Recent Developments in Extradition: Interstate Co-Operation and Individual Rights in Extradition Law: Can the Two Exist

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1. Introduction

Extradition may be defined as the complex compendium of rules and procedures that enable states to seek the return of fugitives from their criminal justice systems. In this sense extradition is a part of the system of mutual assistance in criminal matters between states. The essential element here is reciprocity, with states having a mutuality of obligations. However, at the same time, extradition performs the important function of providing the individual fugitive with protection through legal safeguards, that may prevent return to the state making the extradition request.

Initially, the emphasis of extradition law was on the obligations owed by one state to another state and the fugitive under consideration had only the rights and procedural safeguards granted to her or him as an object of the process. The sole recourse that the fugitive had was to the extradition treaty and the domestic law of the requested state. It is evident that here there were potentially two conflicting pulls in opposite directions: the international co-operative approach, bearing on the rights and duties of states and the domestic law perspective with an increasing emphasis on the protection of a fugitive’s rights.

Case law in many states including Canada, the United Kingdom and the United States shows a favour for liberal interpretation of treaties in order to give effect to them. This has been viewed as in keeping with the commitment to interpret them in good faith, as dictated by the maxim *pacta sunt servanda.* In a 1987 decision of the Supreme Court of Canada in *Canada v. Schmidt,* it was held that:

"The present system of extradition works because courts give the treaties a fair and liberal interpretation with a view to fulfilling Canada’s obligations, reducing the
technicalities of criminal law to a minimum and trusting the courts in the foreign country to give the fugitive a fair trial."

In *Belgium v. Postlethwaite*\(^3\), the House of Lords reasoned in 1988 that states have entered into extradition treaties in order to bring to justice those who have committed grave crimes and that to apply to them strict canons of statutory interpretation appropriate to construing domestic legislation would tend to defeat rather than serve the purpose.

The purpose of this article is to address in general terms whether the traditional safeguards for the fugitive are either needed or warranted today given the increased injection of international human rights law into the process, as well as increasing reliance on constitutional norms in some states. The argument is that in an age of increased co-operation in international criminal matters, with a determined effort being made by many states to deter and if this fails to extradite or prosecute international and transnational criminal offenders, obstacles that are concerned with essentially conceptions of state sovereignty can be done away with as long as basic human rights and fundamental freedoms are guaranteed.

This article will consider two of the grounds for refusal and consider their future place in extradition law and practice. The experience of Canada, a state that does not belong to a cohesive regional system, such as the Council of Europe, with strong transnational human rights protections and close international criminal co-operation will be the focus. Unlike the situation in states parties to the European Convention on Human Rights and Fundamental Freedoms\(^4\), any transgression by Canada of internationally recognized human rights cannot be appealed to a regional adjudicative body with enforcement powers such as the European Court of Human Rights in Strasbourg. Nevertheless, it must be noted that the 1982 Canadian Constitution Act\(^5\) is modelled in many respects on the European Convention on Human Rights, as well as the International Covenant on Civil and Political Rights.\(^6\)

2. Grounds for refusal

2.1. Nationality of the fugitive

Broadly speaking, when a state enters into an extradition treaty relationship with another state based on reciprocity, it seems to imply an understanding that the parties view as more or less equivalent their respective conceptions of the fundamentals of criminal justice. On this basis, is it in keeping with this perceived

\(^3\) (1987), A.C. 924. This case was cited by the Judicial Committee of the Privy Council in *United States v. Bowe* (1990), A.C. 500 (On appeal from Bahamas).

\(^4\) 1950 ETS No. 5.


\(^6\) 999 UNTS, p. 171.
mutual confidence and respect, for the requested state to refuse to extradite its own citizens and nationals, on the one hand, but to be amenable to surrender non-citizen permanent residents or other aliens on the other? If the criminal law safeguards at trial and other guarantees for the fair trial of the fugitive, once extradited are more or less equivalent in both states, then should not extradition of all offenders be viewed in the same way and permitted?

Space does not permit an account of the history of this exception to extradition in civil law countries and the contrary position taken by common law jurisdictions. However, a few brief remarks are necessary, on what Lord Cockburn in 1877 called a “blot on the law”. A year later in 1878 he chaired a royal commission in Great Britain to look at the state of extradition law. Four traditional arguments were identified for non-extradition of nationals. Firstly, the fugitive should not be withdrawn from his natural judges. Secondly, the state owes to its subjects the protection of its laws. Thirdly, it is not possible to have complete confidence in the justice meted out in a foreign state, especially with regard to a foreigner and fourthly, it is not advantageous to the accused to be tried in a foreign language, separated from family, friends, resources and character witnesses.

It must be recalled that if the common law countries that at that time and still today use the territorial basis of jurisdiction over the offence as their primary basis were to refuse extradition of citizens, alleged and convicted fugitive offenders would avoid prosecution or punishment. The common law approach has thus been that where an extradition treaty is silent as to nationality or citizenship it applies to all persons. The British courts, like the Cockburn Commission have refused to accept the view that the non-extradition of citizens or nationals is a rule of customary international law and should be implied into the extradition treaty.

The majority of Canada’s extradition treaties that specify nationality or citizenship state that the parties are not obliged to extradite such persons, giving a discretion to the requested state. Of special interest here is the 1989 Treaty between Canada and the Netherlands that takes a different tack and perhaps is indicative of future developments on this issue. Article 3(1) provides that a request for extradition “shall not be refused solely on the basis of the nationality of the person sought”. In those treaties where a discretion is present, from the Canadian perspective it is a policy matter for the executive, namely, the Minister of Justice. This is also the case with the political offence exception

and the death sentence exception. It should, however, be stressed that should the treaty obligation, the section of the Extradition Act or the exercise of the Minister’s discretion violate a right of the fugitive contained in the Canadian Charter of Rights and Freedoms, which is an integral part of the Canadian Constitution Act of 1982, then the provisions of the Charter of Rights will have primacy. As was stated by the Supreme Court of Canada in Canada v. Schmidt: "There can be no doubt that the actions undertaken by the Government of Canada in extradition as in other matters are subject to scrutiny under the Charter . . ."

On the other hand, many civil law states have been uncompromising on this issue. Apart from the reasons outlined in the Cockburn Commission, the only rationale for non-extradition is that any detrimental impact is tempered by the domestic provision for prosecution on the nationality basis of jurisdiction over the criminal offence. It is submitted that if the requesting state cannot be trusted to act fairly, then no extradition should take place regardless of nationality. On this point it has been stated that:

"[I]f a state owes to its nationals a duty to apply its own laws to them as to acts, wherever committed by them, then it should demand extradition of nationals who have committed acts abroad and have been taken into custody there. In fact, in the latter situation, the state of allegiance contents itself with watching to see that its nationals obtain justice. The same protection of nationals should suffice after extradition."

Even where the requested state does have the jurisdiction to prosecute itself based on nationality, the accused is in a privileged position, because the state of nationality may have no real interest in prosecuting for an offence committed abroad, where the victims likely are foreigners, with remote sources of evidence and also a general lack of contact with the crime.

In Canada, until the enactment in 1982 of the Canadian Charter of Rights and Freedoms, Canadian citizens had been extradited either where the extradition treaty was silent on the nationality question or where a discretion existed and was exercised by the Minister of Justice in favour of extradition. Section 6(1) of the Canadian Charter of Rights and Freedoms provides that every Canadian citizen has the right "to enter, remain in and leave Canada". In this context the issue is what is meant by the word "remain". Without going into the intricacies

12. Extradition Act, id., s. 25. See further Sharon A. Williams, Extradition to a State that Imposes the Death Penalty, 2 CYIL 1990, pp. 117, 138-141.
of the Canadian Charter and especially the limiting Section 1, it is sufficient here to look to the cases on point which go to the heart of the matter.

In *Federal Republic of Germany v. Rauca* 17, Helmut Rauca was charged in the Federal Republic of Germany with mass murder in Lithuania during the Second World War, during its occupation and *de facto* control by Germany. At the time he was a German citizen and member of the Gestapo. In the 1950s he had gained entrance to Canada and eventually had become a Canadian citizen. When this request was presented Canada had not enacted the amendments to its Criminal Code that have been in place since August 1987 which would allow for prosecution in Canada of such a case, on the basis here of the presence of the accused today in Canada, even though it is the only connecting element. It was argued on the fugitive’s behalf that only extradition should be ruled out because of the right of the Canadian citizen to remain in Canada. It was held that even though the right to remain is *prima facie* violated by extradition, the right to remain is not absolute and extradition is “a reasonable limit prescribed by law as can be demonstrably justified in a free and democratic society”. Two more recent cases have presented a Section 6(1) right to remain argument, but with the vital fact difference that rather than be extradited they could in fact in theory have been prosecuted in Canada for the same criminal conduct because “a significant portion of the activities took place in Canada”. 18 Their argument was based on the facts that their personal conduct had occurred entirely in Canada and that there was concurrent jurisdiction in Canada and the United States. In dealing with this contention that because prosecution was possible that extradition was unconstitutional in the cases of *United States v. Cotroni* 19 and *United States v. El Zein* 20 the Supreme Court of Canada held that extradition was essential to the continuance of a stable and democratic society and that the objectives of extradition warranted the limited interference with the right to remain in Canada. Specifically, the Supreme Court stated that in a number of cases Canada had recognized that the United States as the requesting state had jurisdiction over the offence and the ability to request extradition from Canada successfully where the fugitive’s acts were confined to Canadian territory, but detrimental effects were felt in the United States. 21 Also, the Court held that it may in some cases be preferable for the accused to be tried in the foreign state. 22 Such a decision must be based on the prosecutorial discretion of the requested state, whilst giving due regard to individual constitutional rights. In Canada, as in many countries, prosecutorial discretion has been viewed as both necessary and desirable and the courts have been reluctant to review such a power. The key seems to have been

20. *Id.*
21. *Id.*, 1488.
22. *Id.*
that the criminal justice system best operates through a broad grant of prosecutorial discretion and that there may be very valid reasons why the decision is made to extradite rather than to prosecute. Unless there is an abuse of process, in that the discretion were exercised in an improper or arbitrary way, the decision should not be interfered with by the courts. The prosecutorial authorities have the obligation to make sure that prosecution in Canada is not a realistic option.

In conclusion, Canadian courts view extradition, even where prosecution in Canada is possible on the same facts as a reasonable limitation on the right of a Canadian to remain in Canada, especially where the objective is the effective prosecution of international crime. Thus, it has been possible to reconcile the Canadian Charter of Rights and Freedoms and Canada's extradition treaty obligations.

2.2. The double criminality rule

It is a basic precept of extradition law, contained in many states' domestic legislation as well as bilateral extradition treaties, that the double criminality rule has a central role to play. The rule provides that the offence for which the fugitive is sought must, on the basis of reciprocity, be one for which the requested state could in turn request extradition. It relates to the maxim *nulla poena sine lege*, or no punishment without law. As Oppenheim succinctly stated: "No person may be extradited whose deed is not a crime according to the criminal law of the state which is asked to extradite as well as the state which demands extradition." Nevertheless, it is not viewed as a principle of customary international law, but rather as a creature of treaty and statute. Thus, the fugitive cannot raise it as a ground for refusal if it is not provided for in the governing treaty. This position has recently been reinforced by the Supreme Court of Canada in *United States v. McVey II*, where it was held that there is no obligation under customary international law or the common law; that treaties create the obligation to do so and that the parameters of the obligations must be found within the four corners of the treaties. As noted in another decision of the same court in *Allard v. Charette*, the practice of states may have a value in interpreting the law

24. *Id.*, 1498.
but when it comes down to extradition it is the terms of the treaty that must be looked at and that is where the international duty lies.

The approach taken by Canada over the last five years or so has been to adopt the so-called “no-list” approach in new or amended extradition treaties.\(^\text{29}\) This means that there is not a list of extraditable crimes appended to the particular treaty and the emphasis is on double criminality and duality of punishability.\(^\text{30}\) This appears to be the way of the future, as it prevents the problems of out-dated lists and allows for potentially more offences to be extraditable such as fiscal offences, that for the most part are not extraditable under list treaties.\(^\text{31}\) Nevertheless, it is still the requirement, and in these no-list treaties perforce the central requirement, that the offence is regarded as criminal in both the requesting and requested states. The emphasis is not on the strict denomination of the offence in the respective states but rather upon the conduct constituting the offence.

However, in those treaties which still maintain the appended list of extraditable offences, the position has long been taken by Canadian courts that it is not necessary for Canada and the requesting state to use the same terminology or denomination. The key factor has been that the fugitive has committed what amounts to a criminal offence in both states and that a *prima facie* case has been established. In *Corroni v. Attorney General of Canada*\(^\text{32}\), the Supreme Court of Canada held that the test to be used is what is the essence of the offence. There is no requirement of exact identity between the offence that the fugitive is charged with in the requesting state and the Canadian offence. The emphasis is on the criminal conduct, the inquiry is not focussed on the legal framework of the requesting state, but rather on the facts and whether they can be fitted into Canadian criminal law in order to establish that if the conduct had occurred in Canada, it would have amounted to a criminal offence in that country.

The issue of double criminality came before the Supreme Court of Canada again in *Washington v. Johnson*\(^\text{33}\), where the applicable treaty was the 1971


\(^{30}\) Bassiouni, *op. cit. supra* n. 1, p. 322. Note that there has been a considerable debate over the years as to the two potential ways to interpret double criminality. There is the *in concreto*, or objective approach that looks to the exact labelling of the offence and its constituent elements. See 41 RIDP 1970, p. 12 for resolutions adopted by the 1969 Congress of the International Association of Penal Law, which demonstrates a preference for this approach. On the other hand there is the *in abstracto*, or subjective approach that looks to the actual criminal nature of the act without undue weight on the label and full identity of the elements in the states. See C. van den Wingerd, *Double Criminality as a Requirement to Jurisdiction*, in: N. Jareborg (ed.), *Double Criminality Studies in International Law* (1989), p. 43.

\(^{31}\) Note, however, that the exception for fiscal offences even in list treaties was eroded in the House of Lords decision in *R. v. Chief Metropolitan Magistrate. ex parte Secretary of State for the Home Department*, [1988] 1 WLR 1204 (H.L.).


\(^{33}\) 40 C.C.C. 3d 548.
Extradition Treaty between Canada and the United States. This treaty contained a schedule of offences. In writing for the majority Justice Wilson stated that the issue was whether the requesting state must establish that the offence charged in the requesting state is an offence in Canada, or whether it was enough to show that the conduct that the fugitive was charged with would have amounted to a crime, listed in the treaty, if it had taken place in Canada. As in the earlier cases the court held that there is no need for exact identity in terminology used to denominate the offence, nor for the elements of the crime to be the same in both states. As a practical matter this would be an impossible task to accomplish, even as in this case in two common law systems with fairly similar criminal systems. Most recently, the Supreme Court of Canada in *McVey II*, presented the Canadian approach, when the majority noted that in Canada the practice had developed of giving the extradition judge the role of identifying the crime for which the fugitive was charged according to Canadian law. Therefore, the crime as it is known in the requesting state is set out in the information and the arrest warrant and the extradition judge identifies the equivalent Canadian crime.

This being said, there was until the Supreme Court decision in *McVey II* some controversy in Canadian jurisprudence as to whether the crime had to be listed in the schedule or list appended to the treaty in the names under which it is known in the requesting state and Canada. In simple terms was a double listing necessary? This restrictive approach was taken by Justice Borins in *United States v. Smith*, and by Justice Wilson in *Johnson*. Both relied on the following passage from La Forest’s *Extradition to and from Canada*:

> An extradition crime may be broadly defined as an act of which a person is accused, or has been convicted of having committed within the jurisdiction of one state that constitutes a crime in that state and in the state where that person is found, and that is mentioned or described in an extradition treaty between those states under a name or description by which it is known in each state.”

An opposite view was taken by Justice Smith, the extradition judge in *United States v. Caro-Payan* and *United States v. Golitschek*. She emphasized that “a treaty

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36. See H.V.E. Hartley Booth, British Extradition Law and Procedure (1980), p. 50, where he states that the extradition court cannot become a tribunal of foreign law.
38. *Id.*
42. Ont. D.C., 18 February 1988, unreported.
must be [given] a liberal interpretation in working to achieve its stated ends".44
She applied the British cases of *In re Neilson*45 and *United States v. McCaffery*46 and went on to hold that the old double criminality test, which required an almost exact pairing of all of the constituent elements, is not the requisite test today. Rather, it is the conduct test that should be applied. The *Caro-Payan* decision with respect to there being no need for an exact pairing of the constituent elements is non-controversial. However, it is the underlying rationale of the decision that is pertinent to this discussion, in that Justice Smith seems to have had the opinion that as long as the conduct would be criminal if committed in Canada, and if that conduct is listed in the treaty, then there is no need for it also to be listed under a name by which it is known in the requesting state. This would seem to go against the position taken in the La Forest text, that there would have to be a double listing in the treaty schedule. As this writer has commented elsewhere, however much assistance a doctrinal view may be it does not bind the courts.47
There is a good argument that Article 2(1) of the 1971 Canada-United States Extradition Treaty does not require such double listing. The *McVey II* case has cleared up this quandary as to single or double listing. This case involved an extradition request for the offence of conspiracy to export high-technology equipment to the former USSR and ten counts of making false statements to the United States Customs service to put such export into effect. The 1971 Treaty did not list the making of false statements as an extraditable offence. However, the extradition judge held that he could commit the fugitive for surrender because firstly, the conduct of the fugitive would have constituted the crime of forgery if done in Canada48, and secondly because forgery was listed in the 1971 Treaty. It must be noted that McVey's conduct did not amount to forgery in the United States. The argument presented by the fugitive that a double listing was required was rejected. This decision was reversed on *habeas corpus* and upheld on appeal to the British Columbia Court of Appeal49, where the Court interpreted the *Johnson* case to require double listing. The passage in the La Forest text quoted above was referred to again.

None of the earlier cases had direct bearing factually on the *McVey II* case. The *Smith* case had dealt with a request for murder where the conduct would have been classified as manslaughter in Canada. However, both offences were listed in the 1971 Canada-United States Treaty. In *Johnson*, the concern of the Supreme Court of Canada was with whether the crime for which the fugitive was sought would be a crime contained in the treaty list by a name known under the criminal

44. *Caro-Payan*, *op. cit.* supra n. 42.
45. [1984] 2 All E.R. 84 (H.L.).
law of Canada. The difficult question is to decide what construction must be placed upon Article 2(1) of the 1971 Treaty which provides that:

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

When the wording is examined carefully, it is apparent that the article can be divided into two parts. Firstly, the person shall be extradited according to the provisions of the treaty for any of the offences listed in the Schedule and secondly, that the listed offences must be punishable by the laws of both states by a term of imprisonment of not less than one year. As discussed above, it is the duality of conceptions of the criminality of the conduct that is the keynote. The intention of the parties to the treaty was to extradite on the basis of reciprocity and the second part of Article 2(1) should be read in this light. The term “offences” should be interpreted to mean “conduct” and any “conduct” listed in the treaty should be extraditable, provided that it meets the two part test contained therein.

The principle of speciality is also of interest here. It provides that a person shall not be tried or punished in the requesting state for an offence other than that for which extradition was granted. It is linked to the rigid approach of non-extradition exhibited by the Court of Appeal in McVey II. However, if a rigid technical interpretation is made of Article 2(1) of the 1971 Treaty, it would result in unnecessary difficulties concerning criminal conduct. The British Columbia Court of Appeal held that as McVey’s conduct would not amount to forgery under the US Code and other legislation, this would result in a violation of the speciality principle. This analysis seems artificial and would defeat the purpose of the treaty, which is based on the reciprocal recognition by both states of the criminality of the conduct. Unrelated offences allegedly committed before extra

The Supreme Court of Canada noted in McVey II that the Court of Appeal considered itself bound by the Johnson precedent, although the facts as conceded by the latter court were the reverse. In Johnson the issue had been whether the requesting state had to establish that the crime would constitute one listed in the schedule according to the law of Canada. The majority found that in coming to its decision the Court of Appeal in McVey had been affected by the quotation from the La Forest text quoted above. Most importantly, Justice La Forest writing for the majority and author of the said book noted that the definition in a book is not a substitute for the extradition legislation, and it may be added the treaty itself. He stated that the quoted passage was meant to be “broad description viewed from the perspective of the whole of the extradition process” and not to

50. See, e.g., Article XII of the 1971 Canada-United States Extradition Treaty.
be used in place of the legislation itself. Therefore, he dispatched with the requirement for a double listing.

In conclusion, the McVey II Court held that what must be established is that the conduct of the fugitive would, if it had occurred in Canada constitute a crime listed in the treaty according to some name by which it is known under Canadian criminal law. This decision is to be applauded. Even though the 1991 Protocol to the 1971 Canada-United States Treaty has adopted the no-list approach and now applies to all extradition requests between Canada and the United States made after its entry into force, even where the criminal conduct took place prior to that date, the decision is of critical importance to the interpretation of those treaties, which are still in the majority, that retain the list of extraditable offences.

3. Conclusion

It is necessary to strike the appropriate balance between safeguarding the rights of the individual and the strengthening of mutually beneficial international co-operation in criminal matters between states. Clearly, in the absence of effective global international human rights enforcement mechanisms, many of the traditional safeguards in the extradition process still have a vital role to play. In light of the above discussion, it is submitted that the double criminality rule based on dual conceptions of criminality of the conduct and a dual punishability requirement should be retained. However, the nationality exception should be abolished. In so doing international co-operation and individual human rights would be provided for.