" but notes that it "needs to be consistently and closely examined to see whether it responds adequately to evolving and emerging modern challenges."

Accomplished Canadian extradition lawyers Kevin Gray and Leo Adler take a close look at a contentious issue that frequently arises in extradition cases, namely the fact that federal government lawyers do not have a duty to fully disclose all evidence, including exculpatory evidence that may point to the innocence of the individual who is being sought for extradition. They highlight that this differs from the duty that prosecutors have in criminal trials in Canada to disclose all such evidence. They make the case for a strengthened approach to disclosure which more fully conforms to the Charter of Rights.

Dr. Gillian MacNeil, Assistant Professor with the Faculty of Law at the University of Manitoba, looks closely at the role and standing of extradition treaties within Canada's extradition system. She highlights that the existence of an extradition treaty with a country is often taken to mean that Canada has carefully reviewed and is satisfied with the criminal justice system in that country; but that reality very often does not back that up. She proposes a change of approach that would require Canadian government lawyers to provide evidence that the existence of the treaty reflects a satisfactory legal system that conforms to minimum standards of criminal justice.

Ottawa-based human rights advocate Matthew Behrens has been involved in providing support to a number of individuals facing extradition from Canada. In his contribution to the special issue, he draws on his extensive involvement in the MM case. MM faced extradition to the US state of Georgia on child abduction charges after she had fled to Canada with her three children to escape an abusive former spouse. While the extradition judge had quashed the extradition request, that was reversed on appeal, including at the Supreme Court of Canada. Essentially, MM was not permitted to raise the defence that her actions reflected the necessity of protecting her children. When it became clear, after years of legal challenges, that the extradition would proceed, MM tragically took her own life. The article

powerfully demonstrates the degree to which there has been an abject failure to bring ‘gender-based analysis plus’ to extradition law and practice.

Finally, Alberta-based lawyer Prabjot Singh raises concerns about the use of diplomatic assurances in extradition cases, pointing to cases involving Mexico and India in which assurances given against mistreatment in the requesting state proved to be inadequate. The article looks closely at several cases in which the Indian government has sought extradition of Sikh activists, arguing that the cases have been politically motivated and marked by irregularities and human rights concerns. Ultimately this contribution calls for a review of extradition relationships with countries with troubling human rights records, such as India, and underscores the need for wider reform of Canada’s extradition reform.

The need for significant reform of Canada’s extradition system is apparent, convincingly laid out by the expert colloquium convened by Professor Currie and reinforced by the House of Commons Standing Committee on Justice and Human Rights. Contributors to this special issue have made numerous thoughtful recommendations as to the necessary changes that would right the current imbalance between efficiency and fairness that has led to troubling and tragic cases such as Hassan Diab and MM.

Alex Neve and Sharry Aiken, *The Case for Reform of Canada’s Extradition System: a special issue of the PKI Global Justice Journal* (2024) 8 PKI Global Justice Journal 1.

Canadian Extradition Law: The Pressing Need for Reform

By: Robert J. Currie

ExtraditionExtradition—the formal legal surrender between states of individuals sought for criminal prosecution or to serve a sentence—is an essential tool in the worldwide fight against cross-border crime. In a time when the permeability of borders to criminal conduct has reached previously untold levels, the importance of effective international law enforcement cooperation has similarly intensified. Criminal investigation and enforcement powers can, for all practical purposes, only operate within national borders, but criminals themselves are not so constrained. Human trafficking, internet fraud, financial crime, wildlife trafficking—all are running rampant. All states, and their citizens, have a pressing interest in crime suppression, in which extradition plays a key role; in Canada we need only think of the cases of Luka Magnotta, Nicholas Ribic and Gerald Gallant to know that extradition is a process we need; and because criminals are so mobile, we need it to work well.

All of the above is true, but there is an important caveat. Extradition is a legal process, based on international law agreements between states, and executed under domestic laws that give effect to

those agreements. Legal machinery that is not just and fair in its operation undermines the rule of law, and while this is the case for criminal law generally, an unfair extradition can be particularly toxic. A person extradited from a state leaves behind any legal protections they might enjoy under that state's law and is essentially at the mercy of the foreign state where they now face trial. They may not know the legal culture or speak the language of the foreign state, and if incarcerated they will be separated from family and social settings, undermining hopes of rehabilitation. Some of this may be appropriate or at least tolerable in a given case, but it means that decisions about whether to extradite should not be undertaken in a casual or summary manner; they require careful consideration by way of a fair process.

In liberal democratic states, an extradition law that is just and fair is one where due consideration is given to the unique questions that arise: has the requesting state offered enough evidence to show that a criminal trial is warranted? Does the person sought have a reasonable ability to challenge extradition, and to do so before an impartial decision-maker? Can the requesting state be trusted to give the person sought a fair trial, and to adhere to acceptable standards regarding pre-trial detention, incarceration and parole? If there is concern on these latter points, will the requesting state promise to prevent problems, and can it be trusted to keep that promise? And in some cases, would justice be better served if the person sought was actually tried in the requested state?

The authors of the articles in this issue have varying perspectives, but all agree on an essential point: Canada's extradition laws and practices have significant problems that are producing unjust and wrongful extraditions, and must be reformed.

This problem is longstanding and well-known to those who follow the admittedly obscure world of extradition law and practice. As is often the case, when looking at extradition a page of history is worth a volume of logic. Canada has a long history of participating in extradition treaties, its very first one being the Jay Treaty, one of the first modern international law instruments regarding extradition in modern history. Historically Canada took a similar approach to many common law states in that it required a state requesting extradition to present evidence that was sufficient to make out a *prima facie* case that the alleged offence had been committed (basically the same test for committing a case for trial before a Canadian court of criminal jurisdiction). The evidence presented at the extradition hearing had to be admissible under Canadian evidence law, which *inter alia* treated hearsay quite restrictively. This sometimes presented functional difficulties, not least because civil law states were not always able to muster the required evidence due to different domestic approaches to evidence and criminal procedure. While scores of people were extradited to our most frequent extradition partner, the U.S., cases were sometimes complex and known to be time-consuming on occasion.

By the late 1990s an effort to streamline and modernize Canada's extradition laws and procedures had taken hold at Justice Canada, and a new version of the implementing legislation—the *Extradition Act*—was passed in 1999. Canada was an extradition laggard and not a good law enforcement partner, government officials explained to the House of Commons, and was holding up international criminal cooperation efforts through clunky and outdated laws. The new legislation promised a better

approach, one that would be more efficient and prevent Canada from the danger that it would become a haven for dangerous criminals. As Professor McMahon has concluded from a close examination of how the new *Act* was brought in, the government's rhetoric captured Parliament's imagination but was short on both supporting data and public consultation. Nonetheless, the new legislation came into effect and a new era was, indeed, brought in.

Warning signs came early. In a prescient article published in 2002, Professor Anne Warner La Forest argued compellingly that the new legislation was long on efficiency but short on protective guardrails for the person sought.[[1]] The main power to extradite was discretionary and in the hands of the Minister of Justice who, history would tell us, was typically keen to extradite. Under the new *Act*a "record of the case" (ROTP), a summary of the evidence available to the foreign prosecution, was all that was needed to ground extradition. The ROTP was presumed to be reliable, and Canada's own law of evidence applied only to evidence gathered in Canada. The role of the only true guardian of the *Charter* in the process, the extradition judge, was reduced to that of a rubber stamp; as Professor La Forest memorably remarked, "other than as a matter of form, it is difficult to understand why the judicial role has been retained in the new *Act*, as the extradition judge has little, if anything, to do."

By 2006 the Supreme Court of Canada expressed its own disquiet about the constitutionality of the *Act*, due to the very real prospect that people could be extradited despite significant flaws in the requesting state's evidence—which, again, was presumed to be reliable. In *Ferras* the Court attempted to patch the hole by declaring that an extradition based on a flawed case could breach s. 7 of the *Charter*. A person sought must be able to lead evidence capable of demonstrating the problems in the requesting state's case, and that any of the latter that could be demonstrated to be "manifestly unreliable" would be removed. This, the Court felt, would re-balance the scales.

However, as I have written elsewhere, what little light was introduced by *Ferras* soon slipped away, as the senior appellate courts raised the "manifestly unreliable" threshold to a stratospheric height that could not be scaled by persons sought except in the most unusual cases. The Supreme Court of Canada itself ratified this approach in a 2015 decision, completing the transformation of extradition hearings into a largely formalistic process, unencumbered by meaningful adversarial process.

Where do we sit today? Certainly Justice Canada's desire for easier extradition has been accomplished. A common, dreadful and unfunny joke about extradition in Canada states that there is only one question in extradition cases: aisle or window seat? The "joke" describes a situation well-known to the defence bar, that a client targeted for extradition will almost certainly be surrendered, even where it would appear to be unjust, and even to places where they should not be sent. To be sure, many meritorious extraditions are taking place, but there are a disquieting number of horror stories.

Most prominent and disturbing, perhaps, is the well-known saga of Dr. Hassan Diab, whose case is discussed elsewhere in this issue. Dr. Diab was wrongfully extradited to France to face prosecution for a terrorist bombing, on the basis of evidence that even the extradition judge said was "based on some

questionable methods and on an analysis that seems very problematic," "susceptible to a great deal of criticism and attack," "convoluted, very confusing, [and] with conclusions that are suspect." Clearly uncomfortable with this result, the extradition judge nonetheless ruled that his hands were tied by the "manifest unreliability" standard, a finding upheld by the Ontario Court of Appeal. After three years in solitary confinement in France Dr. Diab was released because a court found there was no evidence against him, yet somehow in 2023 the French system saw fit to convict him, *in absentia*, for this crime that he demonstrably did not commit.

And there are others. Abdullah Khadr was detained and mistreated to the point of torture by the Pakistani secret service, acting at the behest of the CIA. Returned to Canada due only to heroic efforts by Canadian government officials, Khadr then faced an extradition request brought—with no lack of temerity—by the same US government that had placed a bounty on his head. Disturbingly, Justice Canada did not turn back this extradition request but pursued it with vigour, despite resounding declarations from two levels of court that the US was abusing the process of our courts. Only the Supreme Court's refusal of leave halted the case.

Less fortunate was Régent Boily, a Canadian who through a combination of unfortunate personal circumstances became ensnared in an organized crime operation in Mexico. Apprehended in Canada after escaping a Mexican prison, he faced being extradited back to Mexico and sent to that same prison, where there was an obvious risk of torture. While Canadian government officials obtained diplomatic assurances from Mexico that he would neither be sent to the same prison nor tortured, both of these things happened. Rather than call for any accountability from Mexico or assist Boily, Canada instead engaged in protracted litigation with him upon his return (ignoring, along the way, a finding against Canada by the United Nations Committee Against Torture). Part of the government's "scorched earth" litigation strategy involved denying that Canada had any duty to give legal effect to the assurances—despite these having been the only way that the original extradition was *Charter*-compliant. The Federal Court awarded Boily $500,000 in damages, and another black eye for Canada's extradition law.

There are similar stories, but the reader will have gotten the picture. One of the most disturbing aspects of this case law is that, while in some cases the courts halt the extraditions and in others they do not, in each such case Justice Canada seems to have worked its hardest to complete such questionable extraditions. In Diab's case, notoriously, Justice officials had evidence that exculpated Diab but did not disclose it to him, choosing instead to make various efforts to shore up the shoddy French case. In other cases Justice has energetically (and often successfully) pursued results that would shock Canadians—extraditing people to face, for example, double jeopardy, indefinite civil detention post-sentence, torture and mistreatment by out-of-control prison officials, sentencing regimes which do not take aboriginal status into account, "life without parole" sentences, and extreme disparities in sentence as between Canada and the requesting state.

Is this a fair and just legal process? Why are taxpayer dollars being employed to facilitate breaches of human rights? To put it colloquially, we all want the bad guys to go to jail—but at such cost? And, not

to drown the reader in rhetorical questions, but there are others: why does Canada maintain extradition relations with states with poor human rights records, or states such as India which have not ratified the UN Torture Convention? In light of the Diab case, why do we have extradition relations with France at all? Why is the government's litigation style in extradition cases so aggressive, and why (in contrast to other states, like the UK) does it publish hardly any information, statistics or policies about extradition?

In September 2018 I had the honour of convening and chairing the "Halifax Colloquium on Extradition Law Reform" at the MacEachen Institute of Public Policy at Dalhousie University. In attendance were experts in various disciplines—extradition, criminal law, human rights, international law—united by our conviction that there was a pressing need to reform Canada's extradition laws and practices. Through the Colloquium and further consultations at an event hosted by Prof. John Packer at the University of Ottawa's Human Rights Research and Education Centre, we produced *The Halifax Proposals*—a detailed and comprehensive law reform plan. In it we proposed that the *Extradition Act* should be amended in accordance with three general principles: fundamental fairness, transparency and a re-balancing of roles, both between the courts and the government, and between constitutional/*Charter* protection and administrative efficiency.

The *Halifax Proposals* also laid out a number of specific fixes for every stage of the extradition process and some underlying policy points, including:

- States with which Canada has extradition relations should not be presumed to be acting in good faith;
- The presumption of innocence should apply, appropriately, to extradition, and in particular the Crown should be required to disclose any exculpatory evidence in the hands of either Canada or the requesting state;
- In a time of global telecommunications, the extradition process should make more use of first-person evidence and cross-examination (via video-link as necessary), in order to allow persons sought to meaningfully challenge the case for extradition;
- The broad discretion awarded to the Minister of Justice must be reined in and subjected to a more exacting standard of review;
- Questions of law, particularly those relating to procedural and other human rights standards in the requesting state, should be within the jurisdiction of the extradition judge and not the Minister;
- Surrender should only be permitted if the requesting state is ready to take the case to trial;
- If diplomatic assurances are used to facilitate surrender, they must be meaningful, transparent, monitored and legally enforceable;
- In cases where Canada and the requesting state both have jurisdiction over an offence allegedly committed by a Canadian national, there should be a presumption in favour of prosecution in Canada which would have to be overcome by the Crown;
- Justice Canada's International Assistance Group, which oversees all extraditions and conducts some, must function as "Ministers of the Crown" in the traditional sense, striving to seek a fair

result as opposed to simply facilitating extradition;
- Canada should engage in a review of its extradition arrangements and ascertain whether certain states are sufficiently safe for extradition;
- There should be Parliamentary scrutiny and meaningful oversight of the government's conduct in extradition matters, including annual reports to Parliament if necessary.

In February 2023 the House of Commons Standing Committee on Justice and Human Rights undertook hearings on the topic of "Reforming Canada's Extradition System," and heard evidence from a variety of witnesses, including several members of the Halifax Colloquium, the World Sikh Organization of Canada, the International Civil Liberties Monitoring Group, and British extradition expert Anand Doobay. The Committee's June 2023 Report featured no less than twenty recommendations—unanimously signed off on by Committee members of all parties—calling for reform and changes to Canada's extradition laws, policies and practices. Recommendation number 20 summed up the Committee's desire for change nicely: "That the Government of Canada undertake comprehensive reform of the Extradition Act as soon as possible and consider making changes to the extradition process not requiring legislation, in the interim, in order to avoid further injustices in extradition proceedings."

On October 5, 2023, Minister of Justice Arif Virani published his statutorily-required response to the Committee's Report. Regrettably, it was clear that the Minister and his department were not on board with their Parliamentary colleagues. Suffused by somewhat condescending explanations about various aspects of the extradition process, the response waxed less than enthusiastic about the potential for actual reform, mostly defending existing practices and expressing mild agreement that certain minor changes could be examined in the future.

At the time of writing this article, some six months later, we are still waiting. Hassan Diab, horrifically, still waits to hear if France has requested his re-extradition, and what Canada's response might be. Canadians wait to see if Prime Minister Trudeau, who promised Canadians he would make sure that what happened to Hassan Diab "never happens again," will keep his promise, not least by having his government pay some actual, serious attention to the need for extradition law reform. Current signs are not encouraging, but the articles in this issue will help to further the reform dialogue that is so vital. I commend the editors on this effort, well-timed and desperately needed.

[1] See generally Anne Warner La Forest, "*The Balance Between Liberty and Comity in the Evidentiary Requirements Applicable to Extradition Proceedings"* (2002-2003) 28 QLJ 95.

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Extradition Reform and the Hassan Diab Case: An Interview with Don Bayne

By: Don Bayne

*Don Bayne**The case of Canadian citizen Dr. Hassan Diab offers one of the starkest illustrations of how Canada's extradition system can lead to deep injustice. Dr. Diab's ordeal began more than fifteen years ago when he was arrested on a French extradition warrant in 2008. In 2014, after six years of legal proceedings in Canada, he was extradited to France in relation to a 1980 bombing of a synagogue in Paris that killed four people and injured many more. In early 2018 he was released after more than three years of detention in France, almost all of it in solitary confinement, and allowed to return to his family in Canada, after investigative judges concluded there was no basis to press charges. French appeal courts later ruled however that the case should go ahead and an in absentia trial, criticized by many as being unfair, was held in April 2023. Dr. Diab was convicted and sentenced to a life prison term. As this journal is being published it is not known whether France has made a second extradition request. The Canadian government has refused to disclose any information to him or his counsel about the status of the case.*

Claire Millard, PKI Global Justice Journal's intern and a law student at Queen's University, had an opportunity to interview Dr. Diab's Canadian legal counsel, Don Bayne. They discussed the ways that Dr. Diab's experience illustrates the reforms that are needed to Canada's extradition law and practice. The interview has been slightly edited for length.

> **PKI: To start, could you briefly introduce yourself and your experience representing people facing extradition in Canada.**

I'm a criminal lawyer with 53 years of experience. In those 53 years, I've done two litigated extradition cases, which I think is a measure of how rarely in most jurisdictions they come up. It's kind of a backwater of law, and that explains in part why law is so poorly developed and misunderstood and inherently unfair.

But I've been 15 years on Hassan Diab's case. Through that involvement with Dr. Diab and his family, I have become very focused on Canadian extradition law and practice because of the obvious injustices going on in his case, but that quite frankly permeate other cases as well.

PKI: That is all very interesting. Now we're going to get into those concerns. I have a few questions about Hassan Diab's case. To start, could you please briefly summarize his case, including the most recent developments and where things stand since the 2023 ruling in France?

It started in 2008. I was not the first lawyer of record. There was a different lawyer of record initially. The family retained me in early 2009. Dr. Diab was by then in custody, having been arrested on an extradition warrant at the request of France. We began by redoing the bail hearing, which resulted in Dr. Diab's release on bail. His spouse, Rania, was the first member of the family I met. She came to the office seeking help. There were some irregularities, serious ones, with the first bail hearing, all conducted in French. Dr. Diab was not fully bilingual in French and could not understand the proceedings. The Court of Appeal ordered a new bail hearing. He was released.

And that began the long journey through the courts in Canada. From 2009 when he was released until about 2015, the case proceeded through the Ontario Superior Court here in Ottawa, then the Court of Appeal in Toronto, and then in writing to the Supreme Court of Canada. The case against him was a very poor and weak one which the Canadian extradition judge, the Superior Court judge, said would clearly lead to an acquittal in Canada. But he felt bound by the nature of Canadian extradition law to commit Dr. Diab for extradition at the request of France, even though he found the evidence suspect, confusing and contradictory. The nature of the test for extradition is so low that people's liberty can be deprived on very little evidence. And Dr. Diab's liberty was taken from him.

We appealed to the Court of Appeal, pointing out that France wasn't even ready for a trial, they just really wanted Dr. Diab to investigate further. And that is illegal. The Court of Appeal said, no, it's clear to us he won't just languish in prison during an investigation. But that's exactly what happened for over three years, after he was sent to France. He sat in solitary confinement while French investigative judges thoroughly investigated the case.

The Supreme Court of Canada also refused to assist Dr. Diab or even to examine the issues that we raised. And in that way, all three levels of the Canadian courts really failed Dr. Diab.

He was committed for extradition on obviously unreliable handwriting opinion evidence, there being no other evidence against him. And then France, during the three years they had him in custody, concluded that the handwriting evidence was indeed completely unreliable, just like all the international experts we had called before the Canadian court had said it was. And so he was finally released by the French after three years of detention.

Dr. Diab then returned to Canada in 2018 and the Prime Minister said that what had happened to him never should have happened and should never be allowed to happen again. Unfortunately, the government hasn't lived up to those words because since then lobby groups in France pressured the French to hold a trial in Dr. Diab's absence. The investigative judges who had dismissed the charges against him went to the court, which is a very unusual experience in any court, being judges themselves. They said there's no valid basis on which you could convict this man, the evidence shows that he's innocent. The court convicted him anyway.

That was in April of 2023. Now we are in May of 2024. Dr. Diab and his family live in limbo, not knowing what is coming next, because France has issued an arrest warrant for him, based on this kangaroo court conviction. But Canada has not said anything other than that they will follow the rule of law. It is not clear at all what they mean by that. Every time a car turns on to the little crescent where he and his family live, Hassan wonders if it's the RCMP coming for him again.

So that is the odyssey of the many years of this case, a case in which all of the forensic evidence, that is to say the fingerprint evidence of multiple fingerprints — which is not opinion evidence it is scientific evidence — shows that he's excluded. His is not the fingerprint left on the card used by the bomber to sign into a hotel in Paris in 1980. His prints are also not those on the bomber's police statement in France. That is coupled with the fact that evidence from the university in Beirut confirmed — both in documents and by eyewitnesses — that Dr. Diab was in Beirut when the bomber was in Paris for the relevant period of time from September 22nd to at least October 3rd, 1980. During that critical period of about 12 days, Dr. Diab was not in Paris but in Beirut, studying for and writing his exams at the university, as he has said throughout.

So that's the summary of the history of the case. The evidence, far from showing guilt, shows innocence. The investigative judges in France pleaded with the court not to convict because it would be an unjust conviction, but the court went ahead and convicted regardless.

> **PKI: It is really a complex case with much to discuss and you touched on a few of the injustices. Could you speak more broadly about some of the ways that you believe Canadian law or the actions of Canadian government lawyers contributed to the injustices experienced in the case.**

Inherent in extradition is that our system takes away people’s liberty in Canada without any sworn evidence. Years ago, the Extradition Act was changed from requiring sworn evidence to simply having an unsworn signed statement from a foreign official, all hearsay, stating that they have a case against the person.

The Supreme Court of Canada has identified liberty as the most important thing that the Charter protects. Yet we've set up a system in Canada where it is just that paper document that can deprive someone’s liberty and then the onus shifts to the person to prove their innocence. In Dr. Diab's case

there was no sworn evidence on which the Canadian court could rely, just a document from the French investigating magistrate making certain claims, some of which we now know to be untrue.

For example, the claim in the document, which is called the Record of the Case, was that when the bomber signed into his hotel on September 22nd, before the bombing in Paris, he filled out a registration card and printed five words, four of them in capitals and one in lower case letters — PANADRIYU, ALEXANDER, LARNACA, CYPRUS, and technician — all of which were a fake identity. None of it was in script writing, all of it was in block printing. The world's leading experts, from Canada, the US, Great Britain, and Switzerland, all said you cannot conduct a reliable handwriting comparison when it is not handwriting but printing and there's not enough of it to draw any kind of a conclusion.

That didn't deter the French because they had an opinion from two so-called experts in France claiming that they could identify the printing as being Hassan Diab's. But unfortunately for them, they were actually using the wrong handwriting. They were comparing the printing on the registration card to another person, not Dr. Diab. The comparison writing they were using was actually his girlfriend in Lebanon at the time in question. So they effectively identified her, not Dr. Diab, as the 40-year-old bomber who signed in at the hotel. She was a young university student in Beirut at the time. That's how incompetent this opinion was.

The second thing about the Canadian extradition system is that this document provided by a foreign official without being sworn evidence is presumed by our system to be reliable evidence. The onus then falls on the accused person to rebut that presumption. It reverses the presumption of innocence which is at the heart of our criminal justice system and it reverses the onus of proof that is fundamental in criminal matters. It even effectively makes unsworn evidence more powerful than sworn evidence, which is not presumed to be reliable. That regular sworn evidence has to show its reliability.

So you've got a problem of no sworn evidence. Further, that unsworn evidence is presumed to be reliable evidence. Thirdly, the accused person has to prove that the document is "manifestly unreliable". The courts in Canada have made that a practically unattainable standard. It is practically impossible for an accused person to show that a document coming from another country, where they may never have been, is manifestly unreliable.

In Dr. Diab's case, I would assert that he did show it was manifestly unreliable. The world's leading experts on handwriting said it was completely, totally manifestly unreliable. But the judge said the term manifestly unreliable is a very high standard and even if it makes no sense, with this handwriting opinion I feel bound and I have to commit him.

There is another requirement from criminal procedure that is missing in extradition, that is the duty of full disclosure, so the person knows the case they have to meet. There is no such duty in extradition. States can simply cherry pick a few pieces of evidence and bury other evidence that shows

innocence. From the start they actually excluded from the Record of the Case evidence that pointed to the accusation against Dr. Diab being untrue. There was in fact a fingerprint on the bomber's hotel card. It had been checked against many people, including Hassan Diab, and they knew it was not him. Rather than disclosing that, which would have obviously made a manifest difference to a judge, they said there was no fingerprint evidence, which was clearly not true and they knew it was untrue.

While Dr. Diab was still in Canada the RCMP did further fingerprint tests. The French sent the police statement from when the bomber had been arrested in Paris on a shoplifting charge and had left a number of fingerprints on the statement he signed at the police station. They were checked in Canada against Dr. Diab. About eight of the 12 prints were smudges, but at least four were good prints, suitable for comparison. All four of those good prints excluded Dr. Diab. It was not him, scientifically. And they — the French and the Canadian justice lawyers prosecuting the case on behalf of France — did not disclose that to the extradition judge and did not disclose that to the defence at the extradition hearing. There was no requirement in law that they had to make such full disclosure, which protects innocence.

Finally, and ironically in this case involving France, extradition is said to be based on a principle called comity, which is the mutual recognition by nations of the laws and customs of each other. The problem is that while Canada respects and credits French law to try Canadian citizens, the French do not acknowledge or credit Canadian law to try French citizens. There is quite simply no comity with France. Yet the Ontario Court of Appeal relied on this principle in saying we must extradite based on comity.

There is no comity with France. Just recently there has been a case in Canada of a French priest, Johannes Rivoire, who was accused of having sexually abused multiple Inuit children over 20 years. He was back in France and Canada asked France to extradite him, something Inuit people have long demanded. The French refused, in part because they do not extradite their own citizens, unlike Canada. He has now passed away. It is ironical that we will do for France what France will not do for Canada. There is, in truth, no comity with France.

That is a long explanation of many of the things that are wrong with Canadian extradition law. And they are seriously wrong. They lead to injustice.

> **PKI: In an interview with CBC in April 2023, you described that 2023 French court ruling as a political result. Could you elaborate on that a little bit?**

There is really no other rational explanation for conviction given the evidence in this case. Physical descriptions do not match. The man who carried out the bombing was a man in his 40s. Hassan Diab was in his mid-20s in October of 1980. He was shown to be in Lebanon writing exams at the university when the bomber was in France. The French court suggested that the bomber perhaps did not travel by land but instead might have flown to Paris and then flown right back after the bombing. There is

absolutely no evidence of that. In fact, we know the bomber was in Paris from September 22nd to October 3rd. This wasn't an overnight fly in and fly out operation. Evidence is all to the contrary.

And then, of course, you had the French investigative judges themselves, very unusually, going to the court to say: you cannot register a conviction, there's no valid evidence, the evidence shows he is innocent. The court went ahead and convicted anyway.

There's no basis for a conviction other than politically to satisfy the lobby groups that were raising such noise in Paris, anxious to find a scapegoat for a very serious terrorist bombing that the French had never been able to solve.

PKI: How does Hassan Diab's case exemplify the aspects of the Extradition Act that you feel are in need of reform.

I have gone through a list of failures. We need to change the law that doesn't require any sworn evidence. We need to reform the law so there is no presumption that an unsworn document is reliable evidence. That's simply a complete fictional construct. We need to change the law as to the test that a person has to meet to show the unreliability of the allegation. It's a mountainous barrier that nobody can meet, which is unrealistic. We have to require full disclosure of all exculpatory evidence. And quite frankly, if a nation that does not reciprocate with Canada is asking for extradition, we should simply say no. If you want a trial, send the evidence here and we'll try him in Canada. That's what France does.

Last June, the House of Commons Standing Committee on Justice and Human Rights made a series of recommendations for reform along the lines we've just talked about. In particular, they called for full disclosure of exculpatory evidence, for the threshold to rebut any presumption of reliability to be changed, and to make it clear that there cannot be extradition for mere investigation, among other recommendations. But none of that has come to pass. None of those reforms have gone forward, the government has not taken action.

PKI: In your view, why hasn't any action been taken or why haven't the necessary steps to make these changes been taken so far?

My own view is that Canadian courts are too deferential to the political process, at the cost of justice and the cost of sound legal process. They are too deferential to international politics and diplomacy. Canada is like the earnest little kid trying to show how cooperative we can be with the big players in the world, at the expense of protecting Canadians and at the expense of justice in Canada.

And quite frankly, it is also because most judges who deal with extradition never did an extradition case when they were in practice. They are told it has always been done this way and they do not

question that. Nowadays, we don't have a Chief Justice Dickson, who was a great judge, or a John Sopinka or a Louise Arbour, on the Supreme Court, judges who take a hard look at the realities of extradition and are prepared to say: this is unjust.

> **PKI: Those are all of my questions. I very much appreciate you taking the time to speak to us today. It was a pleasure.**

I welcomed the opportunity. These are serious concerns which merit much greater attention.

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Canadian Extradition Law After Meng Wanzhou: Paths for Improvement

By: Joanna Harrington

Meng WanzhouFor almost three years, the chief financial officer of China's largest and most successful company, and the daughter of its billionaire founder, was Canada's most well-known detainee. Arrested on 1 December 2018, and released ten days later on a $10 million bond (*United States v Meng*, 2018 BCSC 2255), Meng Wanzhou spent the next 34 months under house arrest in Vancouver while awaiting extradition to the United States. A timeline of what we now call the "Meng Wanzhou saga" is available from CBC News.

At issue in this long, involved story — to use a synonym for saga — was a charge of fraud. Back in 2013, Meng had made misrepresentations to a financial institution in Hong Kong about the business activities of the Huawei Technologies Co. Ltd. in Iran. With Iran being a country subject to U.S. (but not Canadian) sanctions, Meng's actions, and those of others within Huawei, were viewed by the U.S. Justice Department as a "concerted effort to deceive global financial institutions, the U.S. government and the public about Huawei's activities in Iran" (U.S. Department of Justice, Office of Public Affairs, Press Release, "Huawei CFO Wanzhou Meng Admits to Misleading Global Financial Institution," 24 September 2021). To negotiate an end to the charges, Meng agreed to the accuracy of these facts, and on 24 September 2021, U.S. prosecutors announced before a U.S. court in Brooklyn, New York, that a deferred prosecution agreement had been reached, which would lead to the deferral, and then dropping, of all charges against her. See United States Attorney's Office, Eastern District of New York, Press Release, "Huawei CFO Wanzhou Meng Admits to Misleading Global Financial Institution," 24 September 2021.

Meng's negotiation of a U.S. deal also brought an end to the extradition proceedings in Canada. The admission of financial fraud led to the withdrawal of the U.S. to Canada extradition request, and with "no basis for the extradition proceedings to continue" (Canada, Department of Justice, Press Release, "Statement from the Department of Justice," 24 September 2021), Meng was free to leave Canada, and did so. The conclusion of the extradition proceedings was soon followed by China's release of the two Canadians (Michael Korvig and Michael Spavor) who had been detained since soon after Meng's arrest. The timing of their release reinforced the perception that China had used hostage diplomacy to secure a desired result ("Huawei executive Meng Wanzhou freed by Canada arrives home in China," BBC News, 25 September 2021).

The Meng Wanzhou extradition case attracted extensive media coverage, in addition to untold suffering for the two Michaels and their families. It also highlights several areas for improvement for Canadian extradition law and practice. The first concerns the public's need for more and better information to understand the extradition process, and the provision of data on extradition requests to Canada and their outcomes. The second reflection concerns the reputation of extradition, and the doubts expressed about its fairness, which were met by repeated, but underwhelming, references to vague invocations of the rule of law. The third reflection concerns the U.S. extension of extraterritorial criminal jurisdiction to address situations viewed as contrary to U.S. foreign policy goals and national security concerns.

The need for information

My first reflection on the Meng extradition case arises most directly from my own interactions with journalists. At various times during those three years, my phone and email were abuzz with queries from the media wanting to understand what was happening and what would happen next. There were questions about the extradition process, the role of the extradition judge, and the powers of the Minister of Justice, alongside the burning question of when would Meng be surrendered to the United States. Two months after her arrest, Meng Wanzhou was on the cover of *Maclean's* magazine as "The world's most wanted woman". It took another month for Canada's Justice Department to issue an extradition fact sheet explaining the process, an infographic on its phases, and a statistical table on the processing of extradition requests to Canada from the United States.

And it is this public engagement effort from 1 March 2019 that is still relied upon by Justice Canada to inform the public about extradition. But what use to the public, or to lawyers, is a statistical snapshot of U.S. extradition requests for a randomly selected ten-year period from 2008 to 2018? The information is stale, and focused only on U.S. extradition requests, with no data provided on extradition requests to Canada from other states, and no data disclosed (regardless of the country involved) about the length of time taken in each case from request to surrender (or to discharge, refusal, or withdrawal).

Without the public disclosure of such data, an evidence-based assessment of Canadian extradition law and practice is impossible. Moreover, the data regarding extradition to the United States requires disaggregation. Given our geographical proximity, and the ease with which many an individual from the U.S. can "fit in" once in Canada, one can guess that the United States is responsible for most of the extradition requests to Canada. In practical terms, however, this is an extradition relationship with 51 entities, since both criminal law and sentencing practices can differ across the 50 states, and with U.S. federal jurisdiction. (Unlike in Canada, where criminal law is an exclusive federal matter, constitutional law in the United States allocates the general police power to the states.) The disclosure of data on extradition outcomes might also reveal that a suspected high number of U.S. extradition cases are ultimately resolved post-surrender by plea deals.

This call for greater transparency and the publication of information has been endorsed by the House of Commons Standing Committee on Justice and Human Rights (*Reforming Canada's Extradition System*, June 2023, Recommendation 18), but with an undefined, and thus worrisome, exception for confidential material. Simply put, confidentiality is too easily pleaded in extradition matters, where it is often rationalized by reference to the statutory non-disclosure of information obtained in confidence from a foreign state (*Access to Information Act*, RSC 1985, c A-1, s 13(1)(a)). By contrast, a balanced exception to extradition data disclosure could be crafted for requests that did not lead to the issuance of an Authority to Proceed. But once an individual becomes subject to the coercive arm of the Canadian state, extradition confidentiality makes less sense, and any confidential material exception to extradition data disclosure must also be crafted to exempt those requests that the foreign state has itself made public.

Extradition's reputation and the rule of law

Extradition is a process for securing the presence in another state of a person accused or convicted of a crime. It is inherently an inter-state process, with the judicial aspect on the Canadian side cast as one that must not "disable Canada from complying with its international obligations in a prompt and efficient manner" (*United States of America v Anekwu*, 2009 SCC 41 at paras 26, 30). And yet, extradition from Canada is rarely prompt, nor efficient (absent an individual giving consent to their requested surrender). Meng's near-three-year fight against her committal for extradition is but one example. Indeed, in 2023, a government official advised a House of Commons committee that "[a]n average extradition process takes from 18 months to two years, but in a very litigious case it can go on for up to 10 years" (*Reforming Canada's Extradition System*, June 2023 at 25).

A wanted person who does not consent to their extradition is bound to make use of whatever avenues are available for challenge, if only to delay the eventuality of surrender. But the nature of Canada's extradition process also contributes to the lack of efficiency. The process begins within the Department of Justice, then moves to the courts, then moves back to the Department of Justice, and then likely back to the courts. Having the courts embrace a more robust role in examining the fairness and justice of an extradition request might achieve some economies in the use of judicial and court resources but, alas, under Canada's *Extradition Act*, the role of the extradition judge is judicially recognized as being "carefully circumscribed" (*MM v United States of America*, 2015 SCC 62 at para 22).

Only the Minister of Justice has the statutory authority, at the end of the process, to refuse an extradition request on the grounds that "the surrender would be unjust or oppressive" (*Extradition Act*, s 44(1)), reversing this provision's colonial heritage where it was the judge, and not a politician, who made this call. From Victorian times on, judges under the *Fugitive Offenders Act, 1881*, c 69, s 10, could also discharge the wanted person "by reason of the trivial nature of the case" or if the request was "not being made in good faith." (Joanna Harrington, "Expanding the Role for the Minister of Foreign Affairs in a World of Conditional Extradition" (2022) 1:1 *Transnational Criminal Law Review* 34 at 42).

Throughout the Meng extradition saga, the Government of Canada emphasized that "Canada is a country governed by the rule of law" and that "extradition in Canada is guided by the *Extradition Act*, international treaties and the *Canadian Charter of Rights and Freedoms*" (see, for example, Department of Justice Canada, News Release, "Extradition relevant to the case of Ms Meng Wanzhou", 1 March 2019). This rule-of-law talking point was also used several times by the Prime Minister, accompanied by assurances that "Meng's case will be handled by our justice system" (John Paul Tasker, "Trudeau rejects calls to release Meng Wanzhou," CBC News, 25 June 2020). Little mention was made of the law's assignment to the Minister of Justice of the decision to both start and end an extradition case. This is also a rule of law that could be changed, should Parliament wish, paying heed perhaps to a 2016 report by the Law Commission for New Zealand, which recommended giving a court, and not the minister, a "meaningful judicial role in evaluating the evidence of alleged offending in standard extradition proceedings," and further suggesting that "the sole responsibility for deciding nearly all the grounds for refusing surrender" should be given to the courts (Law

Commission, *Modernizing New Zealand's Extradition and Mutual Assistance Laws*, Report No 137, 5 February 2016, para 13(b)).

Surrender regimes with more robust roles for judges are also speedier. The European Union's judge-to-judge process whereby a European arrest warrant can be issued by one EU national judicial authority for execution by another EU national judicial authority, without the involvement of the executive branch, provides the starkest comparison. According to a 2020 review by the European Commission, the average time from arrest to surrender for those who did not consent to their surrender was 45.12 days (*Report from the Commission to the European Parliament and Council on the implementation of Council Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States*, COM(2020) 270 (2 July 2020) at 1.1).

Extraterritorial criminal jurisdiction

Courts in Canada, and government lawyers, have stated repeatedly that an extradition proceeding is not equivalent to a criminal trial. As such, an extradition proceeding "differs … in the factors which render it fair," with such factors to include concepts fundamental to extradition, such as "the concepts of reciprocity, comity and respect for differences in other jurisdictions" (*Kindler v Canada (Minister of Justice)*, [1991] 2 SCR 779 at 844-45, McLachlin J. as she then was). But should "comity and respect for difference" extend to the aggressive extension of U.S. extraterritorial criminal jurisdiction?

The U.S. request for the extradition from Canada of "the world's most wanted woman" was based on false statements made, not in the state requesting extradition, but in Hong Kong, by a Chinese national to the senior executive official of a British multinational bank (HSBC), as part of an alleged effort by a Chinese company to evade U.S. imposed (but not Canadian endorsed) sanctions against Iran. The link to the United States seems tenuous in that many multimillion deals are going to be reached using U.S. currency and to clear those funds, a U.S. clearing bank or clearing house is needed. That international business uses the U.S. dollar as an international currency should not lead to U.S. jurisdiction such that the United States becomes the world's policeman. After all, trillions of payments are made daily using the U.S. dollar, with much wider consequences for all if the dollar can serve as a jurisdictional anchor.

It is a fundamental principle of Canadian extradition law, and extradition law generally, that a person cannot be extradited to face punishment in one country for conduct that would not be considered criminal in the other. This is the test of double criminality that lies at the heart of the extradition committal proceedings. It is also a test that reflects the fundamental concept of reciprocity which, as noted above, is one of the factors that renders an extradition proceeding to be fair. It was also a test that was easily met in the Meng extradition case by framing the offence at issue as one of fraud. As Justice Holmes made clear in her decision on double criminality, "Canada's law of fraud looks beyond international boundaries" (*United States v Meng*, 2020 BCSC 785 at para 61). All the Attorney General of Canada had to establish was that the conduct in which Meng engaged would have amounted to fraud, had that conduct taken place in Canada.

But there remains dissatisfaction with the implications of this result. HSBC was a significant lender to Huawei, with HSBC's U.S. subsidiary having "cleared very substantial dollar transactions for various Huawei entities between 2010 and 2014" (*United States v Meng*, 2020 BCSC 785 at para 10). This clearing of funds – turning the promise of payment into the actual movement of money between accounts – took place at a time when U.S. regulations required banks to obtain authorization from the U.S. Treasury Department before providing financial or credit services through the U.S. to entities in Iran. Thus, a misrepresentation made to HSBC about Huawei's business activities in Iran could give rise to a loss, or a risk of loss, for HSBC, which in an unrelated matter, had paid a significant price for "illegally conducting transactions on behalf of customers in Cuba, Iran, Libya, Sudan and Burma" (U.S. Department of Justice, Press Release, "HSBC Holdings Plc. and HSBC Bank USA N.A. Admit the Anti-Money Laundering and Sanctions Violations, Forfeit $1.256 Billion in Deferred Prosecution Agreement, 11 December 2012). These were all countries subject to U.S. sanctions enforced by the aptly named Office of Foreign Assets Control. One can only wonder as to whether the potential implications for Canada were fully considered when it accepted the breadth of asserted U.S. jurisdiction in the Meng extradition case and issued an Authority to Proceed.

Conclusion

For the non-expert, extradition is often explained as a process of hand over or transfer, somewhat akin to deportation, or even the return of unwanted goods, whereby fugitives from justice are sent back to the jurisdiction from where they have fled. The underlying assumption is that the individual wanted for trial has fled both justice and the jurisdiction, and thus, upon discovery in another state, deserves to be sent back. But extradition is far more complicated than sending back goods from Amazon that do not fit. The liberty rights of an individual will always be at stake, with extradition raising important questions about timeliness, fairness, cooperation, and jurisdiction that should be considered prior to the issuance of an Authority to Proceed. It can also raise concerns about the long arm of U.S. justice policing the activities of foreign corporations simply because the American dollar is the practical choice for international commerce.

Moving forward, the Department of Justice needs to embrace the value of proactive information provision to foster public support and respect for extradition law in Canada. The rule of law requires no less, with modern communications technologies making it easy to schedule the timely release to a website of up-to-date data on the number of extradition requests received and from where, and then later recording, with what result, including the length of time between request and surrender, refusal or withdrawal. The obstacle to regular information provision is simply the lack of commitment to doing so.

Change is also needed from within the courts, and to the unproven judicial assumption that extradition is a speedy process. It often is not, but a more robust judicial role in examining the fairness and justice of each extradition case could help direct resources to cases worthy of surrender, while securing protection for the individuals at risk in those that are not. Current extradition law, however, assigns too large a role to a Cabinet minister. It also assigns too large a role to fuzzy concepts of comity in international relations, when under international law, any assertion of jurisdiction over matters taking

place outside a state's territory needs a solid justification to accord with the rule of non-interference in another state's affairs. The use of the U.S. dollar is just too broad a jurisdictional anchor, with the Meng extradition case having undermined Canada's past opposition to U.S. over-reach, which animates our *Foreign Extraterritorial Measures Act*.

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The Two Michaels, The Donald, and the Tech Tycoon's Daughter: Litigating in the Minefield of U.S. v. Meng

By: Robert Frater[1]

two Michaels**Introduction**

Much has been written about the role of the Attorney General in criminal litigation. The theory of counsel's role is very well-established: in principle, a prosecutor must act independently, eschewing any partisan concerns of the government of the day. The required spirit of fairness and objectivity must also inform the role of counsel appearing for requesting states in extradition matters.

But extradition is a context in which politics is frequently much closer to the surface than in a run-of-the-mill prosecution. At the front end of the process is a state-to-state request, usually made pursuant to a treaty negotiated between the states. At the back end, the *Extradition Act* demands that Ministers not surrender individuals for "political offences" or offences of "a political character" (ss. 44, 46). Extradition hearings thus begin following political acts and lead, if committal occurs, to a process that is essentially political: *Németh v. Canada (Justice)* , 2010 SCC 56 at para. 64.

Is it realistic to believe that politics can be avoided in the middle part of the process, the extradition hearing? And if not, does that mean we ought to be thinking about whether safeguards are necessary

to ensure that hearings are not improperly affected by political concerns? Or that we need to take steps to ensure the government's counsel is not making politically-motivated decisions?

This paper is a personal reflection on the role of counsel in extradition proceedings, based on the author's involvement as lead counsel for the requesting state in the extradition of Cathy Meng, a Chinese tech executive wanted in the U. S.A. on fraud-related charges. Extradition reform ought to be informed by its unique context, and with due regard for what the key actors are asked to do.

The Case

Ms. Meng was arrested on an extradition warrant in December 2018 at the Vancouver airport. The essence of the allegation was that Meng, as Chief Financial Officer for the electronics company Huawei, made false statements to a representative of the HSBC bank in a Hong Kong tea room in 2013. The false statements concerned Huawei's relationship with a company controlled by Huawei that was doing business with Iran, contrary to U.S. sanctions. The allegation was that the statements reassured HSBC and other bankers, who continued to do business with Huawei. The banks also ran into trouble with U.S. regulators. Not the most complex fraud, nor one that had the most victims, nor one with particularly sympathetic victims.

The Role of Extradition Counsel

The touchstone for ethical conduct by Crown counsel in criminal cases is the famous statement by Justice Rand in *Boucher v. The Queen*, [1955] S.C.R. 16 at 23-24:

It cannot be over-emphasized that the purpose of a criminal prosecution is not to obtain a conviction; it is to lay before a jury what the Crown considers to be credible evidence relevant to what is alleged to be a crime. Counsel have a duty to see that all available legal proof of the facts is presented: it should be done firmly and pressed to its legitimate strength, but it must also be done fairly. The role of prosecutor excludes any notion of winning or losing; his function is a matter of public duty than which in civil life there can be none charged with greater personal responsibility. It is to be efficiently performed with an ingrained sense of the dignity, the seriousness and the justness of judicial proceedings.

That statement has been repeated hundreds of times in Canadian decisions, and relied on by many foreign courts:*R. v. H.*, [2004] 2 AC 134 (H.L.); *Libke v. The Queen*, [2007] HCA 30; *DPP -v- D.O.* [2006] IESC 12. It underscores that Crown counsel must be committed to the fairness of the process, not focused on the achievement of a particular result. Or, as Justice Charron expressed it in *R. v. McNeil* 2009 SCC 3, at para. 49, "the Crown's undivided loyalty is to the proper administration of justice."

In general, these statements are fine. In practice, they lead to other principles informing the *Bouchervian* prosecutor's actions. Let's look at a few.

1. *The Crown has no client*

This is a different way of underscoring the duty of impartiality emphasized by Justices Rand and Charron. It is literally true in criminal proceedings, but not in civil proceedings, where Crown counsel does take instructions. But it is a proposition that can be difficult to apply in a case like *Meng*. Let me give you three examples.

First, the elephant in the room throughout the *Meng* proceedings was the situation of the two Michaels, Mr. Michael Spavor and Mr. Michael Kovrig. They were arrested and held in small prison cells in China, without being charged for some time. They were severely restricted in communicating with the outside world, subjected to unfair trials, and all, it appeared, as payback for Ms. Meng's arrest. Mr. Spavor and Mr. Kovrig were not actually our clients, to be sure, but their interests were under consideration in everything we did, such as trying to expedite the proceedings.

Mr. Spavor's and Mr. Kovrig's dire circumstances led us to reflect often on our own legal system. For example, Ms. Meng was granted bail on terms that allowed her to live in her Vancouver mansion, able to dine with friends or to have private shopping excursions. She tired of certain restrictions like being followed by a team of private security personnel. She exercised her statutory right to a bail review, which we knew would appall anyone concerned with the comparative equities of her situation and that of Mr. Spavor and Mr. Kovrig. But comparative equities could play no role in a bail review.

Second, within the federal government, there were a very broad range of interests in this litigation. Global Affairs, obviously. The Canadian Border Services Agency, whose actions in dealing with Ms. Meng were subject to minute dissection in *Charter* motions, and led to highly stressful testimony for the individuals involved. Ditto for the RCMP's arresting officers. CSIS too, had an interest, as revealed in Federal Court litigation: *Canada (Attorney General) v. Meng* .There were many, many interests within government, and maybe some people who may have been holding out hope that we would lose some motion to make their uncomfortable political problem go away.

Third, we were in regular contact with U.S. prosecutors, and the actions of American officials were also part of the litigation. One of the many abuse of process allegations brought by the defence team concerned statements made by former President Donald Trump that may have suggested a willingness to deal the Meng extradition for a treaty with China on trade. So various parts of the United States government had client-like interests, too. How we defended the actions of the former President mattered greatly: many eyes were watching.

Thus, while we had no one who may technically be viewed as a client, we certainly had no shortage of individuals or groups with client-like interests, all of them looking at us to be *their* lawyer in these proceedings.

The situation caused me to reflect on what it means to have no clients in theory, while at the same time having many people counting on you to ensure that their perspective, their interests, get some measure of justice. I came to the conclusion that the true appreciation of my role involved ensuring

appropriate voice was given to their interests, not to the exclusion of other considerations, but in a way that recognized that justice in this case was neither blind nor deaf to their significant interests, even where those interests may seem political. As we moved through the proceedings, my colleagues and I tried to ensure that we chose our words very carefully, because our words would be parsed by multiple audiences.

2. *The Independence of Prosecutorial Decision-making*

Another bedrock principle of prosecutorial decision-making is the principle of independence. Strictly speaking, this principle is about exercise of the decision to prosecute, that is, to charge. Charging decisions — who gets charged for what offences — must not be made in a partisan way. Why does the principle exist? Any system committed to the rule of law must prevent politicians from deciding who gets prosecuted, because that may not go well for their political opponents.

This principle is generally known as the Shawcross principle, based on a 1951 speech in the U.K. Parliament by Attorney General Sir Hartley Shawcross, a name straight out of Dickens. The Shawcross principle had a brief moment of fame in Canada in 2018-2019 as the SNC Lavalin affair played out, in which former Attorney General Jody Wilson-Raybould described feeling pressured by the Prime Minister's Office over a criminal case.

Post-SNC Lavalin, there was a much greater appreciation of the Shawcross principle among senior government officials. There was intense interest in this case, which meant I attended lots of long meetings with lots of high officials. But to a person, I think they were terrified of saying anything that might be perceived as telling me what to do. These officials seemed to be well-acquainted with Justice Rand too, because I would get questions along the lines of "I know the Crown neither wins nor loses, but are you going to win"? As I said before, I think there were hopes in some places that we would lose, and lose quickly.

Our extradition system gives distinct roles to the Attorney General and the Minister of Justice, who are the same person at the federal level. Committal proceedings are conducted by counsel for the Attorney General. If a judge decides to commit, the Minister of Justice must decide whether to surrender the person. What this tends to mean, and did mean in this case, was that the Attorney General does not play an active role in the proceedings, leaving leadership to the Deputy Attorney General, a member of the public service. And this meant that litigation decision-making was concentrated in very few hands, surprising perhaps for a case with such wide-scale ramifications. Our team sometimes felt that we were on a very small island.

While government insiders were very reluctant to create a hint of a whiff of a trace of telling our team what to do, Shawcross does not demand that prosecutors be hermetically sealed from the rest of government. If you doubt that, you should read the House of Lords decision in *Corner House Research,*[2009] 1 AC 756] . In that case, the Director of the Serious Fraud Office had to decide whether to continue an investigation involving members of the Saudi Arabian government. Both the

Prime Minister and the British Ambassador weighed in with the Director, the Ambassador claiming that "British lives on British streets were at risk." The Director decided not to charge, and his decision was judicially reviewed. The House of Lords held that the Director was entitled to listen to the Prime Minister and others, and make a decision that happened to be consistent with their view of what the public interest demanded.

While government officials were adhering to the most restrictive view of what the Shawcross doctrine permitted, outsiders, including several who had formerly been insiders, were more than willing to fill the void with their own advice. This advice was given both in public and by correspondence to the Attorney General that was then made public. But as much as our team may have benefitted from advice, it seldom helps to get advice from people who do not know all the facts.

3. *The Attorney General as Guardian of the Public Interest*

Shawcross tells us that the Attorney General must not act in a partisan way, but rather be governed by what the public interest demands. All of the various prosecution agencies in Canada have charging policies that demand fidelity to the public interest, and give lists of "public interest" factors that may justify prosecution: see, for example, the Public Prosecution Service of Canada Deskbook, "Decision to Prosecute". Applying these factors helps ensure that partisan or irrelevant considerations play no role in prosecutions.

However, courts have long referred to the Attorney General as "the guardian of the public interest," a much vaguer notion in that it can be employed in a variety of contexts to describe things that the court thinks the Attorney General ought to be doing: see, for example, *Murdoch v. R*., 2015 NBCA 38; *Hy and Zel's Inc. v. Ontario (Attorney General); Paul Magder Furs Ltd. v. Ontario (Attorney General)* , [1993] 3 SCR 675.

It is not a particularly helpful phrase in litigation, since the Attorney General can scarcely claim to be the sole guardian of the public interest. When it comes to litigation in the Supreme Court of Canada, the phrase borders on incoherence, since in a case like the *References re Greenhouse Gas Pollution Pricing Act* 2021 SCC 11, where attorneys general from various jurisdictions took starkly different positions on what the public interest justifies or demands in tackling climate change. Intervening groups who are not attorneys general can also justifiably claim to be guardians of the public interest, since their presence is due to their ability to voice public interest concerns that may not be heard without their participation.

There is, however, a somewhat more modern phrase that better captures the ground that "guardian of the public interest" was probably meant to capture. That phrase is "guardian of the rule of law," a phrase most often associated with the role of judges: see, for example *Reference re Code of Civil Procedure (Que.), art. 35* 2021 SCC 27, at paras. 48-52.

I admit that defining what is meant by the term "the rule of law" is itself somewhat open to dispute, but the phrase "guardians of the rule of law" is a much better description of what counsel litigating on

behalf of the Attorney General actually do. A recent U.K. report examines the importance of the concept to the Law Officers, including the Attorney General: House of Lords, Select Committee on the Constitution, "The Roles of the Lord Chancellor and the Law Officers," 9th Report of Session 2022-2023 (Dec. 2022) ("Law Officers Report").

Litigation work in the government might be compared to an iceberg: 90 % of it is unseen by the public eye. In addition to the role as the government's litigator, the federal Attorney General has a legal advisory role (see *Department of Justice Act*, s. 5(b)), which may involve advising the government whether its proposed actions are constitutional, whether positions it would like to take in court are objectively reasonable and legally defensible, and whether there are options open to the government other than a fleeting desire for bare-knuckle litigation.

Let me give you an example of how this "guardian of the rule of law" principle played out in the *Meng* case. Recall the example of the comments made by former President Trump. Essentially the defence allegation was that the comments reflected a corrupt motive of the prosecution: the case was not about the legitimate prosecution of a crime, but an attempt to use prosecution solely to advance foreign policy objectives. Any proper understanding of the rule of law forbids prosecution being used for such purposes.

If you are defending a claim that your client's actions compromise the rule of law, the only reasonable response you can make is to attempt to demonstrate that the rule of law has not been compromised. We endeavoured to do that by showing that the statements of the former President were at best ambiguous, and the statements of those actually running the American prosecution were crystal clear about respecting the necessary division between politics and law. The U.S. Justice Department may not be cognizant of Sir Hartley's famous speech, but its practitioners are as keenly attuned to the principle as we are.

4. *The Ethical Standards of Crown Counsel*

Throughout my career, I have heard it said that courts hold Crown counsel to a higher standard than other lawyers. If this were just some sort of code for complying with *Boucher*, or an invitation to remind Crown counsel that they are singled out for special obligations in professional codes of conduct – see the Federation of Law Societies' **Model Code of Professional Conduct** , at s. 5.1-3 - it is harmless enough. But what it means is not entirely clear, and it still gets said in various ways: compare *Everingham v. Ontario,* (1992), 8 O.R. (3d) 121 at 125-126 (Div. Ct.); *Inwest Investments Ltd. v. Canada (National Revenue)*, 2015 BCSC 2170, at para. 49.

What bothers me about this is that the implicit comparison invited by the word "higher" must be to criminal defence lawyers. But do we actually expect defence lawyers to behave badly? Zealous defence of a client's interests does not require any sort of questionable behaviour, and acquiring a reputation as a counsel of questionable behaviour certainly does not do any client any favours. In *Meng* the defence mounted as vigorous a defence as could be imagined without engaging in any

questionable behaviour. In my experience, the most effective defence counsel are those whose standards of professionalism and ethics are equal to those of Crown counsel. No judge would disagree.

Fortunately, I think this assertion is made less frequently these days. And I stronger articulation of the proper role of Crown counsel was made by Justice Charron in *R. v. McNeil* at para. 49:

The Crown is not an ordinary litigant. As a minister of justice, the Crown's undivided loyalty is to the proper administration of justice.

As a guide to action, the statement "the Crown is not an ordinary litigant" has much to recommend it over the traditional "higher standard" statement, because it captures an important nuance: it is not about you, it is about the position you hold. You carry no brief for injustice. If you know of information that would harm your case and help your opponent's, you turn it over. There is case law contrary to your position? The judge is entitled to see it. The worst possible result for Crown counsel in a criminal case is the conviction of the factually innocent; in a civil case it may be the denial of a fair hearing. One must have high personal ethical standards, but the motivating principle is better expressed as the importance of understanding and doing what the office you hold demands.

5. *Speaking in public about a case*

Rules of professional conduct have long demanded that no statements be made in public that would materially prejudice a person's right to a fair hearing: see the FLS Model Code, s. 7.5-2. The same rule, however, also says that "[i]t is important that the public, including the media, be informed about cases before courts and tribunals." For most of my career with the Crown, no balance was struck between these competing considerations: the only thing Crown counsel ever said to the press was "no comment."

But these days, the balance is usually struck in quite a different way. In *Meng*, the amount of time we as counsel spent with communications people fashioning public statements was remarkable, onerous even. And I think that is as it should be; it is quite consistent with a modern Crown's professional obligation. For many people who are simply observers of the justice system, their view of the administration of justice will be shaped by cases that are prominently displayed for all to see, especially if they are in the public eye over an extended period. For counsel not to answer questions about the nature of the proceedings, and to some extent, about their own actions, risks weakening respect for the administration of justice.

The modern Crown does a lot more public explaining, in ways they never used to, because they cannot expect the deference that perhaps once existed. For example, explaining why someone was not charged, or why charges were withdrawn, can be come a critical piece of public speaking if you want the public to have confidence in the administration of justice. The speaker may usually be a government spokesperson or a press release, but it is not wrong for Crown counsel to be that person.

The importance of making public statements increases with lengthy litigation. In *Meng*, representatives of Meng, or people sympathetic to her position, spoke out often; a journalist's best friend is an ostensibly knowledgeable individual with a ready comment. For the Crown to respond to journalists by saying "the matter is under litigation, I have nothing to say," or even "I will wait until the end of the litigation to speak", ignores the nature of our modern world, where information and misinformation flows freely. Failure to even attempt public explanations just leaves more space for misinformation to flourish and suspicions of impropriety to grow. Silence creates the risk that people will form negative impressions of the administration of justice. If Crown counsel are being loyal to the administration of justice, as Justice Charron urges, contributing to the public dialogue about ongoing criminal litigation may enhance respect for the justice system.

Conclusion

Difficult, high-profile cases can test our commitment to values essential to the operation of a just criminal justice system. Those same cases can also be very important in fashioning the public's view of whether the system operates fairly for all.

I do not believe the extradition system is badly broken and in need of serious overhaul. Extradition, like every part of the criminal justice system, needs to be consistently and closely examined to see whether it responds adequately to modern challenges.

What I have tried to highlight here is that the extradition process is a highly unique context, with political considerations and concerns lurking at every phase of the proceedings, not just at the front and back ends. Proposed reforms should be tested against their potential impacts on the roles of the various players in the system- judges, counsel presenting the case for extradition and counsel defending persons subject to requests.

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Improving Disclosure in Extradition Cases: Preserving the Supervisory Role of Courts

By: Kevin W. Gray and Leo Adler

Role of the courts**Abstract**

Unlike defendants in criminal trials, who are constitutionally entitled to disclosure of all documents in the possession of the government, there is no equivalent right in the extradition context. This paper considers when limited disclosure of evidence held by Canadian authorities may be required under ss. 29 and 32 of the *Extradition Act*. The position of the Canadian Government, acting as a representative of foreign sovereigns, has traditionally been that disclosure is not required under the *Act* to address *Charter* violations if those alleged violations were unrelated to the use of any Canadian gathered evidence that the government has sought to introduce under s.32 of *Act*. That view has been rejected on multiple occasions by the Supreme Court of Canada (**"SCC"**), most recently in *Anekwu*. Nonetheless, the Department of Justice has continued to argue that disclosure is only required where there is a clear link between the issues at play during the committal hearing and alleged violations of the *Charter*. The government's approach, which has been endorsed by courts in some provinces, has been to label attempts to obtain disclosure as fishing expeditions and allegations of misconduct as lacking an air of reality. The effective result of the policy has been to reject judicial supervision of the actions of Canadian authorities, even where there is no other realistic means of bringing them to light prior to extradition. This article proposes a strengthened approach to disclosure, arguing that the approach of adopted by courts in many provinces is not compliant with the *Charter*.

Introduction

The *Extradition Act* was revised in 1999, according to the government of the day, in order to streamline extradition requests. The new *Act* moved away from an extradition hearing that more

closely resembled a pretrial hearing and introduced instead the Record of the Case ("ROC"). The ROC functions as a summary of the extradition partner's evidence against the person sought. It "must include a document summarizing the evidence available to the extradition partner for use in the prosecution and contain certification that "in the case of a person sought for the purpose of prosecution, a judicial or prosecuting authority of the extradition partner certifies that the evidence summarized or contained in the record of the case is available for trial." Where a state proceeds using a Record of the Case (which is the normal approach) the accused person is not provided the evidence to be used against him, but merely a summary thereof. No further disclosure is required under the Act, and the person sought will have limited rights to cross-examine affiants or to lead evidence.

Subsequent case law has established that the person sought for extradition is not entitled to *Stinchcombe* disclosure. The *Stinchcombe* regime governs criminal trials in Canada and requires that all relevant information in the possession of the government be disclosed to the defence prior to trial as a means of permitting the accused to make full answer and defence. Instead, under the current approach in Canada, the person sought is entitled to disclosure in only two circumstances. First, under *Anekwu*, where the ROC relies on evidence gathered in Canada, the accused is entitled to sufficient disclosure to determine if the evidence was gathered in a *Charter* compliant manner. Second, following *Larosa*, an extradition judge may order disclosure, as a discretionary remedy, where necessary to establish evidence of *Charter* violations, assuming that the applicable test is met.

This article discusses the application of the *Larosa* test and the relationship of the *Larosa* test to the ability of courts to control the manner in which the investigation of crimes occurs on Canadian territory. It argues that courts, in many provinces, have been overly deferential to the government in declining to order disclosure, either by finding that the evidence request is not linked to the extradition or that the person sought has not made out a *prima facie* case of a violation. As a result, individuals have been unable to vindicate their rights when those rights are violated by the actions of authorities investigating transborder crime.

Evidence Linked to the Extradition Request

Although the *Extradition Act* is largely silent on the issue, it is now well-established that where evidence of a violation of the *Charter* or some other law is identified, "the extradition judge, unlike the preliminary inquiry justice, may grant *Charter* [or common law] remedies that pertain directly to the circumscribed issues relevant to committal." What remains ill-defined is the precise scope of the phrase "circumscribed issues relevant to committal," the meaning of which continues to be a source of contention before courts.

On the preferred view of the Federal government, the term 'issues' refers narrowly to issues at play during the committal — notably whether evidence contained in the ROC was collected in a manner compliant with the *Charter*. On the preferred view of most defense counsel, the word 'issues' must be given a broad and purposive interpretation to allow the extradition judge to scrutinize the actions of Canadian authorities, including the manner in which they coordinate with foreign authorities, for

potential violations of *Charter* rights. Courts across Canada have yet to take a consistent position on the matter. These conflicting approaches have yet to be addressed and resolve by the SCC. This is particularly troubling in Ontario, where courts will virtually never order disclosure, even in the face of evidence of rights violations.

The Larosa Test

Previous jurisprudence has defined the potential scope for disclosure of evidence not contained in the ROC. As the Court of Appeal for Saskatchewan stated in *Daul,* the person sought may obtain disclosure "in relation to a *Charter* issue that is justiciable which has arisen at the committal stage of the extradition process if there is an "air of reality" to the issue raised."

As elaborated on in *Larosa*, decided by the Court of Appeal for Ontario, and subsequently adopted across Canada, an individual requesting disclosure must identify evidence linked to the extradition process that is in the possession of Canadian authorities. Courts will not generally order disclosure from foreign states provided they have provided the appropriate documents under the *Extradition Act*. The person sought must then satisfy a three-pronged test: (1) that the person sought's allegations of misconduct are capable of supporting the remedy sought, (2) that there is an air of reality to the allegations, and (3) that the documents or testimony sought would be relevant to the allegations.

With respect to the second prong of the *Larosa* analysis, the accused must show that there is an air of reality to the accusations. Under that prong of the test, there must be "some realistic possibility that the allegations can be substantiated if the orders requested are made." An allegation need not be certain, or more likely than not to be true. It merely must be tenable or plausible. The second prong can be satisfied on the basis of an evidentiary foundation which reasonably supports the allegations, including any reasonable inferences from the evidence available. It is generally not difficult to surmount this hurdle if evidence of Canadian conduct that is potentially rights-violative is available. As the court noted in *Meng*, disclosure should be ordered if "it is not possible, without full argument, to rule out that an applicant's application will succeed."

It is the first and third prongs that typically pose the greatest challenges to individuals resisting extradition. As construed by the courts, individuals held for extradition have very limited remedies available to them: the exclusion of evidence under s.24(2) or a stay of proceedings under s.24(1). Evidence can be excluded from the ROC if it was obtained illegally in Canada. In principle, this might put an end to extradition proceedings if it made identification of the person sought impossible. However, even if this were to occur, it would always be open to the requesting state to excise any illegally obtained evidence from the ROC. As a practical matter, this is often the approach of foreign authorities, acting with the assistance of their Canadian extradition partners.

An accused may also argue that the extradition should be stayed because of a violation of the person sought's *Charter* or common law rights. This will occur for one of two reasons: (1) where state conduct compromises the fairness of an accused's trial (the "main" category); and (2) where state conduct

creates no threat to trial fairness but risks undermining the integrity of the judicial process (the "residual" category). It is almost always the second – residual – category that is at play in the extradition context. However, the standard for an abuse of process leading to a stay is extremely high. It will only be granted in the clearest of cases. Very few cases have been found to be the clearest of cases. In one case, a judge suggested that an accused would be given the maximum possible sentence and raped while in prison. In another, the court declined to extradite an accused to the United States where American authorities had been complicit in the accused's being tortured in Pakistan.

Disclosure as a Means of Laying the Groundwork for a Stay

In the vast majority of cases, applications for disclosure are typically designed to allow the accused to argue for a stay under s.24(1) of the *Charter*. This had led to widespread divergence amongst Canadian courts as to how to apply the first and third prongs of *Larosa*. Courts in British Columbia and Quebec have taken a more liberal approach and have been more willing to find that disclosure should be ordered where the accused can show some wrongdoing that might, if widespread, lead to a stay.

For example, in *Sidhu*, the British Columbia Supreme Court was faced with the allegation that the persons sought had been transported to Toronto from British Columbia so that they could be quickly removed from Canada to India, and away from judicial oversight, if the Minister did not decide to reconsider his decision to permit extradition. As their lawyers were on the other side of the country, they were unable to communicate with counsel. The court found that there was an air of reality to the allegations that these government actions amounted to a violation of the right to counsel and ordered disclosure.

In *Meng*, A.C.J. Holmes was presented with evidence that the Canadian Border Services Agency ("CBSA") had abused its immigration powers to conduct a criminal investigation of Ms. Meng, with an eye to obtaining information to bolster an American extradition request and subsequent prosecution. The Court found that the evidence on the record, which tended to show that the CBSA had improperly interrogated Ms. Meng, and shared that information with the RCMP, established an air of reality sufficient to require subsequent disclosure. Notably, A.C.J. Holmes wrote that it was unclear whether the abuse of process would be sufficiently serious to justify a stay of proceedings. Nonetheless, she found that disclosure should be ordered to allow Ms. Meng to make that argument.

Finally, in *Sari*, the person sought alleged that when he arrived at Vancouver International Airport to celebrate his birthday with his family, the CBSA engaged in an authorized investigation of his electronic devices in order to gather evidence for the United States. The court found that even if it was not clear that a stay would issue, it was again appropriate to order disclosure.

Similarly in Quebec, courts have been willing to order disclosure to permit applications for a stay of proceedings. Thus, in *Larose*, where the person sought for a drug related offense alleged that a police interrogation violated her *Charter* rights to be represented by counsel of her choice, the court ordered

disclosure of the officers' notes in order to allow the defence to investigate the conditions of her detention and interrogation, even if it was not clear that a stay of proceedings would be available, "as a remedy for constitutional violations [such] as those alleged in this case."

However, not all courts have been as willing to order disclosure, as a result of which persons sought have been rendered incapable of providing fulsome arguments that Canadian authorities violated their *Charter* rights or otherwise engaged in abusive conduct. In fact, the Court of Appeal for Ontario has never ordered additional disclosure in an extradition case, including in *Larosa* itself.

For example, in *Viscomi*, the extradition judge declined to order disclosure to allow the person sought to argue that his section 8, 9 and 10(1) *Charter* rights were violated through an unreasonable search. The Court of Appeal for Ontario upheld that ruling. Rather than asking if it was possible that a stay might issue if disclosure were ordered, Justice Miller, for the majority, accepted the extradition judge's proposed "reasonable prospect for success on the application" test. Looking only to the evidence before the court and finding that the accused had no reasonable prospect for success on his application, the court declined to order additional disclosure.

In *Hibbert*, the person sought additional disclosure to show that his rights under s.8 were violated during a police search, and that information obtained was shared improperly with authorities in the United States. The court rejected the request for additional disclosure, arguing that disclosure was not necessary to determine if his rights were violated. (Ironically, after finding that a portion of the Canadian gathered evidence needed to be excluded based on a violation of the person's sought's *Charter* rights, the request for Mr. Hibbert's extradition was dismissed.)

In *Elofer*, the person sought requested disclosure of evidence collected by the police, including police notes from the day of her arrest, to argue that she was improperly arrested inside her house without an appropriate warrant. Although the person sought filed affidavits stating that the police had trespassed into her condominium unit to arrest her absent a proper warrant, the extradition judge declined to order additional disclosure.

Finally, in *Aboutaam*, the person sought requested disclosure with respect to the actions of the CBSA. The CBSA had admitted to sharing the person sought's passport application with the United States contrary to the privacy regulations in force at the time. The disclosure was designed to show not only that the evidence used to identify him was obtained in violation of the *Charter* and should be excluded under s.24(2), but also that the unauthorized sharing of Mr. Aboutaam's documents might lead to a stay under s.24(1). Both the extradition judge and the Court of Appeal had before them evidence of the sharing of information with the United States and ever-shifting explanations of what had happened and based on what legal authority. Nonetheless, both the extradition judge and the Court of Appeal denied his requests for further disclosure.

Conclusion: Laundering Our Wrongdoing?

As Professor Anne Warner La Forest has written, extradition law has always rested on maintaining a balance between safeguarding the liberty of the person sought and the state interest in international cooperation. Similarly, as Justice Moldaver stated in *McDowell*, the purpose of extradition hearings is to afford "fugitives the protection of our laws and values while they remain in Canada… [and provide] a front line check on the methods used by both foreign and domestic law enforcement agencies to collect evidence in Canada."

The SCC has never stated that a violation of the *Charter* will not lead to a stay. In fact, it has frequently stated the opposite. Nonetheless, Ontario courts have interpreted the *Larosa* test as requiring a showing not merely of a rights violation, but that disclosure is virtually certain to lead to a stay of proceedings. And precisely because a stay of proceedings is only available in the clearest of cases, courts have been extremely reluctant to order disclosure.

This approach is in contradistinction to the role of other courts in protecting the rights of Canadians in different judicial contexts. The right to a fair hearing, as the SCC noted in *Dersch*, is subsumed by s.7 of the *Charter*. It applies not only at trial, but as the SCC held in *Dynar*, in the extradition context. To identify how s.7 protections apply, the SCC has instructed courts not only to balance the interests of the individual against those of society as a whole but also the principles of reciprocity, comity, and respect for differences in other jurisdictions.

The emphasis on reciprocity and comity, invoked so frequently in extradition cases, needs to be understood for what it is, a red herring. Judicial supervision of the sharing of information is judicial supervision of Canadian, not foreign, police conduct. However, if the government is allowed to send evidence overseas without judicial supervision and to then deny disclosure, it can effectively 'launder' its wrongdoing by preventing any effective judicial supervision of its actions.

The *Larosa* test suffers from two key structural weaknesses as applied in large parts of Canada. Courts are extremely reluctant to scrutinize the manner in which Canadian-gathered evidence was obtained, despite the fact that in *Anekwu*, the SCC stated that "s. 32(2) applies to all Canadian-gathered evidence, whether it forms part of the record of the case or not." Moreover, although the SCC has made it clear that disclosure is permitted to allow for the person sought to argue for remedies under s.24 of the *Charter*, courts have adopted an onerous approach to the *Larosa* test, rendering disclosure virtually impossible.

This approach cannot have been what the legislation was designed to do. Simply put, it sets the bar too high. It requires courts to already know the existence of wrongdoing before ordering disclosure. But parliament cannot have intended to create a situation where the left hand of the state does not know what the right hand is doing. The job of the Attorney General and the courts is not just to facilitate cooperation with foreign states; it is also to ensure the protection of the rights and interests of individuals who are on our soil.

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Check Please? Extradition in the Era of Multi-Lateral Suppression Conventions

By: Gillian MacNeil

> Multi-lateral suppression
> photo by: Tori Rector

According to submissions made by the Minister of Justice in *United States v Burns*, 2001 SCC 7, para 73, “Canada satisfies itself that certain minimum standards of criminal justice exist in the foreign state before it makes an extradition treaty” (see also *United States of America v Ferras; United States of America v Latty*, 2006 SCC 33, para 56).

This assurance, its apparent acceptance by Parliament, and clear acceptance by the Supreme Court of Canada, has had a significant impact on Canada's domestic extradition law. In this contribution, I argue that it is time to excise this assumption from Canadian extradition law. Canada is party to several multilateral treaties which are intended to facilitate state cooperation in the suppression of certain transnational criminal offences (the "suppression conventions"). The provisions of these conventions are directly at odds with any assumption that Canada carefully chooses its extradition partners. The international legal reality of Canada's extradition relationships has changed significantly over the last several years. Canada's domestic extradition law should be amended to reflect that reality.

Canadian extradition law is governed by the *Extradition Act*, SC 1999, c 18, Canada's international treaty obligations (Harrington at 36), and decisions of the Supreme Court of Canada. Usually, an extradition from Canada is based upon the existence of an extradition agreement between Canada and another state. The *Extradition Act*, section 2 defines an extradition agreement broadly as meaning "an agreement that is in force, to which Canada is a party and that contains a provision respecting the extradition of persons".

Canadian extradition law consists of three stages. First, the Minister of Justice certifies whether the acts for which an extraditee is sought amount to offences under Canadian criminal law. Second, an extradition judge determines whether the individual before the Court is the individual sought and whether there is sufficient evidence to justify extradition. Finally, the matter is returned to the Minister to determine whether the individual should be extradited (*Extradition Act*; *MM v United States of America*, 2015 SCC 62, paras 19-26). As I suggest below, Parliament appears to have accepted that Canada has carefully assessed its extradition partners to ensure that those jurisdictions meet "minimum standards of criminal justice" (*Burns*, para 73). As I will argue, that assumption is reflected in certain key provisions of the *Extradition Act*. The Supreme Court of Canada has explicitly accepted this assurance (*Canada v Schmidt*, [1987] 1 SCR 500 at 523; *MM* para 120) and, I will argue, that has informed the Court's approach to its interpretation of both the judicial phase and judicial review of the final Ministerial phase of the extradition process.

The judicial phase of Canada's extradition process is governed by the provisions of the *Extradition Act*, including provisions related to the admissibility of evidence. The provisions were intended, at least in part, to make it easier for Canada to process extradition requests from jurisdictions with civilian legal systems (Currie, at 10-12; Harrington at 40). And, indeed, Canada has committed itself to "expedite extradition procedures and … simplify evidentiary requirements relating thereto", at least in respect of offences governed by some of the suppression conventions (see for example article 16.8 of the *United Nations Convention against Transnational Organized Crime,* ("*UNTOC*")).

As specified in section 29(1)(a) of the *Extradition Act*, the only issues before the extradition judge are whether "there is evidence admissible under this Act of conduct that, had it occurred in Canada, would justify committal for trial in Canada" and whether "the judge is satisfied that the person is the person sought by the extradition partner". This assessment is done in accordance with the evidentiary rules

which apply in the extradition context. Importantly, the extradition partner can submit a “record of the case” which includes “a document summarizing the evidence available to the extradition partner for use in the prosecution” (section 33(1)(a)). The extradition partner must certify either “that the evidence summarized or contained in the record of the case is available for trial” or that the evidence “was gathered according to the law of the extradition partner” (section 33(3)(a)). Provided the statutory conditions are met, the record of the case is admissible as evidence in the extradition proceedings (section 32(1)).

The provisions relieve the extradition partner from having to meet the usual requirements of Canadian evidence laws (the only exception to that rule is for evidence gathered in Canada). Instead, “[c]ertification … is the indicium of reliability that Parliament has prescribed for evidence” in the extradition context (*Ferras* para 52). The utility of certification as an accurate indicium of reliability depends in turn upon “Canada’s reliance on the good faith and diligence of its extradition partners”. (*Ferras* para 32). That reliance must, in my view, result from the understanding that Canada carefully selects its extradition partners before entering into an extradition relationship. Though changes to the *Extradition Act* were the work of Parliament, I would note that the Supreme Court first accepted assurances that Canada carefully chose its extradition partners in a 1987 decision (*Schmidt* at 523), several years before Parliament relaxed evidentiary requirements in the 1999 *Extradition Act* (on the nature of the changes and their interpretation, see Currie pp 17-23). It is logical that Canada is willing to rely on the good faith of its extradition partners precisely because of the belief that those partners have been carefully chosen.

The assumption that Canada carefully selects its extradition partners also influences the role of the extradition judge in assessing evidence. The role has been described by the Supreme Court as “carefully circumscribed” (*MM* para 22). This limited role is justified because “[t]he assumption that the requesting state will give the fugitive a fair trial according to its laws underlies the whole theory and practice of extradition” (*Argentina v Mellino*, [1987] 1 SCR 536 at 554-55). While the Supreme Court has accepted that an extradition judge has some ability to assess the threshold reliability of the evidence presented (*Ferras* paras 43-54; *MM* para 40), this is done against the presumption that the evidence is reliable (*MM* para 72). A presumption that “may only be rebutted by evidence showing ‘fundamental inadequacies or frailties in the material relied on by the requesting state’: *Anderson*, at para. 31.” (*MM* para 72).

The impact of the assumption on the Ministerial phase (and its review) is even clearer. The initial determination as to whether surrender of an individual would be unjust is left to the Minister (*Mellino* at 555-56). While the courts are able to review that determination (*Mellino* at 556), the Minister is accorded a high degree of deference. The determination as to whether the extradition of an individual would offend Canadian standards of justice is done against the understanding that Canada has carefully selected its extradition partners to ensure any individual extradited would receive a fair trial (*MM* para 120). When a potential extraditee alleges that a surrender decision “offends against the basic demands of justice”, Canadian courts should only intervene in “cases of real substance” (*Schmidt* at 523). This determination by the courts “must begin with the notion that the executive must

first have determined that the general system for the administration of justice in the foreign country sufficiently corresponds to our concepts of justice to warrant entering into the treaty in the first place" (*Schmidt* at 523).

The impact on Canadian extradition law of the assumption that Canada carefully selects its extradition partners is clear. Unfortunately, that assumption fails to take into account the international legal reality of Canada's extradition obligations. As noted at the outset, Canada is party to several suppression conventions. These conventions oblige state parties to cooperate to suppress and prosecute serious transnational criminal offences including various acts recognized as amounting to terrorism, transnational organized crime, and corruption. While the specific details of the conventions differ, most have general features in common. The conventions typically require state parties to (1) criminalize certain conduct, (2) establish jurisdiction over those crimes on multiple bases, (3) cooperate in investigating the crimes, and (4) cooperate in extraditing or prosecuting individuals charged with those crimes. Because of the terms of the conventions, by becoming a party Canada has dramatically circumscribed its ability to carefully select its extradition partners.

A database maintained by the United Nations Office on Drugs and Crimes shows that Canada is party to 24 instruments directed at ensuring state cooperation in the suppression of transnational crimes of international concern. While not all these instruments are full conventions (among the list are agreements which amend earlier treaties), the database indicates that Canada is party to roughly 19 original conventions or protocols which establish obligations to cooperate with other states to suppress transnational offences. One of those treaties, the *Convention on Cybercrime* ("*Budapest Convention"*) is a Council of Europe convention (though non-members of the Council may become party at the invitation of the Council of Europe's Committee of Ministers: see article 37). The remaining 18 suppression conventions to which Canada is party are global in scope.

Of the 19 global or regional suppression conventions to which Canada is a party, only one, the *Convention on Offences and Certain Other Acts Committed on Board Aircraft* (article 16.2), does not create an obligation to extradite.

The extradition provisions in the remaining 18 suppression conventions to which Canada is a party differ in some respects, but two features are common. First, the conventions provide that, if there is an existing extradition agreement between two parties to the suppression convention, the offences included within the convention are deemed to be included as extraditable offences in the existing extradition agreement (see for example article 9.1 of the *International Convention for the Suppression of Terrorist Bombings*).

In the absence of an existing extradition agreement, the suppression conventions generally provide that a state party that makes extradition "conditional on the existence of a treaty … may at its option consider [the relevant Convention] as the legal basis for extradition in respect of the offence" (see for example article 8.2 of the *Convention for the Suppression of Unlawful Seizure of Aircraft*, the "*Hague Hijacking Convention"*). That feature of the suppression conventions was further elaborated in two of

the most recent of the suppression conventions to which Canada is party.

Article 16.4 of the *UNTOC* provides that a State Party which makes extradition conditional on the existence of a treaty may use the *UNTOC* as the basis for extradition, provided that the State informs the UN Secretary General of their willingness to accept the *UNTOC* as "the legal basis for cooperation on extradition" (article 16.5). Canada has made such a notification. These provisions of the *UNTOC* apply not only to the offences contained in the *UNTOC,* but also to the offences governed by the *UNTOC*'s protocols. Canada is currently party to two of those Protocols: the *Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children*, and the *Protocol against the Smuggling of Migrants by Land, Sea and Air*. In addition, the *United Nations Convention against Corruption (*"*UNCAC")*, contains a similar provision (article 44). When Canada ratified the Convention, it indicated that it "recognize[d] the Convention as an extradition agreement sufficient to establish the legal basis for extradition under domestic Canadian law.".

These sorts of provisions raise two issues that undermine the assumption that Canada has carefully selected its extradition partners and limited its treaty relationships to those jurisdictions which meet certain minimum standards. The first problem is created by the provisions which deem new offences to be included in existing bilateral extradition treaties. Canada may currently choose its bilateral extradition partners carefully, but this was not always the case: until Canada became responsible for its own international relations, it did not choose its extradition partners at all. As noted by Joanna Harrington, this historical reality, combined with the apparent lack of ongoing attention to the existence of these older extradition relationships, means that Canada maintains bilateral extradition relationships with current or former Commonwealth states, some of which have problematic human rights records (p.39). Rather than limiting the possibility that Canada may be asked to extradite an accused to one of these states, the deeming provisions of the suppression conventions expand the possibility of a request for extradition.

The second problem is, perhaps, the more obvious: as a party to the suppression conventions, Canada has bound itself to multilateral agreements which may serve as the basis for extradition in the absence of a bilateral relationship. The impact of Canada's status as party to these treaties cannot be overstated: to give only two examples, there are 190 parties to the *UNCAC*, the *UNTOC* tops that number with 192 current state parties. The suggestion that Canada carefully assesses the legal system of a state before entering into an extradition relationship is inconsistent with the reality that Canada has enmeshed itself in a web of multilateral extradition obligations. This leads to my final point.

The *Extradition Act* sets out the grounds on which the Minister may refuse extradition. The Supreme Court has held that any decision to extradite must also respect the *Charter* (*Kindler v Canada (Minister of Justice)*, [1991] 2 SCR 779 at 846-47). However, those protections may be limited. There is no blanket prohibition on Canada extraditing an individual to face capital punishment (though absent exceptional circumstances Canada should obtain assurances that capital punishment will not be imposed) (*Burns* para 8). Further, the Supreme Court has, in the context of deportation, affirmed that

expelling an individual to face torture may be a justifiable limit on an individual's section 7 *Charter* rights (*Suresh v Canada (Minister of Citizenship and Immigration)*, 2002 SCC 1, para 78).

I do not mean to suggest that Canada will routinely extradite individuals to face either torture or capital punishment (where a request comes from the US, Canada always seeks diplomatic assurances when a death sentence is possible: see Standing Committee on Justice and Human Rights, *Reforming Canada's Extradition System* 16). What I do suggest these decisions indicate is that the protection that the *Charter* provides in the extradition context is unclear and may be lower than Canadians might assume. What is clear is that "[d]ifferences in legal systems – even substantial differences – should not, generally speaking, constitute grounds for refusing surrender" (*MM* para 120). Section 44 of the *Extradition Act* provides that the Minister must refuse extradition if the purpose of the extradition is to enable the requesting state to prosecute or punish an individual on discriminatory grounds or if the extradition would be unjust or oppressive. The latter, as the Supreme Court has observed, "is clearly a high test" (*MM* para 119). It is time to ask whether that high bar is justifiable in light of Canada's multilateral extradition obligations.

The international reality of Canada's extradition relationships has changed significantly since the Supreme Court's recognition, in its 1987 decision in *Schmidt,* that the existence of an extradition treaty indicates Canada's executive had carefully assessed that jurisdiction's legal system. The multilateral conventions to which Canada is party make such assessments impossible. Canada has effectively entered into extradition agreements with nearly 200 states, most of which were not chosen on a bilateral basis. Canada's domestic extradition law should be updated to reflect that reality. A necessary first step is for the Supreme Court to revisit its acceptance that Canada carefully chooses its extradition partners and excise from its jurisprudence the assumptions that flow from that acceptance. If Canada considers that the legal system and human rights record of an extradition partner meets "minimum standards of criminal justice" (Burns, para 73), our courts should require the Minister to establish the basis for that belief in evidence. Parliament should act as well to specify the type or types of evidence which would provide acceptable proof. Whether that be by way of annual country reports compiled by Global Affairs Canada, review of an extradition partner's legal system and human rights practices by the Minister upon receipt of an extradition request, or some other mechanism is something to be decided by Parliament. Whatever domestic mechanism is ultimately chosen should, however, reflect the current international context of Canada's extradition relationships.

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A Lethal Illustration of How Extradition Laws Turn a Blind Eye to Gender-Based-Plus Considerations

By: Matthew Behrens

Michele MessinaWhile human rights advocates have long lobbied for urgent reform to Canada's *Extradition Act* (the *"Act"*), some may have done a double take a the June 2023 recommendation from the House of Commons Standing Committee on Justice and Human Rights that "the Department of Justice's International Assistance Group receive the training it needs so that it can conduct gender-based analysis plus in the course of its duties."

This call was generated by evidence that the *Act* appears to have been used – in the *MM* case with lethal effect – as a backdoor bludgeon for abusers to chase down and capture battered women and children who had escaped their clutches.

The *MM* case (MM Michele Messina, whose name was subject to an unwanted publication ban) bitterly divided the Supreme Court of Canada in 2015, when a strong all-female dissent accused the majority of "Kafkaesque" justice. While a 4-3 majority affirmed its belief that the role of an extradition judge was limited to determining the sufficiency of foreign evidence to justify committal while excluding consideration of defences, it left several questions unresolved, including the proper interpretation of a *Criminal Code* section (s. 285), which directly impacted the double criminality analysis in Messina's case.

When Messina sought a second opportunity to resolve those concerns in 2019, the Court refused to grant leave, triggering a desperate underground journey that ended when, following her arrest on the outstanding extradition warrant, she took her own life on November 5, 2019 at the notorious Leclerc Detention Centre. As of this writing, however, those issues remain outstanding, and the role of the Minister remains more rubber stamp than safety valve.

While the *MM* case has generated considerable comment on the minutiae of the legally contorted extradition process, it also highlights the serious flaws of a regime that, had it been grounded in *Charter* values and internationally recognized human rights standards, would have produced a much more just result for Messina and her now orphaned children.

Messina fought a decade-long struggle against an extradition process that utterly failed to consider the individualized and systemic gendered violence that led to such a painful ending. This raises serious questions about how normative assumptions undergirding Canada's legal system are upended when the Minister of Justice must prioritize the potential hurt feelings of an extradition treaty partner over the *Charter* rights of the person sought. Indeed, how can it be that superior and appeal courts regularly abdicate their responsibility in committal hearings for interpreting the scope and content of crimes and defences, punting that back to the hands of a Minister who ultimately makes extradition decisions that, as the majority in *MM* noted, are "essentially political in nature"?

As counsel for Messina pointed out in their second Supreme Court leave application, both the comparison of defences available in Canada and a requesting state, and opining on the reasonable prospect of success if the defence was raised in a Canadian trial, "requires the Minister to interpret domestic criminal law. Interpretation of the *Criminal Code* is a question of general law that is both of central importance to the legal system as a whole *and* outside the Minister's specialized expertise. It is entirely a legal and not a political question. …Further, as a matter of legislative intent, Parliament has clearly assigned responsibility for interpreting domestic criminal law to the courts, and not to the Minister."

The deleterious effects of this blurring of roles were acutely felt in Messina's case. This was exacerbated by the *Act*'s head-scratching jurisdictional confusion, low evidentiary standards, undue ministerial deference, and, in *MM*, seemingly wilful blindness even to expert evidence and Supreme Court guidance, which comported with the narrow legislated confines for refusing a surrender that would be unjust or oppressive. Her unique circumstances were compounded by the collective failure to apply a gender-based-plus analysis of the detailed record of injustice that clearly demanded protection for Messina and her children. Instead, this case history was often seriously misinterpreted and, in some cases, ignored.

Sadly, missing in action throughout Messina's decade-long struggle, was the responsibility of multiple courts and successive Ministers of Justice to take judicial notice of the well-documented patterns of male violence against women and children, including the use of family courts and police as further tools of control over women struggling to be free of violence. Messina was traumatized by the consistent judicial and ministerial questioning and downplaying of her lived experience as a battered women who had survived years at the hands of an abuser who had broken her ribs and teeth, kicked her while she was pregnant, raped and threatened to kill her, and beat and terrorized their three children.

The Details Behind the MM Case

Following the 2001 breakup of her marriage in the U.S. state of Georgia, custody of Messina's three children bounced back and forth between her and her ex-husband.In 2008, a judge imposed a draconian *ex parte* custody order, which barred contact with her children due to allegations that Messina excessively consumed alcohol. She was subsequently arrested for violations of the order on

numerous occasions, usually because the children were desperate to be in contact with her. That her abusive ex-husband had been awarded custody of the children, despite his lengthy record of violence, was depressingly unsurprising. As *Salon* reports, “In family courts throughout the [U.S.], evidence that one of the parents is sexually or physically abusing a child is routinely rejected. Instead, perpetrators of abuse are often entrusted with unsupervised visits or joint or sole custody of the children they abuse, putting children in danger of serious, often life-threatening harm, according to children’s advocates.”

In November of 2010, while Messina was trying to regain access, the children (then aged 14, 11 and 9) escaped from their abusive father and, for a week, lived in an abandoned house, sleeping on a concrete garage floor. Afterwards, they couch-surfed from house to house, all the while begging Messina to take them in. She refused, noting she could go to jail if she had any contact with them. Given the desperate circumstances of the children, who continued couch-surfing in an effort to avoid being returned to their abusive father – and the increasing levels of violence and threats made against Messina by her ex – she turned to an adult daughter from a previous marriage, who packed a distressed Messina and the kids in a car and drove them to Canada where Messina had been born.

The U.S. then sought extradition based solely on the father’s “suspicions” that Messina had taken the children from him. The RCMP found the family in a women’s shelter by tracing the internet log-in passwords of the children. Messina was arrested and jailed two days before Christmas, and she remained behind bars awaiting bail for six months. Her children were assigned to foster care. At the time of the arrest, an RCMP officer acknowledged that the children “expressed their fear of the father.”

Even within the impossibly narrow guidelines for refusing surrender, Messina’s original 2011 case appeared open and shut to Quebec Superior Court Justice Carol Cohen, whose pointed questions of Crown counsel during the committal hearing were imbued with frustration and incredulity. Indeed, 13 years before the House Committee recommended that “the Extradition Act be amended to lower the required threshold to rebut the presumption of reliability of the extradition partner’s record of the case [ROC] at the committal hearing,” Justice Cohen declared that if the ROC against Messina were evidence at a preliminary inquiry, “there would not be sufficient evidence to hold her over for trial.”

Justice Cohen also expressed her frustration with Crown arguments that it was beyond her jurisdiction to admit and weigh evidence and to interpret the double criminality that would speak to Messina’s potential exoneration were the case to be heard in Canada. “I think that would be a travesty of justice” to exclude it, she declared.

As the Crown lectured Justice Cohen that she “cannot listen to evidence that goes to a defence or that goes to the whole picture,” she was also told that, as the extradition judge, she could not “look at Canada’s international obligations. It is up to the Minister because he’s the specialist in the matter.”

In a short time, the extradition was quashed. Justice Cohen dismissed the evidence as “so defective and unreliable that it is not worthy of consideration”, paying particular attention to the *Fischbacher* discussion of double criminality’s purpose “to safeguard the liberty of an individual whose extradition is sought by ensuring that he or she is not surrendered to face prosecution in another country for conduct that would not amount to a criminal offence in the country of refuge.” In this instance, the double criminality hinged on section 285 of the Criminal Code, and the exoneration of actions undertaken as “necessary to protect the young person from danger of imminent harm or if the person charged with the offence was escaping from danger of imminent harm,” a defence unavailable to Messina in Georgia.

In her decision, Justice Cohen noted: “We are in the presence of children running away from an abusive father without the knowledge or assistance of their mother, living in an abandoned home and finally begging their mother to take them away, so that their father couldn’t hurt them again.”

During the committal hearing, Justice Cohen noted that the imminent harm faced by the children was documented by a Director of Youth Protection report, and asked whether the Crown possessed “any jurisprudence that section 285 would not apply in an extradition proceeding.” The Crown conceded they did not but proceeded nonetheless under the assumption that the case was presumptively reliable.

The federal government’s successful appeal on jurisdictional grounds – that Justice Cohen had allegedly overstepped the limited bounds of an extradition judge – set the stage for a 2015 Supreme Court showdown. There, some of the country’s top judges asked a series of questions that revealed a serious lack of gender-based-plus analysis.

Missing Something?

“She didn’t take the children from the father at the house in terms of him having possession,” Justice Michael Moldaver declared. “She took them [after] they’d already left. Where’s the imminent harm? I’m just kinda missing that. Imminent harm’s gotta mean something.” Justice Moldaver also apparently missed that, in the record before the Supreme Court, Quebec’s Director of Youth Protection accepted the conclusion of child and family services in Georgia, that they could not confirm that “the children will be safe from abuse if taken back to Georgia.”

Later in the hearing, Justice Moldaver asked the “why didn’t she go to police” question with a notable sense of exasperation.“There were all kinds of other options available at that point other than escaping to Canada,” Moldaver opined, referencing an incident in which Georgia police had stopped Messina and the children for an alleged DUI incident (for which Messina was never charged). Moldaver offered the view that, “what better opportunity to say ‘by the way officer, my children are in imminent harm. Please do something?'”

Chief Justice Beverley McLachlin also betrayed a similarly outdated view of systemic gendered violence when questioning Messina’s lawyer along similar lines, noting: “[i]t is suggested in some of

the material of the [government] that she should have just gone to court or done something like that if your children are in trouble with their custodial parent. This is what we encourage citizens to do in our country. What do you say to that?"

In her eventual dissent, Justice Rosalie Abella pointed out that "the defence of rescuing children to protect them from imminent harm does not exist in Georgia [and] the mother will not be able to raise the defence she would have been able to raise had she been prosecuted in Canada…. At the end of the day, there is little demonstrable harm to the integrity of our extradition process in finding it to be unjust or oppressive to extradite the mother of young children she rescued, at their request, from their abusive father."

Upon hearing news of the Court's 4-3 decision, Messina launched a 12-day hunger strike from her prison cell in Quebec. (Those sought for extradition must normally report to prison in anticipation of legal decisions). A national campaign for reconsideration led by Women Who Choose to Live convinced Jody Wilson-Raybould, the newly elected Justice Minister of a new government which had claimed to embrace feminism, to take a second look at the case, which she announced five years to the day that Messina had been arrested in the women's shelter.

As noted above, when the Minister of Justice takes on a role, namely interpretation of law and defences, that is intended for courts only, it can produce hugely problematic results, which it did in Wilson-Raybould's surrender reasons. Despite having new evidence that was not before her predecessor or the Supreme Court – including an expert opinion from the director of the University of Georgia Law School's Family Violence Clinic addressing the lack of a viable U.S. defence for Messina – Wilson-Raybould insisted that Messina had not met the three-part threshold test to refuse surrender as laid out by Justice Cromwell's majority in *MM*. The three-part test compares differences between the laws of the respective states, explores the likelihood of success were the case to be tried in Canada, and considers how the differences in the laws of the two states would lead to significantly greater jeopardy for the person sought if extradited to face trial.

The Minister chose to ignore Justice Abella's rich analysis of this test and the scope and ambit of section 285. Instead, as Messina's lawyers pointed out, the Minister "articulated a fundamentally different defence based on a lower court decision" while dismissing the detailed family violence expert evidence of a leading Georgia legal scholar who emphasized that attempts to argue a non-existent equivalent of section 285 under Georgia law would "require a judge to make a novel extension of the law to a circumstance not expressly contemplated by the legislature."

In doing so, Wilson-Raybould relied on arguments that seemed remarkably unconcerned about the danger posed by Messina's ex-husband. In one particularly dismissive passage, she ignored the voluminous record of abuse by claiming, "[i]n my view, even applying the most generous modified objective standard to the situation that takes into account Ms. Messina's *claimed background as an abused spouse* [emphasis added], it cannot be said that she was of the opinion that at the time that the children [*sic*] were at risk of 'imminent harm.'" Notably, Department of Justice lawyers also tried to

minimize the violence in their subsequent judicial review factum, which at paragraph 25 noted that the Minister acknowledged “the children suffered abuse at their father’s hands” yet at paragraph 34 reverted to naming it as “their father’s *alleged* physical abuse,” contradicting that part of the record that described the abuser’s arrest for “battery and cruelty to children.” [[1]]

Echoing Justices Moldaver and MacLachlin, Wilson-Raybould criticized Messina for allegedly not providing “any reasons for not contacting the police or child and family services on behalf of her children regarding her concerns about her children’s well-being.” Wilson-Raybould continued by claiming Messina “had adequate opportunity to contact the authorities and it cannot be said that there were no legal alternatives such that she was left with no choice but to take the children to Canada.” She apparently skipped that part of the record where Messina, when asked under oath why she had fled to a Quebec women’s shelter, declared: “Because I had been beaten by him for the last final time.”

Wilson-Raybould also seemed more concerned about the abusive father the children clearly did not want to see, stunningly remarking that in her view, Messina had “deprived” this abusive father “of the reasonable opportunity to visit his children.” Clearly, she did not take account of the Director of Youth Protection report that showed that in one 2011 interview with the father, “at no time did the father call the children by their names. It was the ‘girls’ or the ‘boy.’ He did not express that he loved the children and wanted them to return home.”

The Minister gave lip-service to but downplayed the well-documented violence the children and Messina had experienced by conceding that “the children’s accounts of their relationship with their father are less than positive.” She went on to imply that the abuse could not have been that bad given that the children did not complain to a high school counselor about the abuse and that they attended school regularly.: There was no recognition that it was unlikely that a high school student would share such information with school counselor, knowing that it could result in a phone call home and retaliatory violence from the abuser.

In conclusion, Wilson-Raybould found that “it cannot be said that the harm that [Messina] was attempting to avoid was proportionate to the harm that she caused her children.”

Such troubling outcomes are almost inevitable given the high degree of interpretive and decision-making discretion provided to the Minister under the *Extradition Act*. It starkly underscores that surrender decisions should ultimately be a legal inquiry, not personal or political.

The *MM* case was not the only gender violence extradition upheld by Wilson-Raybould around this time. It was in fact contemporaneous with KT, a Canadian-born UK resident who endured years of physical and psychological abuse. Following a divorce, she was awarded custody of two children, with the father retaining visitation rights. The order stipulated that KT could take the children out of the UK for periods of up to 28 days.

When KT moved back to Canada in October 2015, the two children came with her to see where she would be living. Both boys had the full intention of returning to England to continue their schooling. But during a Skype call with their father shortly after their arrival in Canada, things turned sour; the father became angry and threatened to have the boys arrested. When it became apparent that the boys were questioning whether they had to go back to the UK, the father initiated court proceedings to have the children apprehended and immediately returned to the U.K. notwithstanding KT's right to have the boys with her for up to 28 days.

The Supreme Court of British Columbia refused to allow KT to adduce any evidence to prevent her sons'extradition. The history of the abuse she suffered was deemed not relevant. The Court also refused to consider affidavits from the children that "depose that they do not wish to live in England ever again. They depose that they have asked [the father] several times if they could visit him in the U.K. during school holidays, the eldest once even offering to pay for his own flight. However, [the father] declined each time, saying more than once that he wants to see the results of the extradition proceedings."

In other words, extradition was clearly, as KT explained, being used by her abusive ex-husband as a bludgeon. The Court even refused to consider evidence from a social worker who "report[ed] that the boys have expressed clear and unequivocal views that they wished to remain in Canada with their mother or, if not with her, with their aunt. The boys […] question the apparent attempt of the legal system to trump their views and their voiced opinions."

Apart from the failure to apply a gender-based impact analysis to this case, how did the extradition even get off the ground when it was clear that the alleged facts underpinning the allegations show there was no violation of the law? Indeed, the alleged "child abduction" was not in fact an abduction because the children were overseas within the terms of the custody order, the father was able to communicate with his sons, and the mother attempted to have the boys communicate with the father even after he had threatened to have them arrested. But the dogmatic adherence to an extradition partner's presumed reliability led yet another family down a deeply troubling road.

Ultimately, such extradition cases have serious ripple effects. The organization Women Who Choose to Live has heard from at least half a dozen distressed dual national mothers who have had to weigh the benefits of escaping abusive situations with the reality that any prospective peace and safety in Canada could be interrupted by an abuser's easily sought and executed extradition request. The psychological and legal limbo faced by such protective mothers is excruciating, especially considering they would have a defence for protecting their children from imminent harm had their actions taken place in Canada.

As Justice Abella concluded in her *MM* dissent, the child-centred purpose of section 285 of the Criminal Code "is not a licence to abduct children, it is a defence from criminal liability where their safety urgently requires rescue." The fact that so many have failed to recognize the urgent need for rescue in these cases speaks volumes about the failure of the Canadian judicial system and the

Department of Justice, not only to heed the critical lessons of gender-based-plus analysis, but also to recognize the many ways that the *Extradition Act* leads to serious human rights violations.

[1] See *Mulkey v Canada (Attorney General) (United States of America)*, 2016 QCCA 234 (Respondent's Brief, Attorney General (United States of America) at paras 25 and 34.

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Deferring Justice: The Politicization of Human Rights in Canadian Extradition Law

By: Prabjot Singh

Politicization of Human Rights in Canadian Extradition LawCanada's extradition process revolves around a highly discretionary process which prioritizes administrative efficiency and the executive's authority in matters of foreign affairs over individual *Charter* rights and Canada's international human rights obligations. This raises a number of concerns about prospective extradition to countries where persons sought may face the likelihood of unfair trials, mistreatment, politicized criminal proceedings, torture, and/or other oppressive treatment. These concerns are not just theoretical, but carry potentially grievous consequences, starkly illustrated by the torture of Régent Boily after extradition to

Mexico despite diplomatic assurances in place, the Supreme Court of Canada's ("SCC") problematic conclusions in *Badesha*, and repeated public statements by Indian officials that they intend to initiate extradition proceedings against Sikh dissidents in Canada and have, in fact, made several requests.

The current lack of adequate judicial oversight over such matters leaves members of the Sikh community especially vulnerable to prospective human rights abuses given the problematic use of diplomatic assurances and Canada's ongoing extradition relationship with countries like India.

Diplomatic Assurances: A flawed compromise between politics and Charter rights

The central flashpoint of this legislative tension lays in the judicial deference shown to the political executive in extradition proceedings due to its authority to manage foreign relations. In this context, the SCC has described the Minister's decision to order the surrender of a person sought as "largely political in nature" despite the legal and human rights implications of this decision. While a good deal of jurisprudence has gradually developed to maintain and protect the section 7 *Charter* rights of accused individuals in international contexts, the continued deference to the Minister on this question leaves a dangerous grey zone of vulnerability in extradition proceedings.

In *Badesha,* the SCC sought to further address these complexities involved in balancing *Charter* protections, criminal prosecution, and deference for the executive's handling of foreign policy. Dealing with two Canadian citizens requested by India, the Minister of Justice ordered their surrender contingent on assurances from India regarding their treatment. The British Columbia Court of Appeal found the Minister's decision unreasonable due to India's dismal human rights record and the inadequacy of the measures taken further to the assurance to concretize India's "good intentions" into "realistic protection." The SCC reviewed the Minister's decision and concluded that while some inquiry is required into the human rights record of the requesting state, this would ultimately be tempered by the "high degree of deference accorded to ministers of the Crown in matters of foreign affairs and international cooperation."[1]

One of the central flaws in Canada's extradition proceedings is this overwhelming deference granted to the Minister which effectively hollows out any meaningful judicial review or oversight of the surrender decision. As Professor Joanna Harrington notes, the "real test lies in the application of this exhortation, and a court's willingness to scrutinize a government's assessment so as to ensure a degree of robustness in judicial review that is in keeping with the absolute nature of the right to be free from serious mistreatment."[2] In this regard, Professor Harrington identifies several grave problems in the Court's weighing of the factors in *Badesha*. While India is a party to the International Covenant on Civil and Political Rights ("ICCPR") and the International Covenant on Economic, Social and Cultural Rights—binding it to international human rights obligations including the prohibition on torture—the Court failed to note that India has refused to comply with the ICCPR's monitoring process under article 28. In fact, Professor Harrington notes that the last report submitted was in 1995.

Additionally, Professor Harrington points out that despite being a signatory since 1997, India has not become a party to the 1984 *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* and is therefore not subject to international monitoring by the Committee Against Torture as a result. Considering this wanton disregard of its international responsibilities, Professor Harrington points out that this is "hardly a sign of an Indian commitment to respecting its treaty obligations."[3]

The problem which flows from *Badesha* is that it reiterates that when diplomatic assurances are required to prevent a *Charter* violation, a reviewing court is only expected to consider "whether the Minister has reasonably concluded that, based on the assurances provided, there is no substantial risk of torture or mistreatment." Rather than giving real weight to the meaningful preventionof *Charter* rights, this standard of review grants so much deference to the Minister that the degree of judicial review is merely whether the Minister's decision "falls within a range of reasonable outcomes." The justification for this relies on the logic that such a decision sits at the "extreme legislative end" of administrative decision-making due to its political nature and the Minister's "superior expertise in international relations and foreign affairs."

In effect, the Crown merely has to demonstrate that the Minister *considered* the relevant facts and reached a "defensible conclusion based on those facts" regardless of the gravity of the human rights concerns at hand. In practice, this means that the Minister enjoys what is probably the most deferential standard of review in making surrender decisions: "a reasonable decision that there is no substantial risk of torture or mistreatment is, in reality, fairly low."[4]

It is obviously important for government to have some flexibility and creativity in order the navigate the oftentimes anarchic sphere of international politics. It is crucial, however, to keep in mind that this authority exists on a spectrum. Extradition to a jurisdiction with the risk of torture or the death penalty should not be considered a "high level" policy question that should outweigh public policy and public interest considerations or individual *Charter* rights. To the contrary, it is a highly individualized, discretionary decision that directly determines whether the accused will be deprived of the right to life, liberty, or security of the person. This should be subject to an exacting standard of review given the grave implications of the decision. Granting such a great degree of deference on such a highly specific and substantial decision opens up dangerous possibilities with an impossibly high threshold to overturn inappropriate decisions that do not comport with Canada's international obligations.

Case Study: Sikh activism and the global tools of Indian repression

Canada's unbalanced extradition procedure and the highly deferential standard of review leaves racialized communities and other marginalized groups highly vulnerable to foreign states who may abuse Canada's procedure to stifle political dissent and silence government critics around the world. This is evident in the case of India, one of Canada's many extradition partners, which has consistently sought to repress Sikh political advocacy within India itself, alongside attempts to delegitimize and suppress dissidents living outside of its borders. While using broad anti-terror legislation and

extrajudicial violence domestically, Indian agencies have long engaged in foreign interference, transnational repression, and even extraterritorial assassinations abroad. Within this toolkit, India also seeks to misuse extradition law in bad faith interactions with other states in order to secure custody of Sikh activists in the diaspora.

Although this is a specific analysis of the approach taken by one requesting state, this case study shines light on the cracks in Canada's general extradition structure which may be exploited by any number of bad faith actors—illustrating the urgent need for reform.

Following a litany of injustices and grievances against the Indian state, many Sikhs declared the intention to secede from India in order to establish an independent state, Khalistan, in 1986. In response, Indian security forces sought to repress this mobilization by rejecting any political settlement on self-determination and, instead, used force to crush Sikh dissent militarily in order to maintain political hegemony over the region. India and Canada originally signed their extradition treaty during the height of this insurgency, specifically keeping the proposed extradition of Sikh dissidents in mind.

An analysis of recent case files of Sikh activists in India illustrates a pattern of allegations against activists to secure arbitrary detentions: stock witnesses used in numerous cases from a single police station are cited for information regarding alleged links with foreign Sikhs, intention to commit terrorist acts, and procuring funding. Torture and intimidation are routinely used, along with allegations of international funding and fabricated evidence which are used to frame criminal charges.[5] As articulated by human rights lawyer, Jaspal Singh Manjhpur, the purpose of India's anti-terror legislation—particularly in its use against Sikh dissidents—"is to mentally, socially, economically and politically destroy activists so they are shut down and create a wider atmosphere of fear." The transnational dimension of this strategy is clearly demonstrated by the examples of foreign nationals or residents targeted by India's security apparatus—domestically and internationally.

One British national arrested while visiting Punjab in 2017 had his liberty deprived on discriminatory grounds as he was "targeted because of his activities as a Sikh practitioner and because of his activism in writing public posts calling for accountability for alleged actions committed against Sikhs by the authorities." Similarly, the case of a Canadian permanent resident accused of being associated with alleged Sikh insurgents sheds light on India's unwillingness to comply with its own Supreme Court's directives, let alone diplomatic assurances with no legal enforceability. As a result of his eight-year ordeal (at the time of publication), this individual has been unable to return to Canada to maintain his permanent residency because of the "persecutory behaviour of the Indian state." According to a 2020 IRB decision, the young Sikh was thwarted from returning to Canada despite two separate orders from the Supreme Court of India. He also provided evidence of enduring torture while in custody, as well as facing continuing police harassment after securing bail which made it impossible to work and caused a strain on his marriage. The decision ultimately found that "Indian authorities have treated the Appellant in an unjust and unconscionable way, that violates not only Canadian legal principles but international legal norms."

These problems are clearly reflected in past extradition requests made by India in other countries.

Kulbir Singh Barapind - The case of Sikh student leader, Kulbir Singh Barapind, is illustrative of the risks of accepting diplomatic assurances given by India. Barapind was an active member of a Khalistani student group in Punjab who eventually fled persecution in India and entered the US in 1993. He would later be extradited back to India in 2006 after receiving Indian assurances that he would not be tortured. Despite India's assurances—and the fact that an Indian court acquitted him of all charges and released him in 2008—Indian security forces arrested him again in 2008 and "subjected him to beatings, electric shocks, and other forms of prolonged torture."[6] In a public statement about Barapind's case, Human Rights Watch highlighted the importance of foreign governments taking India's poor record on torture into account when assessing whether to extradite individuals to the country.

West Midlands Three - In December 2020, three UK-based Sikh activists were arrested after extradition proceedings were certified at India's request. The trio was accused of being involved in the 2009 assassination of a right-wing leader of the Rashtriya Swayamsewak Sangh, linked to the ruling BJP in India. These proceedings were certified despite a thorough investigation by West Midlands Police in 2011 concluding that no charges would be laid. The three contended that they had not been in Punjab at the time of the offence but that they did travel to Punjab between 2005 and 2008, in order to document atrocities committed against Sikhs. This is why they believe they were targeted. The government lawyer representing India ultimately withdrew the extradition request on September 22, 2021, acknowledging in court that there was insufficient evidence to substantiate the request, although he noted that "India may in future seek the extradition of these requested persons for these offence or other matters." The widely-respected human rights lawyer, Gareth Peirce, represented the three men and noted that the prosecution failed to inform the court that there had already been related trials in India in which several others had been exonerated, as the evidence in this case was found to have been fabricated and witnesses coerced by police.

Kuldeep Singh - Kuldeep Singh was arrested in the UK pursuant to an extradition request by India on October 15, 2019. He was charged with several counts of funding and conspiracy under India's *UAPA.* Ultimately, Singh was discharged and extradition was not granted on the basis that the evidence presented was insufficient to commit him. Specifically, the out-of-court statements of the jointly indicted co-accused were not admissible within the extradition proceedings and, consequently, there was insufficient evidence to establish a *prima facie* case in respect of the charges. The evidence presented against Singh included summaries of the interviews of the two co-accused conducted by Indian police. The court took note that the summaries were prepared by Indian police officers, without the signatures of the co-accused, and there was no record of a lawyer being present or even consulted. Further, the questions asked and the precise answers given by the co-accused in the interview were not recorded. Ultimately, the appeal was refused as the majority concluded that it would be "manifestly unfair to rely on untested, unsworn, inadmissible hearsay evidence, particularly so when such evidence is the sole evidence relied upon against the respondent." This case demonstrates the risks that Indian extradition partners face in accepting adduced evidence at face

value, particularly given the propensity of Indian agencies to use unreliable or manufactured evidence to frame charges against political dissidents in order to ensure their prolonged incarceration without conviction due to prolonged proceedings.

As demonstrated by these case studies and various reports, India clearly has a poor human rights record which includes endemic torture in custody, failures to honour human rights monitoring requirements and a history of violating diplomatic assurances given to other countries. This is all the more concerning when security agencies routinely use fabricated evidence and criminal proceedings as a political tool to suppress dissent through the use of prolonged trial proceedings. This abuse is even more concerning in light of Canadian intelligence disclosures confirming that India engages in foreign interference activities to align Canada's perception on key issues, particularly with respect to advocacy for Khalistan based in Canada. By interfering in Canadian elections and otherwise influencing Canadian policymakers, Canadian intelligence is unequivocal that India does not differentiate between lawful pro-Khalistan political advocacy and those accused of engaging in political violence. Canadian intelligence agencies believe that India "perceives anyone engaged in Khalistani separatism as a seditious threat to India."

Reevaluating Canada's Extradition Treaty with India

By conflating Sikh dissent with extremism, Indian officials continue to abuse the extradition process in an effort to persuade international partners to criminalize, surveil, and repress Sikh activists around the world. There is ample evidence on the public record making it clear that Indian political interference is an ongoing problem in Canada as explicit efforts have been made to covertly impact public policy and media coverage in Canada in this regard. There is clear evidence that Indian diplomats and intelligence agencies actively engaged in conduct to manipulate public narratives in the media, intervene in electoral processes at various levels, and ultimately influence government decision-making in order to persuade Canadian policy makers to criminalize and prosecute Sikh political advocacy in Canada.

Naturally, this is very alarming particularly given the highly political and discretionary nature of the Minister’s ability to make surrender decisions in extradition proceedings with minimal judicial oversight. This is even more concerning given that Canada’s recent *Indo-Pacific Strategy* identifies India as a critical partner in achieving its objectives and Indian officials have made explicit comments about “cracking down” on Sikh activism in Canada in a manner suggesting *quid pro quo*. All of this should of course be taken into account in assessing extradition requests from the Indian government, but more importantly, it should spark reflection on the clear vulnerabilities of Canada's current legislative architecture and the need for transparent and robust review of Canada's extradition treaties.

Canada’s ongoing extradition partnership with India highlights and exemplifies the numerous frailties within the current system, neglecting human rights obligations and leaving marginalized communities vulnerable to prospective abuses. Given the expansive authority of the executive to make decisions gravely impacting *Charter* rights, it is important that there is no risk—or even a perception—that such

decisions *may* be influenced by electoral calculations, partisan concerns, foreign interference, short-term foreign policy interests or other extrinsic reasons without robust and meaningful judicial oversight.

It is clear that Canada must immediately review and overhaul its extradition relationships with nefarious partners like India, but this is only a short-term solution. More importantly, Canadian extradition law must incorporate meaningful *Charter* protections and robust judicial oversight of the process rather than leaving the decision to politicians and bureaucrats. This overhaul of Canada's extradition legislation as envisioned by leading experts, as well as Canada's Parliamentary Standing Committee on Justice and Human Rights, would be a crucial step towards combatting transnational repression in today's complex world and ensuring that the protection of human rights will not be bartered in the interests of geopolitical relationships.

[1]Joanna Harrington, “Extradition, Assurances and Human Rights: Guidance from the Supreme Court of Canada in India v Badesha” (2019) 88 *The Supreme Court Law Review: Osgoode’s Annual Constitutional Cases Conference* 273 at 275.

[2]Harrington, *Ibid at 288.*

[3]*Ibid* at 283.

[4]Robert J Currie & Joseph Rikhof, *International & Transnational Criminal Law,* 3rd ed (Toronto: Irwin Law Inc., 2020) at 599.

[5]Jaskaran Kaur, *Punjab Police: Fabricating Terrorism through Illegal Detention and Torture.* (Santa Clara: ENSAAF, 2005), 4.

[6]Nitisha Baronia, “Reviewing Extraditions to Torture” (2021) 73:5 Stan L Rev 1221 at 1225.

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