Political Offences: Extradition and Deportation: Recent Canadian Developments

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A. GENERAL CONSIDERATIONS

Extradition as an instrument for international co-operation in the suppression of crime can be traced to very ancient times. However, until the end of the seventeenth century extradition was not used very frequently. In the few cases where the surrender of a person was requested, the motive for the request was political. Thus extradition was a weapon in the hands of autocratic sovereigns, in order to ensure political stability.

It was not until the early nineteenth century that extradition for the purpose of suppressing ordinary crime became widely recognized by the international community. This change in attitude was considered as the direct result of the development of means of transportation and communication. No longer was escape difficult. The growing cosmopolitanism of the new industrial centres also made it easy for a person to remain anonymous. For these reasons law enforcement agencies became increasingly aware that it was imperative to devise a well organized system of extradition arrangements in order to strengthen the domestic enforcement of criminal laws and to protect the state from the immigration of dangerous persons. This awareness was also encouraged by a stronger international comity and the increased solidarity of states. Soon the extraditing of common criminals came to be viewed as in the common interest of all civilized nations and a necessary incident in the maintenance of good relations among them.

At the same time, there was a gradual acceptance of the principle that political offenders should not be subject to extradition. This principle was

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1 I. A. Shearer, *Extradition in International Law* (Manchester: Manchester University Press, 1971) at 5 [hereinafter Shearer]. The author suggests that the oldest document providing for the reciprocal surrender of criminals is the peace treaty of 1280 B.C. between Rameses II of Egypt and the Hittite Prince Hatlusili III.
2 Id.
5 Id. at 109.
6 Id. at 34.
first formalized by a statute in 1833 in Belgium\(^8\) but its origin can be found in the political philosophy of the social contract theorists and the French Revolution. The social contract theorists, with the exception of Hobbes,\(^9\) provided the philosophical foundations which enabled constitutionalists and democrats to morally justify their resistance to royal absolutism. In France, the revolutionary became a national hero and crimes carried out in the name and for the cause of liberty, equality and fraternity could only be sanctioned by the revolutionary government. In recognition of this fact and as a gesture of support for similar struggles, the French incorporated into their constitution of 1793 a provision guaranteeing asylum to all those exiled for their part in the fight for democratic government.\(^10\) This provision constituted the first formal recognition of the difference between political and common crimes.

It was not long after that other nations of Western Europe and the United States recognized this principle. If an individual had a right to revolt against tyranny, those who failed in the attempt to throw off the shackles of oppression should be granted asylum in the countries to which they fled. As a result, from 1830 on, more and more treaties contained provisions excluding the surrender of persons sought for high treason and other overtly political crimes and for acts that contained elements of common crimes but were primarily political in nature.\(^11\)

It is unfortunate to note that countries such as the United States and Great Britain, where the rights of liberty and equality were held in high regard, did not formalize the exemption accorded political offenders until the latter part of the nineteenth century. In England, the first formal statutory recognition given this exemption was in the Extradition Act of 1870.\(^12\) Almost all subsequent treaties contained similar exemptions. Although the United States has never incorporated the exemption in its extradition laws, it is to be found in each extradition treaty concluded with foreign states since 1880.

The late recognition of this principle by these two nations appears somewhat anomalous. However, it is clear that in both cases public sentiment and the precise enumeration of crimes that were to render persons liable to be extradited were thought to make express stipulation of the political exemption unnecessary.\(^13\) In fact, any movement to formalize the principle gained currency largely because of the insistence of France and Belgium that the exemption be included in the treaties. For the United States and Great Britain

\(^8\) Shearer, \textit{supra}, note 1 at 167.
\(^9\) Sinha, \textit{supra}, note 3 at 170-71. Hobbes was an exception in that he believed the individual surrendered all his rights to the sovereign, including the right to rebellion.
\(^10\) Id.
\(^12\) 33 and 34 Vict., c. 52.
\(^13\) Shearer, \textit{supra}, note 1 at 25.
the principle that political offenders should not be subject to extradition was felt to be so basic that it needed no formal recognition.14

This explains why Canadian courts refused to surrender Lieutenant Bennet Young to the United States for the St. Albans Raid. During the Civil War Lieutenant Young and a number of Confederate soldiers descended from Canada upon the people of St. Albans, Vermont. They pillaged the banks, tried to burn the town and killed one person in the course of their escape to Canada. The United States demanded the surrender of these men in accordance with Article X of the Webster-Ashburton Treaty of 1844.16 Although the treaty made no mention of political offenders, the court said:

The United States themselves and all civilized countries, make a wide distinction between offences committed during a normal state of things and those which are incident to political convulsions, or the unusual condition, politically speaking, of any portion of any country. Under this distinction political offenders have always been held to be excluded from any obligation of the country in which they take refuge to deliver them up, whether such delivery is claimed to be due under friendly relationships, or under treaty, unless in the latter case, the treaty expressly includes them. . . . Political offenders, however, form the most conspicuous instances of exclusion from the operation of the extradition law. No nation of any recognized position has been found base enough to surrender, under any circumstances, political offenders who have taken refuge within their territories, or if there be instances, they are few in number, and are recorded as precedents to be reprobated rather than followed.16

14 Mr. Marcy, Secretary of State, to Mr. Hulsemann, September 25, 1853 (Sen. Doc., 33d Cong. 1st Session, Vol. 1, p. 34) — "To surrender political offenders . . . is not a duty, but on the contrary, compliance with such a demand would be considered a dishonourable subservience to a foreign power, and an act meriting the reprobation of mankind."

Mr. Fish, Secretary of State, to Col. Hoffman, May 22, 1876, (For. Rel. 1876, pp. 233-37) — "Between the U.S. and Great Britain, it is not supposed on either side, that guarantees were required against a thing inherently impossible, any more than by the law of Solon, was a punishment deemed necessary against the crime of parricide, which was beyond the possibility of contemplation."

Note that under the U.N. Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents, of December 14, 1973, not yet in force, (1974), 13 Int. L. Mat. 41, a state party to the convention in whose territory the alleged offender is present must either prosecute or extradite him. Thus, for instance, the kidnapping of a diplomat cannot be considered as a political offence, irrespective of the motives of the offender (see Art. 8). However, Article 12 states that the provisions of the Convention shall not affect the application of the Treaties on Asylum, in force at the date of the adoption of the Convention, as between the states which are parties to those treaties.


15 This treaty was binding in Canada because of her colonial status.

There is no unanimity as to the basis for the political exemption. Some jurists believe that to surrender political criminals would surely amount to delivering them to their summary execution or, in any event, to the risk of being tried and punished by tribunals coloured by political passion.\textsuperscript{17} Other jurists\textsuperscript{18} have attempted to explain the exception as part of the duty of non-interference with domestic affairs which one state is bound to observe towards another. This was clearly the position taken in the Report of the British Royal Commission on Extradition in 1878:

> It is true that it is to the interest of every nation that by the submission of its subjects to the constituted government internal peace and order shall be maintained. But one nation can scarcely be said to have such an interest in the particular form of government, or in the particular ruling dynasty, of another, as that it should be called upon to make common cause with it against political offenders.\textsuperscript{19}

This view has been severely criticized on the ground that a failure by a state to comply with the request of another is in fact a form of intervention. It could also be argued that when treaties expressly exclude the extradition of persons charged with or convicted of a political crime, the surrender of the accused in such circumstances would be an interference with the domestic affairs of the demanding state.\textsuperscript{20}

The term political crime embraces two categories of offences.\textsuperscript{21} The first category includes purely political offences such as treason, sedition and espionage. These offences are readily identifiable and are classified as purely political because they are directed against the political organization or government of the state, injuring only public rights and containing no element of common crime. The second category includes offences that have been called complex or relative political offences. These are offences in which a common crime is either implicit in or connected with the political act. Although the distinction does not appear in the Canadian\textsuperscript{22} and British\textsuperscript{23} Extradition Acts, it is relevant when considering extradition treaties. Purely political offences are excluded from the operation of the Acts by virtue of their absence in the enumeration of extraditable crimes in the treaties.\textsuperscript{24} On the other hand, relative political offences are included in the words “offence of a political character”.

\textsuperscript{17} See L. L. Dreere, \textit{Political Offences in the Law and Practice of Extradition} (1933), 27 Am. J. of Int. L. 247 [hereinafter Dreere].
\textsuperscript{18} B. Africa, \textit{Political Offences in Extradition} (Manila: Benipayo Press, 1926) at 106 [hereinafter Africa].
\textsuperscript{19} Great Britain, Royal Commission on Extradition, 1878.
\textsuperscript{20} Africa, \textit{supra}, note 18 at 106.
\textsuperscript{21} Harvard Research, \textit{supra}, note 4 at 112-13. This distinction has particular relevance in those countries where political crimes are excluded from the operation of the act or treaty, but where no enumeration of crimes is given.
\textsuperscript{22} R.S.C. 1970, c. E-21, ss. 15, 21, 22.
\textsuperscript{23} 33 and 34 Vict., c. 32.
What constitutes a political offence or an offence of a political character is a domestic matter. International law or international treaties do not offer any definitions. Thus there is a wide divergence in the definitions among states since the non-extradition of political offenders is viewed as a matter of domestic public policy. Each state has taken upon itself to define the scope and the extent of the political offence exemption in accordance with its own national interests and without any reference to international law. In fact the "political offence" is a political question. This is illustrated by the fact that under section 22 of the Extradition Act, the Minister of Justice may refuse to make an order for surrender of a fugitive if the offence is one of a political character. Since political offences are considered matters of domestic public policy, it is advisable not to define them in a statute. As the world political scene changes so do political offences. This is an area where great flexibility is needed if new modes of resistance to oppression are to be protected.

Only Germany in its Extradition Statute of 1929 attempted to define a political offence. Other states that have tried to establish guidelines have tended to do so by setting limitations on what actions may be deemed to constitute political offences. The murder of the head of a foreign government, a member of his family, anarchistic and terroristic offences, and acts of particular cruelty and barbarity are the common limitations that have come to be incorporated into various national laws as well as numerous bilateral and multilateral treaties. In each case where the previous limitations are used, the act or acts are usually deemed to fall outside the exemption granted the political offender.

Such limitations are not found in the British or Canadian Extradition Acts or in treaties concluded by either of these countries. In particular, the attentat clause was rejected because the prohibited conduct would constitute the clearest form of political crime, namely treason.

In Canada, the Extradition Act in section 15 provides that:

The judge shall receive, in like manner, any evidence tendered to show that the crime of which the fugitive is accused or alleged to have been convicted is an

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23 Garcia-Mora, supra, note 11 at 1227.
26 Reichsgesetzblatt 1, Teil 1, 1929, S. 239, Art. 3(2) as quoted in Harvard Research, supra, note 4 at 385. Appendix VI, Unofficial Translation.
Art. 3(2) "Political acts are those punishable offences which are directed immediately against the security of the state, against the head or a member of the government of the state, as such, against a body provided for by the constitution, against the rights of citizens in electing or voting, or against the good relations with foreign states."
Art. 3(3) "The extradition is permissible if the act constitutes a deliberate offence against life, unless committed in open combat."
27 Bedi, supra, note 7 at 185-90.
28 In general see also L.C. Green, Hijacking, Extradition and Asylum (1974), 22 Chitty's L. J. 135.
29 The attentat clause was first used in Belgium, but today has gained widespread acceptance. This clause generally precluded the assassination of the Head of State from being considered as a political offence.
offence of a political character, or is, for any other reason, not an extradition
crime, or that the proceedings are being taken with a view to prosecute or punish
him for an offence of a political character.

According to section 21:

No fugitive is liable to surrender under this Part if it appears
(a) that the offence in respect of which proceedings are taken under this Act
is one of a political character, or
(b) that such proceedings are being taken with a view to prosecute or punish
him for an offence of a political character.3

Again, according to section 22:

Where the Minister of Justice at any time determines
(a) that the offence in respect of which proceedings are being taken under this
Part is one of a political character,
(b) that the proceedings are, in fact, being taken with a view to try or punish
the fugitive for an offence of a political character, ....
he may refuse to make an order for surrender, and may, by order under his
hand and seal, cancel any order made by him, or any warrant issued by a judge
under this Part, and order the fugitive to be discharged out of custody on any
committal made under this Part; and the fugitive shall be discharged accordingly.

Thus the political nature of the offence can be raised before the extradition
judge or may be determined by the Minister of Justice. The decision is either
judicial or ministerial.

Since purely political offences are excluded from the Act, the judicial
comment has involved the distinction between the complex and relative politi-
cal offence and the common crime.

It is the purpose of this article to examine first the interpretation given
by the courts in England and in Canada to offences of a political nature,
since in both countries the Acts contain no definitions. The two branches of
the relevant sections of the Canadian Act will be analysed separately. This
will be followed by a study of the Fugitive Offenders Act, which does not
contain the exemption in favour of political offenders. Relevant procedural
questions will also be discussed. The article will end with the question whether
deposition can be used as a substitute for extradition in the case of political
offenders.

B. THE CASE LAW

In both the British and Canadian Extradition Acts the political offence
exemption has two branches, one with respect to offences of a political char-
acter and the other with respect to the proceedings or requisitions being taken
with the view of punishing the fugitive for offences of a political character.

1. The Offence in respect of which proceedings are taken is one of a
political character

In Re Castioni32 was the first English case requiring judicial interpreta-
tion of the phrase "offence of a political character". Castioni was a Swiss

31 U.K. Extradition Act, 1870, 33 and 34 Vict., c. 52, s. 3.
32 [1891] 1 Q.B. 149.
whose extradition was requested on the charge of murder. The Swiss government alleged that he had shot and killed one Rossi, a member of the state Council of the canton of Ticino. Evidence adduced at trial disclosed that at the time of the incident popular displeasure with the regime was running high and the government had refused to hold a referendum on the question of the revision of the constitution, something which they were obliged to do because of the presentation of a citizens' petition. A number of infuriated citizens, Castioni among them, decided to take action and seized the town arsenal. After arming themselves, the group proceeded to march on the municipal palace where they demanded admission. When their request was refused by Rossi, the citizens broke through the gate and took forcible possession of the palace. In the course of the tumult, Castioni was seen to have shot Rossi, a man with whom, on the evidence, he had had no previous association.

The court, in determining that Castioni's conduct amounted to an offence of a political character and, as such, a bar to surrender, first considered and rejected the definition put forward by John Stuart Mill in Parliament. Mill had recommended that any offence committed in the course of, or furthering of civil war, insurrection, or political commotion constituted a political offence. Both Denman, J. and Hawkins, J. felt that such a definition was far too broad and that not every act committed during the course of a political uprising or disturbance would be an act of a political character. The conduct in question must be committed with "reference to the object and intention of [the rising],"33 or, phrased differently, the actor must be politically motivated. Therefore, if a person, even though acting with others in a political matter, should commit a crime for purely private revenge, his actions would lose their political character.34 Denman, J. went on to expand on the elements necessary to constitute a political offence. He said:

\[\ldots\] to bring the case within the words of the Act \ldots it must at least be shown that the act is done in furtherance of, done with the intention of assistance, as a sort of overt act in the course of acting in a political matter, a political rising, or a dispute between two parties in the State as to which is to have the government in its hands. \ldots35

and that

[the question really is, whether, upon the facts, it is clear that the man was acting as one of a number of persons engaged in acts of violence of a political character with a political object, and as part of the political movement and rising in which he was taking part.36

In applying these criteria to the circumstances of the case Denman, J. stressed several factors. The first was that the "disturbance" which took place was not a "mere small uprising of people" but had in fact amounted to a state of war37 against the government and, secondly, at the time Castioni fired
the shot, his intention was to promote the object of the uprising: the over-
throw of the government.\textsuperscript{38}

Hawkins, J. used a very similar approach taken from Stephens’ \textit{History of the Criminal Law of England}. Quoting directly from Stephens, he said:

An act often falls under several different definitions. For instance, if a civil war were to take place, it would be high treason by levying war against the Queen. Every case in which a man was shot in action would be murder. Whenever a house was burnt for military purposes arson would be committed \ldots. According to common usage of language, however, all such acts would be political offences, because they would be incidents in carrying on a civil war. I think therefore that the Extradition Act ought \ldots to be interpreted to mean that fugitive criminals are not to be surrendered for extradition crimes if those crimes were incidental to and formed part of political disturbances.\textsuperscript{39}

In the final analysis, it appears that the court felt that there were at least three constituent elements in a political offence. First, the actor must be politically motivated, any conduct for such private purposes as revenge being automatically excluded. Secondly, the act must be at least some overt act aimed directly, not indirectly, at the existing government, if not in active support of the attempted overthrow of the state. Thirdly, the act in question must take place in a political context. All the judges, in speaking of this political context, refer to a political disturbance or commotion. Although it is clear from the examples used by the court that civil war is such a disturbance or commotion, no indication is given as to what lesser forms of conflict will suffice. One further requirement stipulated by Denman, J. is that the person must be acting as part of a political movement or at least in concert with others. Although this appears to be merely a reiteration that motive alone will not suffice and that a broader political context is necessary to give the act a political character, this statement has been subsequently interpreted to mean that the person must be a member of some organized political group or party. This second interpretation is given some support by Denman, J.’s reference to an act committed while two parties are vying for control of the government.\textsuperscript{40}

It is not difficult to see how the above elements, when taken collectively, set out a fairly strict and rigid test which mirrors the historical conditions and the political context of the nineteenth century.

The next major case exploring the dimensions of the concept of a political offence was \textit{In Re Meunier}.\textsuperscript{41} Meunier was an avowed anarchist and his extradition was requested on the grounds he had wilfully caused two explosions, one in a French café where two persons were killed and the other in certain army barracks, the property of the government of France. After his committal, Meunier brought an application for \textit{habeas corpus} alleging, among other things, that the latter offence was political as it constituted an attack on government property and an attempt to destroy the quarters occu-

\begin{itemize}
  \item \textsuperscript{38} Id. at 159.
  \item \textsuperscript{39} Id. at 165-66.
  \item \textsuperscript{40} Id. at 159.
  \item \textsuperscript{41} [1894] 2 Q.B. 415.
\end{itemize}
Extradition and Deportation

Extradition and Deportation by the troops of the French government. As such, he could not be surrendered with respect to that offence. The court, in perfunctorily dismissing this defence, set down a far more rigid definition of a political offence than had been put forward in Re Castioni. Case, J. said:

... in order to constitute an offence of a political character, there must be two or more parties in the State, each seeking to impose the Government of their own choice on the other, and that, if the offence is committed by one side or the other in pursuance of that object, it is a political offence, otherwise not.\(^{42}\)

Cave, J., in what is really the essence of the decision, went on to say that the accused belonged to the party of anarchy and that

the party of anarchy, is the enemy of all Governments. Their efforts are directed primarily against the general body of citizens. They may, secondarily and incidentally, commit offences against some particular Government; but anarchist offences are mainly directed against private citizens.\(^{43}\)

Cave, J.'s views bear only superficial similarity to those of the court in Re Castioni,\(^{44}\) their chief point of coincidence being the requirement that the act be directly related to the issue of who is to control the government. However, beyond this point there is a significant variation as to what elements are necessary to give an offence a political character. Cave, J. totally de-emphasized the requirement that the act must occur during and in furtherance of a political disturbance or commotion. Rather, his criterion was the existence of some kind of organized political party contending for state power. This approach is somewhat surprising, since in Re Castioni the court stressed the necessity of some type of major political convulsion.

This reformulation of the elements of a political offence is less significant than the comments of Cave, J. regarding the nature of offences committed by anarchists. These comments illustrate the degree to which the concept of a political offence is intimately tied to the existing social and political conditions of a country as well as to the prevailing beliefs of acceptable forms of political opposition and struggle.

Anarchist activities throughout Western Europe, most particularly in France, had reached their zenith at this time. The philosophical precepts held by this group were anathema to the bourgeois liberal democrats, who held sacrosanct the existing forms of parliamentary democracy. There can be no doubt that the movement was considered a dangerous one, not only because of its posture towards political institutions, but also because it was associated with a radical wing of the labour movement.

Meunier's activities in France were only a part of a much larger offensive organized by the anarchists, beginning some time in March of 1892. This offensive was prompted by the conservative republicans' continued resistance to social reform and then the Massacre of Fourmies in 1891, where government troops fired on a group of demonstrating workers and killed women and children. Dynamiting, assassination and sabotage became common oc-

\(^{42}\) Id. at 419.

\(^{43}\) Id.

\(^{44}\) [1891] 1 Q.B. 149.
currences, but the two most spectacular acts of the anarchists were the blowing up of the French Chamber of Deputies in 1893 and the stabbing of President Carnot at Lyons in 1894. In addition, trade unionism at this time fell rapidly under the influence of anarchism, culminating in the adoption by the Trade Union Congress of 1895 of a programme of direct action which sought to destroy the capitalist system and the State by means of the general strike, boycotts, and sabotage.46

When this decision is considered in its historical context one is tempted to conclude either that no evidence of the political situation in France was placed before the court or that the notion of giving asylum to a person of Meunier's political persuasion was completely offensive to the judges. If one is permitted to indulge in some historical speculation, it would appear that the court was of the opinion that these were not the kind of political offences that were born of the heroic struggle to create democratic institutions. On the contrary, such offences and any acts protecting the existence of their authors marked the death of such forms of government.

This decision and several others like it in other jurisdictions46 led to the gradual withdrawal of anarchists from the category of non-extraditable political offenders.47 Such a limitation was subsequently embodied in certain bilateral and multilateral conventions, particularly in those concluded among Arab and South American nations.48 The refusal to consider anarchical acts as political crimes is generally rationalized by the belief that anarchical acts are primarily directed at destroying fundamental social institutions, irrespective of national divisions or the existing form of government.

Re Federenko (No. 1),49 a Canadian decision, was the next case to consider the meaning of an offence of a political character. The surrender of Federenko, a member of the Social Democratic Party in Russia, was sought by Russia on the ground of the alleged murder of a watchman. Although the facts given in the report are sparse, it appears that on the night in question the accused and a friend were visiting a house in a village that was then under martial law. The village constable, hearing of the presence of strange men in the area, went with several watchmen, including the deceased, to investigate. On seeing the visitors, one of the watchmen expressed the belief that they were "bad men" because one of them had a watch and they were well dressed. As a result, the accused was asked to accompany the village officials to the administration office. Once outside the house, the accused and his friend started to run and in the course of their flight shot and killed a watchman.

47 Bedi, supra, note 7 at 186-87. The Swiss Federal Tribunal in the Ockert case in 1933 came to a similar conclusion. The court said, "Acts which are not related to a general movement directed to the realization of a particular political object in such a way that they themselves appear as an essential part or incident... thereof, but which serve merely terrorist ends... so as to facilitate... a future political struggle, can raise no claim to asylum."
48 Garcia-Mora, supra, note 11 at 1241.
49 Bedi, supra, note 7 at 186.
40 (1910), 17 C.C.C. 268.
Mathers, J., in considering whether the act was one of a political character, adopted the reasoning of Denman, J. in *Re Castioni*,\(^{50}\) saying that for an act such as murder to be excluded from extradition it must be shown that the act was “done in furtherance of, done with the intention of assistance ... in the course of ... a political rising.”\(^{51}\) Despite the fact that Federenko

\[\ldots\] belonged to the social democratic party, whose object was, not only to alter the form of government, but also to do away with private ownership of property. A propaganda was carried on by them throughout the country and numerous revolutionary outrages were perpetrated by them ...\(^{52}\)

Mathers, J. committed him for surrender, holding that the killing was not in furtherance of a political object. Although the decision on this point is sketchy and none of the elements of the defence is analysed by the court, it seems that Mathers, J. was saying that no sufficient political context existed to give the act a political character.

This case raises several interesting and perplexing questions about the adequacy of the definition applied. What is the nature of an offence committed prior to any revolutionary uprising but with the aim of either fomenting or assisting a future uprising? Or, alternatively, what would be the nature of an offence committed by an underground resistance movement such as existed in France during the Nazi occupation? If, in the latter circumstances, it became necessary to kill a police spy who had infiltrated such a movement in order to preserve the secrecy of its membership, would this act be classified as a political crime? The answer to the above questions must surely be no if the test set forward in *Re Castioni* is applied rigidly. Herein lies the crucial problem with the test. Revolutionary uprisings are rarely spontaneous occurrences, but rather they are the result of long term human efforts and of concentrated attempts towards mass mobilization. These do not take place in a vacuum: a historical concomitant of such a struggle has always been persecution, oppression and violence as the existing government tries to stifle such threatening forms of opposition. Indeed, revolutionary uprisings themselves do not occur frequently, most forms of resistance having a much lower profile.

If the concept of a political offence is to be at all viable the differing modes of resisting political oppression must be recognized and dealt with honestly by the courts. The political climate of the late nineteenth century is gone and political contests no longer take place within the framework of rival party organizations where the individual was usually regarded as an agent of a political party or movement.\(^{53}\)

The capacity and willingness of the courts to deal with the question of a political offence in a flexible manner were tested in *R. v. Governor of Brixton Prison, Ex parte Kolczynski*.\(^{54}\) In this case seven Polish seamen, on board a fishing trawler in the North Sea, had expressed opinions not in conformity

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50 *Castioni*, supra, note 32.
51 *Id.* at 156.
52 *Federenko*, supra, note 49.
53 *Garcia-Mora*, supra, note 11 at 1242.
with the official Communist Party line. The party political secretary who was on board was observed noting their conversations and, as a result, the seven sailors began to fear for their safety on returning to Poland. Their apprehensions were increased by the fact that a brother of Kolczynski, one of the seven, had escaped from another trawler to England. In these circumstances, the seven sailors resolved to take over the trawler and steer to an English port, where political asylum could be sought. Little opposition was offered to their seizure of control, the political secretary alone actively resisting and suffering a cut in the hand from Kolczynski's knife as a consequence. On landing in England the men were detained under the Aliens Order, 1953. The extradition of the seven was sought by Poland on charges of unlawful wounding, false imprisonment and revolt against the Master on the high seas — all of which were extraditable offences.

The magistrate, who left the decision of the political character of the offence to the High Court on habeas corpus, made certain important findings of fact. The first was that Great Britain was regarded by the Polish government as an enemy country and that, under Polish law, treason was committed by leaving Poland and by "going over to the enemy". Secondly, that the only object in the minds of the seven sailors was to leave Poland because of the oppression they suffered and that they achieved their object with the slightest amount of injury to persons and property.55

In ordering that a writ of habeas corpus be issued on the ground that the acts constituted an offence of a political character, the court was forced to critically examine the test laid down in Re Castioni.56 Lord Goddard, obviously finding the definition too narrow for the facts confronting him, stressed that

... [t]he court in Castioni's case was careful to say that they were not giving an exhaustive definition of the words "of a political character". They applied a formula ... when ... about 1882, no better definition could be given.57

Lord Goddard went on to say that although the existence of totalitarian or police states was not altogether unknown in the nineteenth century, a wider and more generous meaning must be given to the concept of a political offence than was given in Re Castioni, "if only for reasons of humanity".58 Unfortunately, the Lord Chief Justice provided no new definition, except insofar as he held that the conduct of the sailors amounted to a revolt of the crew to avoid political persecution, and as such was a crime of a political character.

Cassells, J. also felt that the test laid down in Re Castioni was too narrow, but he, too, failed to make any attempt at reformulating the necessary or constituent elements of a political offence. However, he stressed that the

55 Id. at 544.
56 Castioni, supra, note 32.
57 Kolczynski, supra, note 54.
58 Id.
concept, to be viable, must retain a level of flexibility capable of meeting the needs of changing historical conditions. He said:

The words "offence of a political character" must always be considered according to the circumstances existing at the time when they have to be considered. The present time is very different from 1891, when Castioni's case was decided. It was not then treason for a citizen to leave his country and start a life in another. Countries were not regarded as enemy countries when no war was in progress.\(^5\)

On this basis, Cassells, J. determined that the offence was one of a political character and therefore non-extraditable. One further factor entered into his decision that the writ should issue. The offences, although listed as extradition crimes, were considered to be treason in Poland. As such, the sailors would be punished for an offence of a purely political character.

It is interesting to note that the decision of Cave, J. in Re Meunier\(^6\) was not considered or even cited by the court, as it is obvious that it would have no application in the twentieth century when many nations have adopted a one party political system and other parties are not tolerated, or where withdrawing from the state and living elsewhere may be one of the few remaining means of political protest.\(^6\)

However, in spite of the apparent rationality of the result reached in the Kolczynski case, one is tempted to conclude that the flexibility of the test applied may vary according to the political undesirability of the person sought to be extradited. At least it may be said that in neither the case of an anarchist or a bolshevik was the court prepared to extend the concept of a political offence to cover their situation. But rather, it took a sympathetic case like Kolczynski for the court to feel any compulsion to alter the nineteenth century formulation set out in Re Castioni.

Schtraks v. Government of Israel\(^6\), a decision of the House of Lords, is the next and perhaps the most important British decision in this area. The extradition of Schtraks was requested by the government of Israel on charges of perjury, child stealing and knowingly confining an abducted person. Schtraks had launched an appeal to the House of Lords after his application for habeas corpus was dismissed alleging, among other things, that his committal was unlawful as the offence committed was one of a political character. The facts as set out in the judgment may be summarized as follows.

A young couple, having recently emigrated from Russia to Israel, had considerable difficulty finding work and accommodation and, as a temporary measure, left their two children, a son and daughter, with their grandparents. When the parents requested the return of the children, this request was complied with in respect of the daughter, but the grandfather refused to return the son, Yossele, being afraid he would not receive the religious instruction of an Orthodox Jew. The parents began proceedings against the grandparents

\(^{60}\) Id. at 549.

\(^{61}\) Meunier, supra, note 41.


in the High Court of Israel and obtained an order that the grandparents return Yossele. The grandparents failed to do so and the parents brought proceedings for contempt of court against the grandparents and their son (the wife's brother, Scholem Schtraks), who, they alleged, was making common cause with the grandparents, assisting and encouraging them in the withholding of Yossele. At the trial on the contempt charges, Schtraks gave evidence to the effect that he had not seen Yossele since January 1st, when in fact at a later date he had taken the boy to another settlement where he had convinced people to care for him by telling them that the boy's father intended to convert to another religion. This event served as the basis of the charge of perjury. After about three weeks Yossele was taken from the settlement by Schtraks. Yossele was eventually found in New York and Schtraks went to England.

In raising the issue of the political character of the offences, counsel for Schtraks approached the question in a unique manner. The defence argued that the charges and the request for extradition had been made in furtherance of a struggle between the various political parties in Israel arising out of the conflict of the religious and secular forces in the state. Although the offences themselves were not political in character, the charges had been brought to placate the secular parties of the state in their struggle against orthodox elements. Thus, Schtraks was being used as a political tool, for political purposes in a state where religious conflicts had at all material times assumed a political character and he should therefore be considered as having committed an offence of a political character.

Although Lord Reid rejected the argument that the offences were of a political character, his discussion of the subject is undoubtedly one of the most sensitive and penetrating that has yet been given. His Lordship realised that the exemption accorded to political offenders had developed and become formalized at a time when insurgents against continental governments were regarded as heroes "intolerably provoked by tyranny" who were deserving of asylum although they had destroyed life and property in the course of the struggle. Despite the political biases and purposes that may have given rise to the exemption, Lord Reid concluded that the scope of the exemption could not be limited to such cases, nor could or should the court undertake to determine whether the persons whose conduct was in question had participated in a good or bad cause.

Lord Reid then proceeded to isolate the elements that must be present to bring an offence within the exemption. He adopted one of the early requirements set out in Re Castioni, that the motive and purpose of the accused are relevant and that the act must be committed for the purpose of promoting a political cause. The absence of this element would probably determine conclusively that the act had no political character, but rather, was carried out for an ordinary criminal purpose.

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63 Id. at 564.
64 Id. at 583.
65 Id.
Extradition and Deportation

The second, and by far the most important element which Lord Reid considered, was the political context in which the act must occur. His comments, which are well worth quoting, are directed to the formulation used in *Re Castioni* that the act must occur in the course of and in furtherance of a political rising or disturbance in order to be an offence of a political character.

Moreover, I do not think that the application of the section can be limited to cases of open insurrection. An underground movement may be attempting to overthrow a government and it could hardly be that an offence committed the day before open disturbances broke out would be treated as non-political while a precisely similar offence committed two days later would be of a political character. And I do not see why the section should be limited to attempts to overthrow a government. The use of force, or it may be other means, to compel a sovereign to change his advisors, or to compel a government to change its policy may be just as political in character as the use of force to achieve a revolution. And I do not see why the section should be limited to attempts to supplant it.

I do not get any assistance from the statements in some of the cases that there must be a "disturbance"... [if it means that there must have been some sort of disturbance of public order I would not agree that that is an essential element in a political offence.]

In finding against Schtraks on this issue, Lord Reid also said that he felt it was virtually impossible to define the circumstances in which conduct would be classified as having a political character, but what was clear was that the mere fact that the actions of Schtraks had become a *cause célèbre* in Israel and received considerable political support did not bring him within the exemption. There was no evidence to show he acted...

... in order to force or promote a change of government or even a change of government policy, or to achieve a political objective of any kind.

The decision of Viscount Radcliffe on the issue of the political character of the offence stressed the fact that no conclusive or exhaustive definition had been or was ever likely to be put forward by the courts, and that it was advantageous that this situation should continue. This reluctance stemmed both from a fear that any definition would cover too wide a scope and that the flexibility required to deal with the concept would be gone. However, Viscount Radcliffe did put forward what he regarded as a central feature or concept that lay behind the whole notion of a political offence. In his words, this was...

... that the fugitive was at odds with the state... on some issue connected with the political control or government of the country... It does indicate, I think, that the requesting state is after him for reasons other than the enforcement of the criminal law in its ordinary, what I may call its common or international, aspect... [in my opinion it is still necessary... that the idea of political opposition between fugitive and the requesting state is not lost sight of: but it would be lost sight of, I think, if one were to say that all offences were political offences, so long as they could be shown to have been committed for a political object or

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66 Id. at 583-84.
67 Id. at 584.
68 Id. at 589.
with a political motive or for the furtherance of some political cause or campaign. There may, for instance, be all sorts of contending political organisations or forces in a country and members of them may commit all sorts of infractions of the criminal law in the belief that by doing so they will further their political ends: but if the central government stands apart and is concerned only to enforce the criminal law that has been violated by these contestants, I see no reason why fugitives should be protected by this country . . . on the ground that they are political offenders.\footnote{Id. at 591-92.}

This statement has been the source of considerable controversy and confusion as various interpretations of its meaning have been put forward.\footnote{Re Gross, Ex Parte Treasury Solicitor, [1968] 3 All E.R. 804; Re State of Wisconsin and Armstrong, [1972] 3 O.R. 461; 28 D.L.R. (3d) 513; 8 C.C.C. (2d) 444.} In reaching the conclusion that the offences were not of a political character, Viscount Radcliffe said that there was no evidence to show the acts were committed as a demonstration against any policy of the government of Israel and that Schtrak's was abetting those who opposed the government. If, by implication, Viscount Radcliffe was saying that acts so directed may indeed fall within the exemption accorded political offences, he is in substantial agreement with Lord Reid. If, however, Viscount Radcliffe's statement is not interpreted in this manner, the spectre of an irreconcilable disagreement with Lord Reid is raised. Consideration of this alternative is reserved for later.

The other members of the court, with the exception of Lord Hodson, accepted the reasoning of Viscount Radcliffe and Lord Reid, Lord Hodson preferring to adhere closely to the formulation used in \textit{Re Castioni}. What makes the speeches of Viscount Radcliffe and Lord Reid outstanding is that they lay significantly less emphasis on the requirement of a turbulent political context as an element in a political offence. Certainly, their Lordships have dramatically retreated from the position laid down in \textit{Re Castioni} that some kind of political uprising or disturbance must be taking place. Both judges suggest that a person whose conduct is politically motivated will be considered to have committed an offence of a political character if his acts are directed against the state to force a change in the government or its policies.

The judgment is eminently praiseworthy on this point as it reflects a more realistic understanding of modern conditions and the changing modes of political resistance. The necessity of relaxing the requirement of open insurrection or political disturbance on a large scale is especially apparent in the modern industrial state where political opposition has taken many forms, some of which reflect individual attempts to rouse the people from a level of apathy that renders them immobile and complacent. In the industrial state the seat of control and power is not as visible as it was in the eighteenth and nineteenth centuries, for powerful political and economic institutions such as multinational corporations are mutually dependent and supportive. So an attack against one can, in some circumstances, be reasonably construed as an attack against the other. Rarely have the inefficacy of individual action and the ubiquitous nature of social control been felt so acutely and
been attacked so adamantly by some members of society. If, in fact, the above conditions do exist, they must be recognized and dealt with if the concept of a political offence is to remain viable.

Moreover, in accepting that these conditions may have prompted some persons to become involved in forms of criminal conduct, several difficult and perplexing questions must be answered. Into what classification should a person fall who has as his objective the forcing of fundamental social change but who chooses to direct his conduct towards some subordinate institution or some institution merely symbolic of governmental authority? If it should be said that an indirect attack on a government may in certain circumstances suffice to bring the conduct within the political offence exemption, what are these circumstances and how proximate must the institution be to the central organs of state power? Indeed, one must then ask how are these organs of state power to be defined — narrowly in terms of the government itself or widely in terms of the government and the sources from which it draws its support and upon which it relies. These issues are raised in the following two cases; however, they are not satisfactorily answered. So, too, is the question of the offender who pursues a political objective primarily alone, without the knowledge or prior support of any particular political group. Can or should such acts carried out in relative isolation, even if in furtherance of a political objective shared by others, be considered political offences or are they essentially anarchical? If they are to be viewed as anarchical, it must be because of some intrinsic qualities of the act, rather than by virtue of the political belief of their author. These questions seem to be partially answered by Lord Reid in *Schtraks v. Government of Israel* as he minimized the necessity of overt political disturbance. Unfortunately the object of the attack and nature of the political context that will suffice were given no positive formulation.

The first case that raised some of the crucial issues was *Re Commonwealth of Puerto Rico and Hernandez*. The extradition from Canada of Humberto Pagan Hernandez was sought by the Commonwealth of Puerto Rico and the United States for the crime of murder. It was alleged that Pagan had shot and killed a policeman during the course of a battle on the University of Puerto Rico campus between a group of students, estimated as numbering up to 3,000, and the R.O.T.C. cadets. The police had been called to the campus by the Chancellor of the University to quell the disturbance. Evidence adduced at trial showed that the existence of R.O.T.C. on campus had been an unending source of tension between those students and faculty who believed that the continued Commonwealth status of Puerto Rico.

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Rico was intolerable and that the country was merely a colony of a larger imperialist power, and those who accepted the existing ties with the United States. This tension had been greatly exacerbated by the events of the Viet Nam War which left many students embittered by the fact that they had faced conscription into the American military while Puerto Rico had no official vote in Congress and Puerto Ricans were not permitted to vote in presidential elections. Although the students participating in events on the campus that day, with the exception of the R.O.T.C. cadets, could not be said to belong to any particular party, it was clear that most held the belief that Puerto Rico should gain its independence from the United States. Nor in the minds of many of the student activists was the position of the police one of neutrality in this issue. In general those involved merely saw the law enforcement agencies as an arm of the state which would utilize all its resources to defend the status quo, thereby preserving what was believed to be Puerto Rico's colonial status.

Honeywell, J., the extradition judge, refused to commit Pagan for surrender and discharged him on the basis that the prosecution had failed to produce sufficient evidence on the issue of the assassin's identity. However, at the request of counsel, he did address himself to the question whether in the circumstances the crime could be considered one of a political character. In his opinion the act was not such a crime, but rather a one-sided on-campus confrontation, and thus "could not be considered a political rising against the government" nor could it be considered "an act in furtherance of a political rising". It is somewhat remarkable that, after quoting from Viscount Radcliffe's decision in Schtraks v. The Government of Israel to the effect that it was advantageous that no exhaustive judicial definition had been evolved, the court then went on to apply in the most mechanistic of fashions the formulation used in Re Castioni. Not only was this formulation wholly adopted, but Honeywell, J. stressed that it must "be at least shown that the act which is done is being done in furtherance of . . . assisting . . . a political rising consequent upon a great dispute between two parties in the State ...". Clearly the court was contemplating a test that verged on requiring a political context approximating civil war. The foregoing interpretation is supported by Honeywell, J.'s subsequent statements that although he was urged to determine the question of the political character of the offence by looking at "the whole political situation in Puerto Rico and its past history", it was his view that

... the question in issue should be determined by looking primarily at the events of the day and the actual circumstances of the murder. The general political climate of Puerto Rico at that time is of secondary interest. It is important only if it is the predominant factor in the circumstances of the murder.

Thus it appears that if the conduct in question did not occur as an incident

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73 (1972), 8 C.C.C. (2d) 433 at 441.
74 Schtraks, supra, note 62.
75 Castioni, supra, note 32.
76 Hernandez, supra, note 73 at 440.
77 Id.
in a revolutionary upheaval aiming at the overthrow of the existing government, it could not have a political character.

This decision conspicuously ignores the court's judgment in Schtrak v. Government of Israel\(^7\) and retreats to what some members of the House of Lords had considered an anachronistic formulation of the elements of a political crime. Lord Reid in particular had rejected the requirement that the act must occur as part of an open insurrection or disturbance of the public order.\(^7\) It seems evident that if the case had been dealt with under the guidelines set down by Lord Reid, the conduct in question might plausibly have been held to amount to a crime of a political character, or at least very different considerations would have been entered upon in determining the issue. If the question were to be asked: did the assassin act in order to promote a change of government or to change or demonstrate against the government's policy or to achieve a political objective of any kind, the answer is arguably yes.\(^8\) But such an answer emerges if and only if a broad view of the events of the day in question is taken. Honeywell, J. saw the events as centering around the continued existence of R.O.T.C. on campus, an issue which the university administration had the authority to determine.\(^8\) Alternatively, the events may be viewed as part of an ongoing struggle in Puerto Rico to disengage certain institutions such as the university and the government from its political and economic dependence on the United States. R.O.T.C. was symbolic of the American presence in the country, and for the students a bitter reminder of the government's acquiescence in and acceptance of a Commonwealth status.

It is submitted that the second view is the more accurate and realistic. But this still does not solve the central question of whether the particular person who caused the death of the policeman was motivated by such considerations. The objective circumstances in which the conduct occurred do not permit such an inference to be drawn, for it is equally consistent with the events that transpired that the person acted for a non-political purpose. If one accepts Lord Reid's formulation, the motivation of the actor becomes increasingly important, although it is submitted the nature of the conduct and the object of attack may in certain circumstances be alone sufficient to allow the inference to be drawn that the crime was of a political nature.

In the case at hand, Honeywell, J. did not deal with the motivation of the actor and no direct evidence was adduced by the defence on this point. Rather, the defence took the approach that no sufficient evidence was produced to show that Pagan was the person who had allegedly killed the policeman and, alternatively, that in the circumstances, the murder was a crime of a political character and, as such, not an extradition crime. Because of the lack of direct evidence on the issue of motive and the absence of objective circumstances that would allow the court to draw any inference as

\(^7\) Schtrak, supra, note 62.  
\(^7\) Id. at 583.  
\(^8\) Id. at 584.  
\(^8\) Hernandez, supra, note 73 at 441.
to motive, the court was probably correct in concluding that the conduct in question did not amount to a political crime.

The next and most important case in Canada on this issue was *Re State of Wisconsin and Armstrong.* The surrender of Karleton Armstrong was sought by the United States of America for first degree murder and four counts of arson, alleged to have taken place at the University of Wisconsin Campus in the City of Madison. The charge of murder and one count of arson arose from the bombing of the Army Math Research Centre, a building in which research was carried out for the American military. The other counts of arson were based on the fire bombing of other buildings which were in whole or part used for purposes of or connected with the military forces of the United States — two of these three incidents involving the R.O.T.C. buildings. The defence argued that Armstrong could not be extradited as the offences were crimes of a political character. Evidence was adduced to the effect that there was widespread dissatisfaction and protest against the American involvement in the war in Viet Nam and of dissatisfaction among some groups with the prevailing economic system, especially with the American corporate involvement in other parts of the world. Evidence was also led relating to the meetings, marches, protests, riots and damage to property that had occurred at the university over these same issues, of which the bombings were alleged to be a part.

The trial judge committed Armstrong for surrender, as he was of the opinion that the acts involved were not of a political character. In determining this issue Waisberg, J. relied on the statement of Viscount Radcliffe in *Schtraks* which had suggested that a crime could not be of a political character if the central government stood apart and was concerned only with the enforcement of criminal law in its ordinary aspect. Viscount Radcliffe had also suggested that the meaning of the word “political” in the context of extradition was analogous to its use in terms such as “political refugee”, “political asylum” and “political prisoner”. Interestingly enough, Waisberg, J. then approached the issue of whether the offence was of a political character as if the test was whether the accused was in need of political asylum. In determining this he looked to the position of the witnesses called for the defence rather than to the position of the accused. He said:

Applying the Viscount Radcliffe formula to the facts of this case I find it significant that none of these witnesses, all of whom freely admitted political activity of the kind they suggest is associated with the bombings, require political asylum. That speaks eloquently for the fact that the respondent is sought only for the enforcement of the criminal law in its ordinary aspect. In fact Gerald Nichol, the District Attorney, was cross-examined about the Grand Jury proceedings and made it quite clear that there was nothing of a political nature in the testimony which led to the indictments.

The above formulation results in a test which suggests the offence is not one of a political character unless the accused is sought in order to be politically

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82 (1972), 8 C.C.C. (2d) 444.
83 Schtraks, supra, note 62 at 591.
84 Armstrong, supra, note 82 at 451.
persecuted by the government, in which case the government is not standing apart to enforce the criminal law in its ordinary aspect.

It is submitted that Viscount Radcliffe did not intend to reformulate the concept of a political crime in such a way as to ask the question, "should a person be granted political asylum?" The central concept Viscount Radcliffe was trying to define was the meaning of the word "political", which connoted to him that the fugitive was at odds with the state over the issue of control, or government of the country. Nor, it is submitted, was Viscount Radcliffe saying that the state must assume the posture of persecutor.

A close analysis of his judgment shows that subsequent adoptions of this statement may in fact have taken his meaning far beyond what was intended. Viscount Radcliffe is saying that there must be a connection between the individual actor and the state — this connection being the fact that the fugitive is at odds with the state over its government. In his opinion this necessary connection would be lost if only subjective criteria were applied in determining whether or not the crime was of a political character or, in other words, the belief of the actor that the crime is political cannot be the only consideration. There must also be objective criteria on which to adjudge the offence political. In turning his mind to these necessary objective criteria, Viscount Radcliffe looks to the facts before him, where contending political factions were in existence in the State of Israel and says that the offence is not political, for it is not aimed at the state, but rather was an act directed against another political group in the state and the government was merely standing apart, enforcing the criminal law in its ordinary aspect. Viscount Radcliffe then goes on to say that the evidence:

... does not suggest that the appellants offences, if committed, were committed as a demonstration against any policy of the government of Israel itself or that he has been abetting those who oppose the government.\(^{85}\)

Surely these words indicate that if in fact the accused's conduct had been so directed, his offences may have had a political character.

It is submitted that Viscount Radcliffe's remarks would make little sense if he was saying that the crime became political by virtue of some motive of the requesting state. Such a statement would clearly contradict a long line of cases which have held that the motive or \textit{bona fides} of the state is not an issue into which the court has jurisdiction to inquire. But more importantly it must be realized that Viscount Radcliffe was not considering actions directed against the state, but rather actions by individual groups directed against one another within the state. If the conduct had been directed against the state, how but by the sheerest speculation could it be determined whether the criminal law in its ordinary aspect was being applied — or, alternatively, how can it be said that the state would ever give any indication that it viewed the accused as some kind of political threat that had to be quieted?

This point is beautifully brought out by the naiveté of Waisberg, J.'s comment that nothing of a political nature existed in the testimony that led to the indictments. Surely he must have realized that no such evidence is

\(^{85}\text{Schtraks, supra, note 62 at 592.}\)
admissible or deemed to have any relevance in a criminal prosecution. In no court is it a defence to allege that the crime was committed for political purposes, nor is it likely that in any court the prosecution would adduce evidence that this person should be politically persecuted! It might be said that the fact that witnesses for the defence who held beliefs similar to the accused were in no need of asylum or were not politically persecuted affords some evidence that the situation of the accused was the same. But it is equally possible that the nature of the accused's conduct, which was held to represent a significant escalation in the conflict between the government and the anti-war movement, was such that the government felt it necessary to pursue a conviction in order to ward off other similar attacks. Indeed, the lengthy battle for extradition might be deemed to afford some evidence of this.

The foregoing clearly shows the tremendous difficulties associated with the political asylum test. It is submitted that Parliament did not intend political persecution to be an essential element in a political crime but rather that once a political crime had been committed, it might well be assumed that the prosecution of the offender would also be political. The offence, not the prosecution of the accused, was the issue to which the court should have turned its mind.

On appeal to the Federal Court of Appeal, the defence argued that the trial judge had erred in failing to find the offences to be of a political character. Mr. Justice Thurlow, with whom Cameron, J. agreed, upheld the reasoning of Waisberg, J., agreeing that there was not sufficient evidence connecting the activities of the accused to the political events that had occurred on the campus and across the United States. This lack of evidence was fatal to the case for the defence, as it was the basis on which the motive of the accused had to be inferred. Thurlow, J. then went on to say that as the existence of a political motive or purpose was a necessary element of an offence of a political character, either the accused must provide direct evidence on this point, thereby admitting his guilt, or the circumstantial evidence adduced to establish motive must lead irresistibly to the conclusion that such a political purpose existed.

Thurlow, J. then considered in a most cursory manner the interpretation Waisberg, J. had given to the statements of Viscount Radcliffe in Schtraks v. Government of Israel and agreed that the surrender of the accused was not sought for “anything but the offence of murder and arson in their ordinary criminal aspect” and that the “applicant is not a political fugitive but simply a fugitive from justice.” To give further support to this conclusion, Thurlow, J. pointed out that the offences were committed in the absence of revolution or political tumult; against state property, not the property of the federal government; and against buildings that were, in the opinion of the learned judge, only remotely connected to the government. Thus, if the acts were to be regarded as rebellious, they were rebellious against university authority rather than the authority of the government of the United States.

87 Schtraks, supra, note 62 at 591.
88 Armstrong, supra, note 86 at 286.
These points harken back to the formulation used in *Re Castioni*, in that some overt act aimed directly, not indirectly, against the government is required to give the offence a political character. Thurlow, J. does not go so far as to say that the act must be an incident in and in furtherance of a political rising: he does, however, suggest that the nature of the rights affected by the conduct in question or the object of the attack must be intimately related to the authority of the government.

Sweet, J., in a separate opinion, first stressed that the primary purpose of extradition is to serve the needs of the international community in the suppression of crime and that reciprocity is a necessary concomitant of this interest. Thus the exemption accorded political offenders must be scrutinized carefully. This is indeed what the learned judge proceeded to do, further narrowing the scope of the exemption. Next Sweet, J. adopted the interpretation of Viscount Radcliffe that had been expounded by the trial judge and concluded “that the person accused cannot unilaterally cause the offence to be political.” Although at this point in the judgment he did not define precisely what form of participation the requesting state must be involved in, he said later that

There was no significant evidence offered that the applicant or, for that matter, anyone involved in the anti-Vietnam war movement was being persecuted in the United States for his belief or for the aims of the movement or for his attempts to accomplish these aims by peaceful means. There is no evidence that those who shared the views of the persons who made up the movement were not permitted to speak freely, to voice their views, to protest or peaceably to demonstrate. There is no evidence that those persons, or any witness who felt that the applicant should not be extradited, needed political asylum.

This passage clearly indicates that all three judges on the court felt that political persecution was an essential ingredient of a crime of a political character.

Sweet, J. rejected what in essence was the decision of Lord Reid in *Schtraks v. Government of Israel*. He said:

... neither do I think that a person, sympathetic with the aims of a significant number of persons in a movement to endeavour to bring about a change in governmental policy by legal means and who, himself, commits a crime with the avowed purpose of achieving those aims because he thinks legal means are ineffective, can create a haven for himself in this nation so as to avoid punishment for those crimes.

In other parts of his judgment he suggests that as bombing and arson are not generally accepted activities within the anti-war movement, they cannot be accepted as activities of that movement or in furtherance of the objectives held by that movement. 

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80 *Castioni*, supra, note 32.
80 *Armstrong*, supra, note 86 at 295.
91 Id.
92 Id. at 298.
93 Id. at 295.
94 Id. at 297.
The Armstrong case indicates that in Canada today, those seeking to fall within the exemption accorded political offenders will have to meet the following requirements. First, the accused must act for a political purpose and in opposition to the existing government. This requirement is critically important, and the failure of the accused to testify on this point may be fatal to the defence. Second, the object of the attack or the nature of the rights affected are almost equally significant in establishing the political character of the offence. Re State of Wisconsin and Armstrong and Re Commonwealth of Puerto Rico and Hernandez make it clear that the courts will refuse to accept as political an act which is only indirectly related to governmental institutions and property. The institution, property or person affected must be proximate enough to the central governing authority to be considered to be a part of it. Third, the person acting must be a member of some movement or political group in which the majority of persons participating have adopted extralegal means to realize their objectives. Fourth, the central government of the requesting state must have some reason for requesting the surrender of the accused other than the enforcement of the criminal law in its ordinary aspect. This “other” reason appears to be the persecution of the accused for his political beliefs and conduct. According to the decision of the court in Re State of Wisconsin and Armstrong, evidence of the persecution of other persons holding similar beliefs may well afford a basis from which the court could conclude that the accused would be persecuted if returned to the requesting state. In such a case a sense of international comity and of the necessity of reciprocity will weigh heavily in favour of the surrender of the fugitive. Political offenders will receive little hospitality in Canadian courts if the crimes for which their extradition is sought are directed against a state with a similar set of political institutions and political values.

Perhaps it is time that recognition be given to the fact that the political exemption in its mandatory form is no longer practicable. The present day context of international relations is one in which the mutual interdependence of states, especially those with compatible political institutions, is such that few courts would consider it desirable to adjudge as political those crimes which in all likelihood could occur in similar circumstances within their jurisdiction. The prevailing degree of interdependence makes the costs of failing to respond to the demands of reciprocity too high. Thus it is not unreasonable to suggest that the exemption accorded political offenders should either be made permissive or that in respect of certain states with which we are intimately associated, the exemption should be eliminated. This is perhaps the only way we will deal honestly with crimes of a political character.

2. The Proceedings are taken with a view to prosecute or punish the fugitive for an offence of a political character

According to section 21(b) of the Extradition Act, the surrender of a fugitive is prohibited where “such proceedings are being taken with a view to prosecute or punish him for an offence of a political character”.95 This

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95 R.S.C. 1970, c. E-21, ss. 15, 21, 22. See same formulation in ss. 15 and 22.
provision bears a close resemblance to the second limb of section 3 of the British Extradition Act, 1870, which for the purposes of comparison should be quoted:

A fugitive criminal shall not be surrendered if the offence in respect of which his surrender is demanded is one of a political character, or if he proves to the satisfaction of the police magistrate, or the court before whom he is brought on habeas corpus, or to the Secretary of State, that the requisition for his surrender has in fact been made with a view to try to punish him for an offence of a political character.98

However, the Canadian Act does not contain the words “or if he proves to the satisfaction of the police magistrate, or the court before whom he is brought on habeas corpus, or to the Secretary of State”. These words may be relevant in determining whether, in fact, the Canadian provision could be interpreted more broadly than has the second limb of section 3 of the British Act.

Before consideration is given to this issue it is important to set out some hypothetical situations which at first glance would seem to call for the application of the section. The first such situation which appears to fall clearly under its purview arises when a requesting state seeks the return of the fugitive on a charge of fraud, clearly an extraditable offence, but is in fact merely using this as a device to try him on his return for treason, clearly a political offence. Another situation calling for the application of the section would occur when the surrender of the fugitive is requested again on a charge of fraud, but the requesting state treats fraud like treason. In other words the fugitive would be punished as for an offence of a political character. A third situation to which the section might be interpreted to apply would arise if the fugitive's surrender is requested for fraud and in fact it is clear to the court that he has committed fraud, but he has also committed a political offence, for instance murder, in the course of a political upheaval. The last situation to which the section might be applied would arise where a person has committed fraud, but his punishment would depend on the degree to which he cooperated with the political authorities by giving information he possesses or on whether, by his conduct, he has fallen into political disfavour. These examples are merely intended to be illustrative of the possible range of situations to which the section appears to be addressed.

The first case to require judicial consideration of the section was Re Arton.97 The French government applied for the surrender of Arton on fraud and other theft-related charges. On an application for a writ of habeas corpus, Arton alleged first, that the demand for his extradition was not made in good faith and in the interests of justice and secondly, that the offences were political in their character and that the surrender was demanded for exclusively political motives. During the course of the proceedings it was admitted, in relation to the second point, that the offences for which his extradition was sought were not themselves of a political nature. Thus the applicant's argument rested on the allegation that the request for his sur-

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96 33 and 34 Vict., c. 52, s. 3.
render was made in order to try and punish him for an offence of a political character. In support of this allegation, Arton contended that the tribunal by whom he would be tried would relate the severity of his punishment to the level of his co-operation in disclosing the political secrets that were in his possession.

With respect to the meaning of the second limb of section 3 of the Extradition Act, the Chief Justice, Lord Russell of Killowen, said:

It is clear what this suggestion means; it means that a person having committed an offence of a political character, another and wholly different charge (which does come within both the Extradition Act and the treaty) is resorted to as a pretence and excuse for demanding his extradition in order that he may be tried and punished for the offence of a political character which he has already committed.98

It was Lord Russell's opinion that the application on this ground had to be denied, as no previously committed political offence was proved.99

It should be pointed out that this formulation excludes from the purview of the section the kind of situation which was mentioned in the fourth example given above. However, on the wording of the Act, this interpretation is by no means unreasonable, as the Act seems clearly to require the existence of a political offence and does not seem to prohibit surrender in circumstances which indicate that the accused will be discriminated against and persecuted at his trial for his political beliefs or his conduct in general.

As to the first ground, that the application for surrender was not made in good faith and in the interest of justice, Lord Russell concluded that the court was not competent and had no authority to enter into such an inquiry. He said:

... this is in itself a very grave and serious statement to put forward, and one which ought not to be put forward except upon very strong grounds; it conveys a reflection of the very gravest possible kind, not only upon the motive and actions of the responsible Government, but also impliedly upon the judicial authorities of a neighbouring and friendly Power.100

It is apparent from the foregoing that Lord Russell viewed the question of the bona fides of the requesting state as different from the question of whether the requesting state was asking for the surrender of the accused in order to try or punish him for an offence of a political character.

Substantially the same approach was taken by Wills, J. who agreed that the wording of the second limb of section 3 required that the political offence be one which was previously committed. The learned judge also explored some of the problems associated with any attempt to extend the purview of the section to cover situations of potential discrimination or political persecution of the accused during the trial of these offences. He said:

I can only say that the same considerations must enter into this question that have led us to the conclusion that we cannot enter into the question of whether

98 Id. at 114.
99 It is of interest to note that Lord Russell would only have contemplated the court's interference under the second limb of s. 3 if the fugitive had been able to satisfy the judicial tests set down for establishing the offence was of a political character.
100 Id. at 115.
the action of the executive of a foreign country at peace with us is honest or dishonest; we must assume the French Courts will administer justice in accordance with their own law; and so long as they do that, or whether they do it or not, we cannot interfere before hand to prevent them from exercising in this particular case the procedure which they exercise with regard to any criminals who may be brought within their jurisdiction.\(^1\)

Although the allegation that the state sought extradition to try the accused for a political offence was approached with extreme caution, the court did not recoil from inquiring into it. This, however, was the interpretation given to the decision by Lord Goddard in *Regina v. Governor of Brixton Prison, Ex Parte Kolczynski*.\(^1\) On the application for a writ of *habeas corpus* it was contended that the case also fell within the scope of the second limb of section 3 as the request for extradition was prompted by the desire of the Polish government to try and punish the fugitive for a crime which in Poland was tantamount to treason. As a result, he would be punished for a political offence.

Lord Goddard examined the scope of the second limb in the light of the limitations he thought were imposed upon it by the principle of specialty. This principle, which is incorporated into the British Extradition Act, 1870,\(^1\) prohibits the surrender of a fugitive to a foreign state unless the law of that state or a treaty provides that he will not be tried for any offence committed prior to his surrender other than that for which his surrender is sought. In conjunction with this principle, Lord Goddard cited *In Re Arton*\(^1\) for the proposition that the court must assume that the foreign state will observe the terms of the treaty and then concluded:

> The second limb of the section cannot, therefore, in my opinion, mean that the court can say that if extradition is sought for crime A we believe that if surrendered he will be tried or punished for crime B.\(^1\)

Lord Goddard then went on to construe the section in a totally different and extraordinarily narrow manner. In effect, he held that the second limb added nothing substantive to the rights given to the accused under the first limb of the section, but rather merely provided different ways in which evidence might be adduced to show that the offence was one of a political character. His remarks are well worth quoting:

> ... in my opinion the meaning [of the section] is this: if in proving the facts necessary to obtain extradition the evidence adduced in support shows that the offence has a political character the application must be refused, but although the evidence in support appears to disclose merely one of the scheduled offences, the prisoner may show that in fact the offence is of political character. ... In other words, the political character of the offence may emerge either from the evidence in support of the requisition or from the evidence adduced in answer.\(^1\)

On this basis, Lord Goddard concluded that the case fell within the second

\(^1\) *Id.* at 115-16.

\(^2\) *Kolczynski, supra*, note 54.

\(^3\) 33 and 34 Vict., c. 52, s. 3(2).

\(^4\) *Arton, supra*, note 97.

\(^5\) *Kolczynski, supra*, note 54 at 549.

\(^6\) *Id.* at 550.
limb, as the evidence of the political character of the crime was adduced by the prisoners and not in support of the requisition for surrender.

It is submitted that this interpretation is unnecessarily restrictive and in direct contradiction with the reasoning of Lord Russell in Re Arton. Not only does the learned judge derive no support for his conclusion from in Re Arton, but his interpretation of the second limb of section 3 as merely declaratory of the methods for proving the offence is political makes it redundant with other parts of the Extradition Act, 1870. Section 9 of that Act deals explicitly with this issue, obliging the magistrate to hear any evidence tendered to show that the crime is of a political character. In fact, it is not an unreasonable possibility as Lord Goddard seems to suggest, that the legislature intended the second limb of section 3 to operate as an additional safeguard on a person's surrender. The language of the section seems to clearly contemplate a person satisfying the authorities that, in fact, despite the treaty, he will be tried or punished for an offence of a political character if his surrender is granted. Indeed, this was the opinion of at least one of the other members of the court, Cassells, J. concluded that relief could be given under the second limb of section 3, as the offence for which extradition was sought constituted treason in Poland. This, despite the fact that the accused might well be tried for the offences as listed in the treaty, would result in his punishment for an offence of a political character.

The House of Lords was given its first opportunity to consider this issue in Schtraks v. Government of Israel. It was argued on behalf of Schtraks that the second limb of section 3 permitted the court to hear fresh evidence on the habeas corpus application in order to show the political character of the offence. In admitting the evidence, the House of Lords adopted the construction of the second limb of section 3 that had been put forward by Lord Goddard in Kolczynski.

Lord Reid, in reaching his conclusion that the second limb of section 3 was intended "to emphasize the first part [of the section] and to provide a further opportunity of proving the political character of the offence", was guided by two considerations. The first was that offences obviously of a political character were not within the scope of the extradition at all and secondly that because of the principle of specialty "no foreign country could without a breach of faith use extradition as a means for bringing a refugee before its courts for trial on some other political charge." These two facts were thought to compel a limited construction of the second limb of section 3, thus necessitating that the opinions expressed by Lord Russell of Killowen in Re Arton be overruled. Lord Reid further elaborated on his formulation of section 3 by pointing out that the second limb of the section expressly

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107 For an excellent critical review of this case, see Denny, supra, note 61.
108 Kolczynski, supra, note 54 at 548.
109 Schtraks, supra, note 62.
110 Kolczynski, supra, note 54 at 549-51.
111 Schtraks, supra, note 62 at 581.
112 Id.
permitted the accused to introduce new evidence in order to prove to the court, on habeas corpus, or to the Secretary of State that the offences were of a political character. In contrast, the court could not look beyond the material before the magistrate on an ordinary application for a writ of habeas corpus.

In spite of this seemingly narrow construction, Lord Reid did appear to envisage one area where the scope of the section embraced a substantive rather than procedural protection for the accused. He said:

There is one other aspect which I must mention .... It was and is still thought that some governments treat as political offences and punish more severely such acts which we would regard as ordinary crimes, if the guilty person is a political opponent of the government, or it may be for other reasons. The last part of section 3(1) — "the requisition for his surrender has in fact been made with a view to try or punish him for an offence of a political character" — may refer to cases of that kind.

This comment gives rise to considerable difficulties as it does not sit easily with the rest of His Lordship's reasoning. It appears at the very end of his judgment and has many of the characteristics of an afterthought. As such, it may best be regarded as only a minor qualification of his earlier pronouncements regarding the meaning of section 3. It is submitted that Lord Reid merely intended to support the reasoning of Cassells, J. in Kolczynski where it was concluded that surrender could be refused if the requesting state viewed the crime for which extradition was sought as an offence of a political character. Thus, only in the limited situation where the accused would be punished as for a political crime would the second limb afford any substantive protection.

The decision of Viscount Radcliffe on this issue constituted a resounding rejection of the opinions expressed by Lord Russell in Re Arton. He went somewhat farther than Lord Reid by stating that neither the Secretary of State nor the court could enter into an inquiry which questioned the motives of the requesting state. Therefore, whether the requesting state intended to extradite the accused for one charge and try him for another and wholly different offence was an issue which could not be considered, as the exemption accorded political offenders under section 3(1) spoke only to "the political nature of the very offence for which extradition was sought".

Viscount Radcliffe based this conclusion on his opinion that the legislature had provided sufficient protection against colourable extradition by inserting in section 3(2) the principle of specialty.

Thus, he interpreted section 3 as envisaging

.... two alternative ways of identifying a political offence — one, a charge that on the face of it smacks of the "political", say caricaturing the Head of State or distributing subversive pamphlets, and the other, a charge which, ostensibly criminal in the ordinary sense, is nevertheless shown to be "political" in the context in which the actual offence occurred.

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113 Id. at 584.
114 Id. at 587.
115 Id. at 588.
Lord Radcliffe met the objection that to interpret the first part of section 3 in this manner denuded it of meaning, as the schedule of extraditable offences did not include offences that are political in the first sense he described:

This objection is, I think, mistaken and arises from a misunderstanding as to the place and purpose of section 3 in the scheme of the Act. It is designed as an introductory section, describing both for internal and external readers the basic principles upon which extradition was to be allowed at all. It is not closely integrated with the sections that follow, whose function it is to provide procedure and machinery for regulating extradition in accordance with these conditions ... But, the fact that the list ... [excludes political offences] does nothing, in my opinion, to show in what sense the opening words "offence of a political character" are used in section 3(1) ...\textsuperscript{116}

As was pointed out by Lord Evershed, much of the discussion with respect to the scope of the second limb of section 3 might be characterized as obiter to the main reasoning in the decision. However, that the issue has been authoritatively pronounced upon can certainly not be doubted. Therefore, in Great Britain, the purview of the second limb of section 3 will be limited to protecting the right of the party sought to be extradited, to introduce evidence to prove that a \textit{prima facie} extraditable offence is an offence of a political character or to those limited situations where it can be shown that the requesting state treats the offence, despite its listing in the treaty, as an offence of a political character as in the \textit{Kolczynski} case.\textsuperscript{117}

The position of the Canadian courts with respect to the scope of section 21(b) of the Extradition Act is not as well defined as that of the British courts. No decision has yet been rendered which exhaustively analyses the merits of the several available interpretations. However, in \textit{Re Commonwealth of Puerto Rico and Hernandez},\textsuperscript{118} Honeywell, J. did make several 'pertinent observations, all of which are obiter to his reasons for refusing extradition. In the last paragraph of his judgment he addressed himself to the meaning of section 21(b) and briefly outlined three possible interpretations, only one of which appeared to have found favour with him. He said:

\textit{The wording used in section 21(b) of the Extradition Act "that such proceedings are being taken with a view to prosecute or punish him for an offence of a political character", is not clear. If the offence referred to is intended to mean the same offence in respect to which proceedings are being taken under the \textit{Extradition Act}, then the subsection would appear to have little meaning ... If

\textsuperscript{116} \textit{Id.}

\textsuperscript{117} It is interesting to note that in the recent extradition case of \textit{R. v. Governor of Pentonville Prison, Ex parte Cheng}, [1973] 2 W.L.R. 746, the House of Lords again touched upon the meaning of the second limb of s. 3. The American authorities sought the extradition of Cheng for the attempted murder of a high ranking official in the Formosan government. With respect to this issue, Lord Diplock said, "From the second part of the restriction is also evident, to put it bluntly, that the draftsmen contemplated that a foreign government in its eagerness to revenge itself upon a political opponent might attempt to misuse an extradition treaty for this purpose." (p. 755). Although this comment and several others in the course of the decision indicate a tendency to return to the formulation of Lord Russell in \textit{Re Arton}, it would probably be false to conclude that these statements constitute a reversal of the opinion expressed in \textit{Schtraks v. Government of Israel}. No indication is given that the scope of the second limb of s. 3 was really an issue to which the court directed its mind.

\textsuperscript{118} \textit{Hernandez, supra, note 72.}
the offence referred to in the subsection is a different offence than the offence of murder, as charged, then it would be in contravention of the extradition conventions with the United States of America under which he can only be tried for the actual offence for which he was extradited. It is not to be assumed that a foreign state would act contrary to its international agreements. If, on the other hand, the subsection means that although he will be tried on the offence for which he is being extradited, this is only a pretence and in fact he will be judged and punished by reason of a political offence or offences.119

With respect to the last mentioned interpretation of section 21(b), Honeywell, J. rejected its application to the facts as the evidence indicated that the accused would be given a fair trial on any charge and as the penalty for first degree murder was life imprisonment, no room remained for further punishment by reason of political offences. Although the court was not willing to refuse extradition on this ground, the inference may clearly be drawn that, unlike its British counterpart, section 21(b) operates as a substantive protection for the accused in situations where he can prove that past political offences will govern the disposition of his trial if he is surrendered. If in fact this is what the learned judge intended to indicate, he has indeed strayed far from the English interpretation given the section by introducing the notion that persecution and discrimination at trial, as a result of past political offences, may be grounds to refuse surrender. As is obvious by this formulation, the political offences referred to need not be the ones for which extradition is sought.

Substantive content also seemed to be given to the provisions of section 21(b), by Thurlow, J. in Re State of Wisconsin and Armstrong.20 Although caution must be taken to refrain from reading too much into the comments of the court on this matter it appears that Thurlow, J., in affirming the lower court’s decision as to the inapplicability of section 21(b), did so on the basis that extradition was not sought for the purpose of trying or punishing the accused “for anything but the offences of murder and arson in their ordinary criminal aspect as described by Viscount Radcliffe in his judgment in Schtraks”.21 The implication of this statement seems to be that the crimes of murder and arson are their own justification for taking the proceedings and no behaviour on the part of the requesting state suggests that the requisition for the surrender of the accused is being sought because he is in political opposition to the state. This interpretation appears to shift the emphasis of the subsection even farther away from the meaning ascribed to it by the House of Lords, by introducing as a consideration the purpose of the prosecution or the motive behind it as a ground for refusing to surrender. Needless to say, an inquiry into the motivation of the state comes very close to questioning its good faith. Perhaps the comments of Thurlow, J. were intended merely to point out that, using the analysis of Viscount Radcliffe, it was impossible to conclude that any offence of a political character had been committed.

Regardless of the interpretation one wishes to ascribe to the comments of Thurlow, J., it seems likely that section 21(b) will be interpreted as

119 Id. at 442.
120 Armstrong, supra, note 86.
121 Id. at 285.
providing more than an alternative way by which the accused may prove the offence is one of a political character. This might result from the fact that the Canadian Act does not include the words quoted at the beginning of this section and thus, does not in any way address itself to the question of the manner in which a political offence may be proven. However, the scope of the protection to be afforded by section 21(b) is difficult to determine, as the comments of the courts in this regard are cursory. In Canada, we shall have to await further judicial interpretation before this problem is clarified, but it is hoped that a more liberal construction, in keeping with the spirit of the political exemption, will be given.

C. INTRA — COMMONWEALTH EXTRADITION

In Canada, the surrender of fugitives to other members of the Commonwealth is governed by the Fugitive Offenders Act, which is based on the British Fugitive Offenders Act, 1881. Unlike the Extradition Act, the application of the Fugitive Offenders Act does not depend upon the existence of a treaty. It also imposes few of the traditional safeguards that are normally recognized by international law for the protection of the fugitive. Conspicuously absent is any enumeration of extraditable offences. Instead, the Act provides for the surrender of the fugitive if the offence with which he is charged carries a penalty under the law of the state where it was committed of at least twelve months imprisonment with hard labour. The principle of double criminality, which requires that the offence in question must be an offence under the general law of both the requesting state and Canada, is not mentioned by the Act. Indeed, the Act clearly contemplates the surrender of a fugitive for conduct which does not amount to an offence in Canada. The Act is also silent with respect to the principle of specialty, which prohibits the trial of a fugitive for an offence that may allegedly have taken place prior to his rendition but is different from the one upon which his surrender was granted unless he is given the opportunity of first returning to the jurisdiction from which he was extradited. Finally, but most relevant to the topic under consideration, the Act makes no reference to any exemption to be accorded political offenders.

The omission of these formal safeguards clearly illustrates the different principles and assumption upon which intra-Commonwealth extradition has operated. These principles find their historical origin in the British Empire, for at the time of the passage of the Fugitive Offenders Act, 1881, all parts of the Empire owed allegiance to the British Crown and were subject to the

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124 44 and 45 Vict., c. 69, now repealed and replaced by the Fugitive Offenders Act, 1967, c. 68.  
125 P. O'Higgins, Recent Practice under the Fugitive Offenders Act, [1965] Crim. L. Rev. 133.  
126 S. 3.  
127 S. 4.  
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overall supremacy of the Imperial Parliament at Westminster. Thus, the Fugitive Offenders Act, 1881, did not require reciprocity and extended by the mere force of its enactment to all parts of the Empire, giving extradition \textit{inter se} the appearance of domestic machinery used in the administration of criminal justice. That formalities were unnecessary seemed also to flow logically from the fact that although a fugitive might be surrendered from one part of the Empire to another, he never left the jurisdiction of the highest court of appeal, the Judicial Committee of the Privy Council.

The courts, in keeping with the spirit of the Act, have also viewed surrender to a foreign state in a somewhat different light than surrender to another member of the Commonwealth. As a rule, a far less cautious posture has typified their approach to the latter. In the case of \textit{Re Harrison}, the court commented on this difference:

\begin{quote}
It is quite obvious that some additional care ought to be taken in the case of extraditing persons to foreign countries than in facilitating criminal proceedings in the various parts of the Empire, to which alone the Fugitive Offenders Act applies.
\end{quote}

This was also the opinion expressed by the New Zealand Supreme Court in \textit{Ex Parte Lillywhite}. Speaking for the court Stout, J. said:

\begin{quote}
At common law there was thought to be an asylum for foreign offenders; and it is only by virtue of treaties that foreign offenders are given up. The rendition of an offender against the Crown from one portion of the possessions of the Crown to another portion should, it seems to me, be differently viewed.
\end{quote}

In view of the evolution from Empire to Commonwealth and the concomitant change in many of the members' constitutional status, several commentators have felt compelled to raise questions about whether the Fugitive Offenders Act, 1881, should continue to govern the matter of extradition between member states. Indeed, these inquiries were prompted by more than a merely academic concern to bring intra-Commonwealth extradition in line with historical realities, for the scope of the Act is itself in doubt as a result of some of these changes. The Act applies to any part of Her Majesty's Realms and Territories. Thus, clearly the withdrawal of Burma and the Republic of Ireland from the Commonwealth has terminated its application to these countries. In addition, it would appear to be open to some of the other Commonwealth countries who have recently declared themselves republics to hold that the Fugitive Offenders Act, 1881, no longer applies so as to permit them to surrender fugitives to other parts of the Commonwealth.

The other event which has prompted a critical review of intra-Commonwealth extradition has been the diminution of the sphere of political

\begin{footnotes}
\item[128] P. O'Higgins, \textit{Extradition Within the Commonwealth} (1960), 9 Int. and Comp. L. Q. 486.
\item[129] Clute, \textit{supra}, note 127 at 27.
\item[130] (1918), 25 B.C.R. 433 at 437.
\item[131] (1901), 19 N.Z.L.R. 502 at 505.
\item[132] Canadian Act, R.S.C. 1970, c. F-32, ss. 2, 3.
\item[133] This is precisely what occurred in India after she achieved her independence. See the case of \textit{C. G. Menm and Another} (1954), 17 Supreme Court J. (India) 621.
\end{footnotes}
and social objectives shared by the members. As new members have entered and old members have attained their complete political independence, the complexion of the Commonwealth has become increasingly varied. In particular, political systems with widely diverging views on the sanctity of civil liberties have led to questions about the propriety of surrendering political offenders. The remarks of Paul O'Higgins on this point are apposite:

The very close relationship between different parts of the commonwealth and the simplified procedure for extradition provided by the Fugitive Offenders Act require for their maintenance the utmost good faith and mutual confidence. Whatever was the original raison d'être for the non-exclusion of political offences, be it unity of sovereignty or common political ideals, the Fugitive Offenders Act is not likely long to survive any attempt to interpret its provisions as a licence to secure the surrender of political offenders.184

A question arises as to whether, in light of changed circumstances, the political exemption might be implied, for the Act gives a discretion to the court to refuse to commit for surrender if the offence is of a trivial nature or the application for the return of the fugitive is not made in good faith, in the interests of justice, or for any other reason it would be unjust or oppressive or too severe a punishment to return the fugitive.185 The better answer would be that the exemption cannot be implied and surrender could not be refused on the ground that the offence is of a political character, as the Act clearly specifies that treason and piracy and any other offence punishable by twelve months hard labour or more are extraditable offences.186

This interpretation is consonant with the opinions expressed in the British parliamentary committee's Report on the Fugitive Offenders Act, 1881. When it was proposed that an amendment be passed to exclude treason and other offences of a political character from the purview of the Act, the British Attorney-General refused and said:

As regarded the Mother Country and her Colonies, the authority of the Crown extended over the whole. The result of allowing such an amendment would be that a person in this country might pass over to a Colony and yet not be made answerable to a law general to both the Colony and the Mother Country.187

Although the committee here referred to is a British parliamentary committee, there is no reason to assume that the Canadian authorities would be prepared to adopt a different view with respect to the provisions of the Canadian Fugitive Offenders Act. Indeed, this result is even more likely today, as Canadian courts would undoubtedly rely heavily on the British decisions regarding the status of political offenders under the 1881 Act.

The first case which gave consideration to this issue was Re Government of India and Mubarak Ali Ahmed.188 The Indian government sought the extradition of the accused on charges of forgery. Ali Ahmed, a Pakistani national, had been on trial in India when he jumped bail and fled to England.

184 O'Higgins, supra, note 128 at 488.
185 R.S.C. 1970, c. F-32, s. 17; a similar provision exists in 44 and 45 Vict., c. 69, s. 17.
186 R.S.C. 1970, c. F-32, s. 3.
187 [1952] 1 All E.R 1060.
The magistrate in England committed him for surrender and Ali Ahmed sought a writ of *habeas corpus* alleging that among other things the proceedings were based upon political considerations only and that since 1948, he and his family had suffered political persecution. In addition, he argued that in India he was publicly known as a political spy for Pakistan and would therefore be unable to have a fair trial. Although the court affirmed the order for his surrender and refused to embark on any consideration of whether the accused would be given a fair trial on his return to India, Lord Goddard made some interesting remarks, although clearly *obiter*, showing a tendency on his part to assimilate proceedings under the Fugitive Offenders Act, 1881, to those under the Extradition Act by implying the political exemption. He said:

I am quite sure that in a proper case the court would apply the same rules with regard to applications under the Fugitive Offenders Act, 1881, as it does under section 3(1) of the Extradition Act, 1870. If it appears that the offence with which the prisoner was charged was in effect a political offence, no doubt this court would refuse to return him.\(^{139}\)

However, this approach was to be short lived. In *Zacharia v. Republic of Cyprus*\(^{140}\) the House of Lords came to the opposite conclusion with respect to the relevance of the political character of the offence. In this case, the government of Cyprus sought to have Zacharia extradited on charges of murder, abduction and extortion. The magistrate had ordered his committal for surrender and Zacharia applied for a writ of *habeas corpus* and relief under section 10 of the Fugitive Offenders Act, 1881, arguing that the Divisional Court had erred in the exercise of its discretion under section 10 by failing to consider the political aspects and character of the alleged offences. Section 10, which is substantially the same as section 17 of the Canadian Fugitive Offenders Act, provides as follows:

Where it is made to appear to a superior court that by reason of the trivial nature of the case, or by reason of the application for the return of a fugitive not being made in good faith in the interests of justice or otherwise, it would, having regard to the distance, to the facilities for communication, and to all the circumstances of the case, be unjust or oppressive or too severe a punishment to return the fugitive either at all or until the expiration of a certain period, such court may discharge the fugitive, either absolutely or on bail ... or may make such other order in the premises as to the court seems just.

More specifically it was argued that section 10 had been interpreted too narrowly by the court and that its scope was such as to permit it to be read as embracing provisions similar to those of the Extradition Act exempting political offenders. In support of this contention, evidence was adduced disclosing that Zacharia had been a political spy during the period of terrorist activity prior to the establishment of independence. During the course of his work he had provided information to the police about the E.O.K.A., an organization working for independence. As a result, Zacharia was branded a traitor by the E.O.K.A. and three attempts were made on his life by members of this group. In addition, at their instigation, Zacharia had been arrested and charged four times with murder, although each time the charges were

\(^{139}\) *Id.* at 1063.

later dismissed or withdrawn. The E.O.K.A. was more successful in its efforts to exterminate Zacharia's associates, as four of them were ultimately murdered. Zacharia and his family were given police protection and eventually were escorted from Cyprus to England to guarantee their safety. Zacharia also argued that the application by the present government was made for the purpose of revenge, at the instigation of E.O.K.A. members in the government, and not in the interests of justice.

In response to the question of whether a determination that the offences were political offences within the meaning of the Extradition Act was relevant to the consideration of relief under the Fugitive Offenders Act, 1881, Viscount Simond replied:

... the Fugitive Offenders Act, 1881, unlike the Extradition Act, 1870, makes no exception of political offences. It would be strange if it did, since in the forefront of the offences for which a fugitive offender may be apprehended and returned to his own country is placed the offence of treason. I am, therefore, of the opinion that it is irrelevant to consider whether the offences with which Zacharia has been charged could in another context be called political offences.\footnote{141}

This was substantially the opinion of Lord Devlin, who rejected the argument that because so many new and independent states with different political systems and far ranging views on fundamental questions were now members of the Commonwealth, it was relevant to consider whether the offence for which extradition is sought is of a political character.\footnote{142} If in fact such considerations are relevant, he believed that it was up to Parliament to modify the law to take into account these new conditions within the Commonwealth, but that the discretion vested in the court under the Fugitive Offenders Act, 1881, was not wide enough to permit it to refuse to commit for surrender if the offence was of a political character or even to consider the nature of the offence as a factor to be taken into account in the exercise of this discretion.\footnote{143}

In the course of his argument, Lord Devlin explained why intra-Commonwealth extradition must be distinguished from extradition to a foreign state. He said:

There cannot be cited in support of ... [this] ... submission any provision in the Fugitive Offenders Act, 1881, such as there is in section 3 of the Extradition Act, 1870. In that Act, which gives effect to treaties negotiated with foreign countries, Parliament contemplates that there may be fugitives from oppression as well as fugitives from justice and excludes the former. In the Fugitive Offenders Act, 1881, it is assumed that within the Commonwealth any fugitive on a criminal charge will be a fugitive from justice. I think it is assumed also that countries within the Commonwealth will have the same standards of freedom and justice and good order and will secure them by substantially the same safeguards.\footnote{144}

Lord Radcliffe, who dissented on another point, shared the majority view as to the court's power to intervene under section 10. He also stressed the differences between the Extradition Act, 1870, and the Fugitive Offenders

\footnote{141} Id. at 444
\footnote{142} Id. at 460.
\footnote{143} Id. at 461.
\footnote{144} Id. at 460.
Act, 1881, especially the fact that the whole of the Extradition Act rested on the importance of preserving the right of political asylum as then recognized.\(^{145}\)

Although the House of Lords overwhelmingly rejected the notion that the political exemption might be read into the Act, both Lord Hodson and Lord Devlin felt that the court in the exercise of its discretion under section 10 could consider evidence that the application for surrender was made for the purposes of revenge. This, they felt, would have a direct bearing on the question of whether the application was made in good faith and in the interests of justice. However, both Law Lords were careful to point out that it was irrelevant that the application was actuated by political motives; the concern of the court was its vengeful nature, independent of the motive by which it was promoted.\(^{146}\)

In conclusion, it seems clear that under the Fugitive Offenders Act, the fact that a person may be charged with an offence of a political character will have no bearing upon the court's ultimate decision as to whether he should be surrendered. Instead, the court is confined, in the exercise of its discretion under the Act, to considerations of the triviality of the offence, questions of whether the application is made in good faith and in the interests of justice or whether it would be unjust, oppressive or too severe to order his return. Such questions tread on an area where the courts are extremely remiss to go, as they convey "a reflection of the gravest possible kind upon the motive and actions of the responsible government".\(^{147}\) They often involve, as they did in Regina v. Governor of Brixton Prison, Ex Parte Enaharo,\(^{148}\) the issue of whether the applicant will be given a fair trial if he is returned. It is evident that an inquiry of this kind is neither conducive to friendly relations between Commonwealth countries, nor are the principles under which it is made less illusive than those involved in a determination of whether an offence is of a political character. As one writer aptly phrased the dilemma, "the elements of good will between governments would inevitably triumph over that of compassion."\(^{149}\) This comment is also relevant in relation to the discretion vested in the Governor General. Fifteen days after the final disposition of the case in the courts, the Governor General "if he thinks it just, may" order the fugitive returned.\(^{150}\) Although his discretion is probably wide enough to be exercised in favour of a political offender, it is unlikely that he would intervene in any but the most blatant case. Here, too, the dictates of political expediency might require that individual injustices be overlooked. It is inherently more uncertain for the fugitive to leave such a decision to the government, a body which is inevitably more sensitive to the tensions of international diplomacy than are the courts.

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145 Id. at 444.
146 Id. at 456, 461.
147 Id. at 445.
In England, the failure of the courts to give effect to the political exception in intra-Commonwealth extradition and the unwillingness of the government to intervene have had profound political repercussions. In particular the surrender of Chief Enaharo to Nigeria and of Kwesi Armah to Ghana brought the whole question of the non-exclusion of political offenders to the forefront. As a result of these and other similar events, a general review of intra-Commonwealth extradition was made at a meeting of Commonwealth Law Ministers held in London in 1966. At the conclusion of the conference, a communiqué was issued with a revised scheme for intra-Commonwealth extradition. The following extract from the communiqué discussed the purpose of the scheme.

The Meeting considered that Commonwealth extradition arrangements should be based upon reciprocity and substantially uniform legislation incorporating certain features commonly found in extradition treaties, e.g. a list of returnable offences, the establishment of a *prima facie* case before return, and restrictions on the return of political offenders.

The Meeting accordingly formulated a Scheme setting out principles which could form the basis of legislation within the Commonwealth and recommended that effect should be given to the Scheme in each Commonwealth country. ... 151

The part of the scheme relating to the exemption to be accorded political offenders is extremely broad in scope. In fact, given the judicial interpretation of the second limb of section 21 of the Canadian Extradition Act, these new provisions are significantly wider than those in this Act. Section 9 of the scheme reads as follows:

9. (1) The return of a fugitive offender will be precluded by law if the competent judicial or executive authority is satisfied that the offence is an offence of a political character.

(2) The return of a fugitive offender will be precluded by law if it appears to the competent judicial or executive authority —

(a) that the request for his surrender although purporting to be made for a returnable offence was in fact made for the purpose of prosecuting or punishing the person on account of his race, religion, nationality or political opinions, or

(b) that he may be prejudiced at his trial or punished, detained or restricted in his personal liberty by reason of his race, religion, nationality or political opinions.

(3) The return of a fugitive offender, or his return before the expiry of a specified period, will be precluded by law if the competent judicial or executive authority is satisfied that by reason of

(a) the trivial nature of the case, or

(b) the accusation against the fugitive not having been made in good faith or in the interests of justice, or

(c) the passage of time since the commission of the offence, it would, having regard to all the circumstances under which the offence was committed, be unjust or oppressive or too severe a punishment to return the fugitive or, as the case may be, to return him before the expiry of a period specified by that authority.

(4) The return of a fugitive offender will be precluded by law if the competent judicial or executive authority is satisfied that he has been convicted (and is neither unlawfully at large nor at large in breach of a condition of a licence to

151 *Scheme Relating to the Rendition of Fugitive Offenders with the Commonwealth*, (1966, Cmd. 3008).
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be at large) or has been acquitted, whether within or outside the Commonwealth, of the offence of which he is accused.

(5) The competent authorities for the purposes of this clause will include —
   (a) any judicial authority which hears or is competent to hear such an application as is mentioned in clause 8, and
   (b) the executive authority by whom any order for the fugitive’s return would fall to be made.

(6) It will be sufficient compliance with any one of the paragraphs (1), (2), (3), (4) and (5) if a country decides that the competent authority for the purposes of that paragraph is exclusively the judicial authority or the executive authority.

(7) If the competent executive authority —
   (a) is empowered by law to certify that the offence of which a fugitive offender is accused is an offence of a political character, and
   (b) in the case of a particular fugitive offender, so certifies,
the certificate will be conclusive in the matter and binding upon the competent judicial authority for the purposes mentioned in this clause.

Britain\textsuperscript{152} and Australia\textsuperscript{153} have both enacted legislation adopting these principles. It is unfortunate that Canada has postponed the implementation of what can only be regarded as an enlightened and necessary piece of legislation.

D. PROCEDURAL QUESTIONS

Prior to the recent decision of the Federal Court of Appeal in \textit{Re State of Wisconsin and Armstrong}\textsuperscript{154} the duty of the extradition judge to refuse to commit for surrender a person charged with an offence of a political character seemed relatively clear in the absence of any specific treaty provision to the contrary. The earlier case law on the subject accepted the position that if the crime with which the accused was charged was not an extradition crime or was a crime of a political character, the extradition judge had to discharge him. This was the opinion of Wurtele, J. in \textit{Re Levi}.\textsuperscript{155} In discussing the general powers of the extradition judge, he said:

When, therefore, a person alleged to be a fugitive criminal is brought before an Extradition Commissioner, he should admit any testimony that tends to show that the offence is political or that it is not an extradition crime. If it should be found that the offence is of a political character, or that the offence is not an extradition crime, the prisoner must be discharged; but otherwise, if the evidence is such as would justify committal for trial in Canada ... it is the duty of the Extradition Commissioner to send the fugitive criminal to jail ...\textsuperscript{156}

It was also generally assumed that a writ of \textit{habeas corpus} lay to challenge the legality of any order for committal on the basis that the crime in question was of a political character.

\textsuperscript{152} 1967, c. 68, s. 4(1).
\textsuperscript{153} Extradition (Commonwealth Countries) Act 1966; Australia, Commonwealth Acts 1966, Act No. 75, ss. 10-11.
\textsuperscript{154} Armstrong, supra, note 86.
\textsuperscript{155} (1897), 1 C.C.C. 74.
\textsuperscript{156} Id. at 77.
However, *Re State of Wisconsin and Armstrong* has brought into question most of these propositions and has cast great doubt on whether the judiciary has any role to play in the determination of whether a crime is of a political character and surrender should thus be refused.

Thurlow, J. was of the opinion that the extradition judge must confine himself to an examination of the sufficiency of the evidence of criminality and if a *prima facie* case were established, the accused must be committed for surrender. In particular, the extradition judge is not authorized to decide "that the offence is of a political character or that it is for that reason not an extradition crime or to discharge the fugitive for that reason". In support of this conclusion, Thurlow, J. pointed out that nowhere in the Extradition Act, which he felt fully delineated the duties of the extradition judge, is the judge authorized to make any decision with respect to the political character of the offence. Section 15 merely empowers the extradition judge to receive evidence tendered to show the political character of the offence.

The difficulty with this interpretation is that the phrase "or is, for any other reason, not an extradition crime" used in section 15 seems to indicate that when a crime is of a political character it ceases to be an extradition crime. Thus the extradition judge no longer has jurisdiction to commit the accused for surrender. It is therefore essential for the judge to ascertain the political nature of the offence. However, Thurlow, J. met this objection by interpreting this phrase as being unrelated to the question of the political nature of the offence and referring back to section 2 of the Act which contains the following definition of an extradition crime:

Any crime that, if committed in Canada, or within Canadian jurisdiction, would be one of the crimes described in schedule I; and in the application of this Act to the case of any extradition arrangement, "extradition crime" means any crime described in such an arrangement, whether or not it is comprised in that schedule.

This led Thurlow, J. to conclude that the fact that an offence listed in the schedule or the treaty is in the particular circumstances of the case a political crime does not deprive the offence of its character as an extradition crime, and a determination of whether the crime is political is not necessary to the valid exercise of the extradition judge's power to commit.

Another factor which was felt to weigh heavily in favour of this interpretation is that a fugitive discharged by an extradition judge is "liable to re-arrest and further extradition proceedings and possible committal before another extradition Judge in respect of the same offence and even on the same evidence". As a result, it is possible for successive extradition judges to rule on the political character of the offence. Thurlow, J. seemed to feel this is inconsistent with the intent and purpose of the political exemption and that a final disposition of the matter is called for by the Act, either by the

107 *Armstrong*, supra, note 86 at 277.
108 Id. at 279.
110 *Armstrong*, supra, note 86 at 279.
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Minister of Justice or by "a court which has jurisdiction to determine the matter".161

Thurlow, J. went on to distinguish the preponderance of the British jurisprudence which held that the magistrate had jurisdiction to decide the issue of the political character of the offence and that a failure to do so correctly constituted a defect in the magistrate's jurisdiction. This view was best summarized by Lord Evershed in Schtraks v. Government of Israel.162 In speaking of the limited right of the court to hear new evidence on the application for habeas corpus His Lordship said:

It will, however, follow from what I have said that in so far as fresh evidence is related to the alleged political character of the crimes charged, it goes not to the question of the magistrate's exercise of his discretionary powers and duties but to his jurisdiction. It follows that your Lordships are both competent and bound to receive such fresh evidence as tends to show that the crimes here charged are of a political character and therefore altogether outside the scope of the agreement between the respective Governments of the United Kingdom and Israel.163

Thurlow, J. did not discuss the decision of the House of Lords in Schtraks but looked instead at the earlier decisions of R. v. Holloway Prison (Governor); Re Siletti164 and R. v. Governor of Brixton Prison, Ex parte Kolczynski.165 In Kolczynski, Lord Goddard repudiated any references in the earlier cases which indicated that the magistrate was unable to decide the question of the political nature of the offence and said:

The effect of s. 3(1) is to prevent a crime of a political character coming within the purview of the Act. If the crime is of that character the magistrate had no jurisdiction to commit. If the magistrate wrongly gives himself jurisdiction by holding that a crime is not of a political character when it is, this court can and must interfere .... The magistrate must give a decision on this matter and his decision is open to review on habeas corpus.166

His Lordship based his conclusions upon two considerations. Firstly, section 3(1) of the Extradition Act, 1870 includes the phrase "if he prove to the satisfaction of the police magistrate".167 This section was held to contemplate a decision by the magistrate as to the political nature of the offence. Secondly, Lord Goddard found support for this view in the statutory form of warrant of committal which contains the statement "and forasmuch as no sufficient cause has been shown to me why he should not be surrendered".168 Lord Goddard regarded this as indicating that the magistrate could find sufficient cause for refusing to surrender and that this might well include the fact that the offence was one of a political character.169

161 Id.
162 Schtraks, supra, note 62.
163 Id. at 597.
164 (1902), 71 L.J.K.B. 935.
165 Kolczynski, supra, note 54.
166 Id. at 552.
167 33 and 34 Vict., c. 52.
168 Kolczynski, supra, note 54 at 552.
169 Id. at 553.
Mr. Justice Thurlow, in rejecting the reasoning found in the British cases, pointed out that the Canadian Act contains no such phrase as does section 3 of the British Act and that the statutory form of warrant is different, being inconclusive on the nature of the magistrate's jurisdiction.

A concurring judgment in the Armstrong case was delivered by Sweet, J., who regarded section 18 of the Extradition Act as conclusive of the question of the duties of the extradition judge:

18(1) The judge shall issue his warrant for the committal of the fugitive to the nearest convenient prison, there to remain until surrendered to a foreign state, or discharged according to law.

(a) In the case of a fugitive alleged to have been convicted of an extradition crime, if such evidence is produced as would, according to the law of Canada, subject to this part, prove that he was so convicted, and
(b) In the case of a fugitive accused of an extradition crime, if such evidence is produced as would, according to the law of Canada, subject to this part, justify his committal for trial, if the crime had been committed in Canada.

18(2) If such evidence is not produced, the Judge shall order him to be discharged.\textsuperscript{170}

Sweet, J. felt that this section exhaustively describes the criteria upon which the extradition judge might issue a warrant of committal or discharge the accused. As the section makes no reference to political offences and does not prohibit the issuing of a warrant in such circumstances, the fact that the offence charged is of a political character is outside the scope of considerations upon which the magistrate's decision to commit should be based. The phrase "subject to this part" was held not to import into section 18 the prohibition against the surrender of a person charged with an offence of a political character, but rather is related to the special provisions in the Act regarding the type of evidence the extradition judge may receive.

Sweet, J. went on to point out that the process of committal is separate and distinct from the process of surrender. The extradition judge is involved only in the committal procedure, while it is left to the sole discretion of the executive to determine whether a person who had been committed should be surrendered to a foreign state. Thus, Sweet, J. concluded that "the matter of political asylum is left by the Extradition Act solely within executive discretion".\textsuperscript{171}

It would seem to follow logically from Sweet, J.'s interpretation of the Act that once the Minister of Justice has made a determination that the offence in question is of a political character, or the evidence is available that calls for such a determination, he has no discretion and must refuse to surrender the accused. This would seem to be required by the combined effect of section 21 of the Extradition Act, which contains a general prohibition of the surrender of a person charged with a political offence, and section 22 of the Act, which permits the Minister of Justice to refuse surrender.\textsuperscript{172}

\textsuperscript{171} Armstrong, supra, note 86 at 300.
\textsuperscript{172} R.S.C. 1970, c. E-21. See text at p. 94.
Despite the cogency and well reasoned nature of the court's argument, it is disturbing that a practice which has stood for almost a century should be swept aside so easily. One is left with the impression that although the result may be correct, as it is based on a cautious analysis of the Act, it is possible that when the British Act was transposed into the Canadian context it was casually edited in a manner not intended to alter the substance of its provisions. However, if the Federal Court of Appeal is right, the result of this editing has been to demolish the most important procedural safeguard protecting a fugitive from prosecution for political crimes. It is not difficult to perceive the nature of the political pressure that might be brought to bear on the executive arm of government to force the surrender of an important political offender and the problems involved in any refusal to surrender such person.

There is, however, some possibility that the question of the political nature of the offence might be raised on habeas corpus. This was not the opinion of Sweet, J. in the Armstrong case, but seemed to be that of Thurlow, J., who made a somewhat oblique reference to the fact that the question of the political character of the offence might be determined by a court which had jurisdiction over the matter.\textsuperscript{173} Such a procedure would be beneficial to the fugitive as it would keep the matter partly within the judiciary. There are, however, several procedural difficulties involved should habeas corpus be available to permit the court to determine whether the offence in question is of a political character and that the accused should be discharged. The writ of habeas corpus is available to challenge the lawfulness of the committal, but the inquiry of the court is usually confined to the documents ordering committal and the relevant statutory material. Thus, it is hard to see how evidence of the political character of the crime might be brought before the court. An attempt to bring certiorari in aid would seem problematic as the Federal Court has jurisdiction over matters capable of review on certiorari while habeas corpus must go to a provincial Supreme Court judge. This problem is exacerbated by the fact that the decision in Armstrong obviously precludes the use of the approach taken in the English cases to permit the court to review a decision of the magistrate as to whether the offence is of a political character. In England review of this question has been based on the fact that an error of the magistrate in determining whether the offence was political means that the committal order was made without jurisdiction and therefore was illegal.\textsuperscript{174} As the Canadian extradition judge can no longer make a decision, this jurisdictional argument cannot be raised.

However, it is possible that the court in habeas corpus might take a broad view of its power based on the wording of section 21 of the Extradition Act, which says, “No person is liable for surrender...”. It is not unreasonable to suggest that the word “liable”, which is defined in Black’s Law Dictionary as the “condition of being bound to respond because a wrong has occurred, the condition out of which a legal liability may arise”, might be construed as giving the court the jurisdiction to inquire into the political character of the offence.

\textsuperscript{173} Armstrong, supra, note 86 at 279.

\textsuperscript{174} Schtraks, supra, note 62 at 585.
There is one aspect about which doubt need not be entertained — that this procedural quagmire will eventually have to be clarified by the Supreme Court of Canada.

E. DEPORTATION: THE BACK DOOR OF EXTRADITION

The right to seek asylum in order to avoid persecution or prosecution is as important as the right to resist extradition on the ground that the offence with which the fugitive is charged is of a political nature.\textsuperscript{176} It is recognized by Article 14 of the Universal Declaration of Human Rights which provides that:

\begin{enumerate}
\item Everyone has the right to seek and enjoy in other countries asylum from prosecution.
\item This right may not be invoked in the case of prosecutions genuinely arising from non-political crimes or from acts contrary to the purposes and principles of the United Nations.
\end{enumerate}

Unfortunately, not only are states not bound by this Declaration but it is also well established, in the exercise of their sovereignty, they have the absolute right to choose whether or not to admit an alien.\textsuperscript{176} Thus, according to Hall:

For the reason also that a State may do what it chooses within its own territory so long as its conduct is not actively injurious to other States, it must be granted that in strict law a country can refuse the hospitality of its soil to any or to all foreigners... If a country decides that certain classes of foreigners are dangerous to its tranquility, or are inconvenient to it socially or economically or morally, and if it passes general laws forbidding the access of such persons, its conduct affords no grounds for complaint. Its fears may be idle; its legislation may be harsh; but its action is equal.\textsuperscript{177}

Since a state is free to determine whether or not it will grant political asylum to an alien, it is not inconsistent to refuse the extradition of a fugitive on the ground that the offence he is charged with in the requesting state is of a political nature and, at the same time, to refuse him asylum and order his deportation. The order of deportation is a unilateral act prompted by domestic policies. International co-operation with other states for the suppression of

\textsuperscript{176}See Green, \textit{supra}, note 28, who points out that there are two categories of fugitives who may seek asylum: the one who maintains that he is fleeing from persecution and has been guilty of no crime, and the one who is a fugitive from justice but who maintains that his crime was of a political nature. See also, L.C. Green, \textit{The Right to Asylum in International Law} (1961), 3 U. of Malaya L. Rev. 223; P. Opas, \textit{Extradition of Fugitive Offenders} (1968), 42 Aust. L. J. 87 at 92; and "Immigration, Extradition and Asylum in Canadian Law and Practice" in R.S. Macdonald, G.L. Morris, and D.M. Johnston, eds., \textit{Canadian Perspectives on International Law and Organization} (Toronto: U. of T. Press, 1974) at 244.

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crime is not a relevant consideration. Unfortunately, many states use deportation as disguised extradition.\(^\text{178}\)

In England and in Canada, the Crown has no authority to surrender a fugitive at the request of a foreign state in the absence of a treaty or extradition arrangement.\(^\text{179}\) Thus if the words "an arrangement" used in section 3 of the Extradition Act\(^\text{180}\) are wide enough to embrace a verbal agreement made between a requesting state and Canada, it is submitted that any return of a fugitive to that state should be by virtue of the Extradition Act and not by way of deportation under the Immigration Act.\(^\text{181}\) To use the Immigration Act to return a fugitive from justice is clearly an abuse of the powers vested in immigration officials.\(^\text{182}\) This view is supported by the general principle: _generalia specialibus non derogant_, "the presumption being that the general power to deport cannot be used to replace the special procedure available for the rendition of fugitives."\(^\text{183}\) At least one Canadian author seems to favour the use of deportation as a substitute for extradition:

> Where for any reason extradition proceedings may fail, it is sometimes possible to secure the deportation of the accused, if a British subject, through the immigration officials of a foreign country. Where this course may have to be resorted to, the fullest information regarding the accused, when and where he entered the foreign country, and the possible grounds for his deportation should be procured and forwarded to the Attorney-General. If the accused has been previously convicted his criminal record and a police photograph will assist in obtaining his deportation to Canada.\(^\text{184}\)

It is difficult to agree with these views, for it seems clear that the cases in which extradition will fail are precisely those cases in which Parliament intended it to fail. The procedural and other safeguards provided for in the Extradition Act should not be swept aside, in disregard of the intention of Parliament, by immigration officials co-operating with some foreign police or by the Minister himself.

In _Zacharia v. Republic of Cyprus_, Lord Radcliffe pointed out that the whole of the British Extradition Act, which is the basis for the Canadian Act, rested on the importance of preserving political asylum.\(^\text{185}\) This emphasis, as well as a person's right to seek asylum from prosecution, may at times be difficult to reconcile with the powers of the state to exclude. The potential for abuse, particularly in the case of the political offender, is an ever present temptation to any government which seeks to exclude political undesirables

\(^{178}\) P. O'Higgins, _Disguised Extradition: The Soblen Case_ (1964), 27 Mod. L. Rev. 522.

\(^{179}\) _Re Tukee_ (1852), 1 P.R. 98; _R. v. Governor of Brixton Prison, ex parte Soblen_, [1962] 3 W.L.R. 1154.


\(^{183}\) This argument relies heavily on that used by O'Higgins, _supra_, note 178 at 529.

\(^{184}\) V.C. Macdonald, ed., 2 _Annotations consolidated from the Dominion Law Reports 1911-28_ (Toronto: Canada Law Book Co., 1928) at 1049-50.

and may well wish to co-operate with a friendly or powerful political ally. Indeed, it may perceive that its own interests are best satisfied by the use of the power to deport aliens to effect a return of a political dissident or offender in a situation where such a person would have little inclination to view the affairs of the asylum state any differently than he did those of the state from which he has come. Thus, in some cases the effects of the exemption accorded to political offenders under the Extradition Act, may run directly counter to the state’s perception of its own self interest. Such a situation rarely weighs heavily in favour of the rule of law.

The issue of disguised extradition rears its head in Canada primarily because of the nature of deportation under the Immigration Act and the concomitant powers which are vested in the Minister of Immigration. The problems begin with the very definition of deportation. Section 2 of the Act provides that deportation:

\[\ldots\] means the removal under this Act of a person from any place in Canada to the place whence he came to Canada or to the country of his nationality or citizenship or to the country of his birth or to such country as may be approved by the Minister under this Act.\[186\]

Section 33 of the Act, speaking specifically to the issue of the place to deport, reiterates the provisions of section 2 but also makes provision for voluntary departure in certain circumstances. It specifies that:

Unless otherwise directed by the Minister or an immigration officer in charge, a person against whom a deportation order has been made may be requested or allowed to leave Canada voluntarily.

This section indicates that deportation within the Canadian context is significantly more than mere expulsion. As Kelly, J. pointed out in Chan v. McFarlane:

Although deportation may be commonly thought of as the removal of an unacceptable person from Canada, an act which would be complete when the person concerned was placed beyond the boundaries of Canada, under the Act, deportation is so defined that an order for deportation is an order for the removal under the Act of a person from any place in Canada to the place whence he came to Canada \ldots\ . Deportation thus defined embraces removal from Canada to a destination which must be one falling within the categories set out in 2(d) of the Act.\[187\]

A deportation order made against a person seeking admission to Canada will specify that he be returned to the country from whence he came to Canada, the country of which he is a national or citizen, the country of his birth, or to such country as may be approved by the Minister under the Act. That the Minister may not arbitrarily approve any country is now clear. In Chan v. McFarlane, the Ontario High Court held that the only power the Minister has to authorize a destination, other than the statutory destinations provided for in section 33, is to approve a country under section 36(1). The exercise of this power is conditional upon the receipt by the Minister of a request by the transportation company which had brought the person to Canada that the deportation be made to a country other than one which


is a statutory destination and that the alternative country be acceptable to the person to be deported.  

Although the discretion of the Minister to select the place of deportation is circumscribed by the Act, it appears that in certain circumstances a political offender could easily be returned to his state of origin for prosecution or punishment. This would not be the case if he were permitted to leave voluntarily, choosing the country of his destination or even choosing amongst the statutory destinations if such a choice were available to him in his particular circumstances. However, that a deportee has no right to choose a destination is trite law. In Moore v. Minister of Manpower and Immigration the Supreme Court of Canada dealt precisely with this issue. Moore was about to board a plane leaving Canada for the Republic of Panama when he was arrested, detained, and then ordered deported by the Immigration authorities. His destination under the deportation order was his country of citizenship, the United States. It was argued on his behalf that he should be permitted to choose his destination. The majority of the court, in rejecting this submission, adopted the reasoning of Judson, J., who said:

My conclusion on this legislation is that the choice rests with the Minister and not with the person to be deported. He has the power and its mode of exercise does not raise a question of law which is reviewable.

The court approached the provisions of the Act dealing with voluntary departure in much the same manner. In its opinion a person unlawfully in Canada, demonstrating his desire to leave voluntarily could not exempt himself from the liability of having an inquiry made or from an order of deportation. Whether the order would be executed lay in the sole discretion of the Minister or the immigration officer in charge. The exercise of this discretion is not reviewable by the courts.

The inability of a deportable person to leave voluntarily or select a country that would be more acceptable to him may have severe repercussions for the political offender. Even if one does not question whether a refusal to permit voluntary departure is made bona fide or at the request of a foreign state, the deportation order accomplishes something prohibited by the provisions of the Extradition Act.

An inquiry into the problems presented to the political offender by the immigration laws cannot end here. Several other provisions of the Immigration Act profoundly circumscribe the dimensions of asylum available to both the political refugee and the political offender.

One of the other striking features of the Act bearing upon this issue is that it does not contain special provisions for the granting of asylum to a

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188 Id. at 807.
189 This discretion is also limited in the case of refugees by the Refugees Convention of 1951, to which Canada is a party (189 U.N.T.S. 137, and Protocol, 606 U.N.T.S. 267). See also Stamatios Damiolos (1973), 2 I.A.C. 434.
190 Moore, supra, note 182.
191 Id. at 847.
192 Id. at 844.
person arriving at a port of entry in Canada. The Special Inquiry Officer has no authority to permit entrance unless the person has been or can be granted landed immigrant status or is a *bona fide* non-immigrant. A person seeking asylum might well have been unable to apply for landed immigrant status in his country of origin. Indeed, this would often be the case, as he may have had to leave his home as quickly as was possible in the circumstances. Thus, a person arriving at a port of entry without prior clearance may find himself, at this late date, unable to qualify as an immigrant because of a failure to meet some of the conditions prescribed by the Immigration Regulations. Nor is there any category of *bona fide* non-immigrant into which he would fit if he were in fact seeking asylum. Indeed, the category of tourist seems to be the only one which could be used to permit entrance. However, to claim this as his intention might well result in his deportation for giving false or misleading information to immigration officials.

Furthermore, the Act specifically prohibits the admission to Canada of a member of any of the following classes:

5(1) persons who are or who have been at any time before, on or after the first day of June 1953, members of or associated with any organization, group or body of any kind concerning which there are reasonable grounds for believing that it promotes or advocates or at the time of such membership or association promoted or advocated subversion by force or other means of democratic government, institutions or processes as they are understood in Canada, except persons who satisfy the Minister they have ceased to be members ... and whose admission would not be detrimental to the security of Canada, ....

(m) persons who have engaged in or advocated or concerning whom there are reasonable grounds for believing they are likely to engage in or advocate subversion by force or other means of democratic government institutions or processes, as they are understood in Canada.

(n) persons concerning whom there are reasonable grounds for believing they are likely to engage in espionage, sabotage or any other subversive activity directed against Canada or detrimental to the security of Canada.

These subsections are, however, left to the interpretation of the Special Inquiry Officer who must decide which groups “advocate ... subversion”, what is meant by “force or any other means” and what constitutes “any other subversive activity”. In addition to this wide discretion, the Act places a duty upon the clerk or secretary of every municipality, every immigration officer, police officer and peace officer to send a written report to the Director of the Immigration Branch of the Department of Manpower and Immigration concerning any person who is not a Canadian citizen (which would include a landed immigrant) who engages in or advocates or is a member of any of the above classes.

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103 R.S.C. 1970, c. I-2, ss. 5-7. It has been learned by the authors that a special interdepartmental committee exists which may recommend that a person be granted political asylum. If this committee refuses to grant political asylum, the applicant may still appeal to the Immigration Appeal Board. We were unable to find any reference to this committee or to the procedure used in the Immigration Regulations. It appears that this procedure is completely unofficial. See, also, 2 Green Paper on Immigration (Ottawa: Information Canada, 1975), ch. 4 “Refugees” at 99 et seq. and 223; ch. 6 “Controls and Enforcement” at 143 and 173 et seq.; 4 C.E.D. (Ont.) (3rd) tit 27, esp. ss. 59-59C; 62A; 155-160.

104 Id., s. 18 (1) (e)(viii).

105 Id., s. 5 (1)(m) and (n).
of a group advocating subversion or is involved in activities detrimental to the
security of Canada.\textsuperscript{196} After an inquiry is held by a Special Inquiry Officer,
any person found to be a member of such an organization or whose conduct
is deemed detrimental to the security of Canada, is subject to deportation.\textsuperscript{197}

It has been impossible to obtain from the Department of Immigration
and Manpower a list of the organizations which fall within the prohibited
class or information concerning the type of conduct that would be deemed
detrimental to the security of Canada. No official interviewed was willing to
indicate whether such a determination fell within the discretion of the Special
Inquiry Officer or whether internal departmental guidelines existed on this
matter.

The provisions of the Immigration Act referred to above have a tre-
mendous impact on both the political offender and the person seeking asylum
as a political refugee due to the fact that the Special Inquiry Officer lacks
authority to permit admission and that immigration authorities have too much
discretion to exclude persons of particular political persuasions. The wide
discretion given to the Special Inquiry Officer allows him to be influenced
by his own political biases inasmuch as he is not often fully informed of the
political facts of the many countries in the world. Thus, it is highly possible
that an uninformed bias will prompt a rigid and ahistorical classification of
such so-called dangerous organizations. For example, a failure to take
cognizance of the differing political and ideological positions of the multitude
of communist and socialist parties existing in the world today could result in
gross injustice, as many have chosen to work within the democratic frame-
work. Also, it seems singularly inequitable that a person should be refused
admission to Canada for such activities, whereas if he were a Canadian
citizen, he would be permitted to carry them out with impunity. Since the rules
governing these prohibited classes cannot be ascertained, it is impossible for
a socialist or communist refugee from a conservative or military government
to be aware of his status as a possible immigrant. Indeed, this ambiguity may
lead to the iniquitous result that in attempting to exercise his right to seek
asylum, he will find himself promptly deported to his state of origin.

\textit{Walter Irving Cronan v. Minister of Immigration and Manpower}\textsuperscript{198}
illustrates some of these problems. Cronan, a former Canadian citizen, was
ordered deported under section 5(1) of the Immigration Act. He had been
a member of the United States Communist Party from 1942 to 1948, and
as a highly trained physicist, engineer and inventor had later done some
consulting work on war production techniques for the American Govern-
ment. The precise legal issues of his appeal are not relevant here but the
attitude of the Immigration Appeal Board toward the Communist Party is an
interesting one. In deciding that the Communist Party was an organization
falling within the prohibited class at the time Cronan was a member, the
Board took as their guidelines the statements of the Benchers of the Law

\textsuperscript{196} \textit{Id.}, s. 18 (1)(a) and (c).
\textsuperscript{197} \textit{Id.}, s. 18(2).
\textsuperscript{198} [1971] 3 I.A.C. 44.
Society, quoted on appeal in *Martin v. Law Society of British Columbia*. The Benchers, in commenting on the nature of communism, said:

The history of Communists in Canada, in Britain and in the United States during the last 3 or 4 years has shown that the doctrines of Communists are dictated from abroad and involve traitorous conspiracies and attempts against these countries. The mere statement of willingness on the part of an avowed communist to take the oaths — lip service to the letter of the law — is not sufficient to justify his acceptance as a person who, in truth, would carry out in its true meaning the requirements of the oaths. The sophist having in his mind justified his adherence to the subversive doctrines of Communism can always justify to himself the lesser matter of the violation of an oath.

Cold war sentiments and shades of McCarthyism seem to be out of place for a tribunal deliberating in 1971.

Cronan also argued that the provisions of section 5(1) permitted him to prove that he was no longer associated with such an organization and thus had ceased to be a member of this prohibited class, but as he could not ascertain how to satisfy the Minister or why he, in fact, had failed to do so, he was unable to present his case adequately. The Board held that although the onus of proving he had ceased to be a member of the Communist Party rested squarely upon the shoulders of the person seeking admission into Canada, the decision of the Minister was purely administrative and not subject to review of any kind. Nor was the Minister obliged to give reasons as to why he had not been satisfied that the party seeking admission was no longer a member of a prohibited class.

The apparent harshness of these provisions is modified by the jurisdiction given to the Immigration Appeal Board under section 15 of the Immigration Appeal Board Act over the power to deport. However, under section 21 of the Immigration Appeal Board Act:

> Notwithstanding anything in this Act, the Board shall not

(a) in the exercise of its discretion under section 15, stay the execution of a deportation order or thereafter continue or renew the stay, quash a deportation order, or direct the grant of entry or landing to any person, ...

(b) if a certificate signed by the Minister and the Solicitor General is filed with the Board stating that in their opinion, based upon security or criminal intelligence reports received and considered by them, it would be contrary to the national interest for the Board to take such action.

(2) A certificate purported to be signed by the Minister and the Solicitor General ... is conclusive proof of the matters therein stated.

The effect of this certificate was considered by the Board in the *Cronan* case. The Board held that:

> Notwithstanding the Minister's Certificate, the appellant had and indeed legally

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200 Cronan, supra, note 198 at 58.
201 Id. at 59.
203 Cronan, supra, note 198.
Extradition and Deportation

exercised his right of appeal in law .... The Board seized with a case in which a Minister's certificate is produced will adjudicate only upon the merits of the appeal in law. Although the Board can hear submissions on facts coming under section 15 of the Immigration Appeal Board Act, it is precluded by the certificate from granting special relief under that section of the Act.\textsuperscript{204}

Therefore, an applicant must be able to prove that the deportation order be quashed for invalidity. In most cases this would be impossible, for the political offender or the individual seeking asylum might well fall within the prohibited classes set out in section 5 of the Immigration Act or be outside the classes of \textit{bona fide} immigrants set out in section 7. Failure to have the order quashed is fatal, as a section 21 certificate effectively pre-empts the jurisdiction of the Board to exercise its discretion to permit a person to remain in the country.

In several cases the question has been raised whether or not section 21 of the Immigration Appeal Board Act contravenes the provisions of the Canadian Bill of Rights. In the \textit{Cronan} case, it was argued that a section 21 certificate infringed section 2(e) of the Bill by denying the applicant the right to a fair hearing in accordance with the principles of fundamental justice for the determination of his rights and obligations, in that the certificate prevented any determination of his rights under section 15 of the Immigration Appeal Board Act. The Board dealt with this submission in a perfunctory manner, concluding that the provisions of section 15 provided not rights but rather only a conditional privilege similar to the privilege, but not the right, of a person to be admitted into Canada, even after he had fully complied with all regulations respecting admissibility. Neither privilege was to be construed as a right to which section 2(e) of the Bill of Rights would apply.\textsuperscript{205}

Similar issues were raised in the Federal Court of Appeal in \textit{Re Prata and the Minister of Manpower and Immigration}.\textsuperscript{206} It was argued on behalf of Prata that as he was unable to see the criminal intelligence reports upon which the section 21 certificate was based, he could not correct any erroneous or prejudicial material that they might contain. Further, it was argued that this refusal to disclose amounted to a denial of natural justice. The court, in rejecting the contention that the applicant had any right to an opportunity to answer, held that the section clearly contemplated that the decision of the Minister of Manpower and Immigration and the Solicitor General was to be based only on reports “received and considered by them”.\textsuperscript{207} Further, the court pointed out that the privilege granted to persons under section 15 was clearly subject to the overriding right and responsibility of the executive arm of government to exclude these persons who might be a threat to the national interest of Canada. That this decision lay solely with the responsible ministers was in keeping with the traditional approach taken by Parliament to matters of security and arose as a result of the fact that:

(a) ... the information on which such decisions must be based is not of such a

\textsuperscript{204} Id. at 81.
\textsuperscript{205} Id. at 81-82.
\textsuperscript{206} (1972), 31 D.L.R. (3d) 465.
\textsuperscript{207} Id. at 471.
character that it may be established by the sort of evidence that can be put before
a judicial tribunal in the ordinary way, and (b) the sources of such information
will dry up if a practice is not followed of protecting their identity.

The court also dismissed the other argument of the applicant that section 21
of the Immigration Appeal Board Act denied equality of the law by creating
a class of deportable persons to which a substantive privilege was to be denied.

In summary, despite the jurisdiction of the Board to permit a person
belonging to a deportable class to remain in Canada, this discretion is severely
circumscribed by the power of the ministers under section 21. The circum-
cstances of the exercise of this power make it virtually unreviewable, as is
indicated by the tenor of these decisions and the general approach the courts
have taken to matters involving national security. It also seems clear that
such a power, if unchecked, could be abused and result in the return of a
person seeking asylum from prosecution.

Before turning to the jurisdiction of the Board under section 15 of the
Immigration Appeal Board Act, several preliminary remarks are necessary.
Section 15 was substantially amended in July of 1973. However, as there
have been no reported decisions involving the amendments and the new text
still contains part of the old language, it is important to examine some of
the decisions of the Board under the earlier version in order to ascertain the
Board’s general approach to matters of asylum. Before its amendment section
15 of the Immigration Appeal Board Act provided that:

15.(1) Where the Board dismisses an appeal against an order of deportation or
makes an order of deportation pursuant to paragraph 14(c), it shall direct that
the order be executed as soon as practicable, except that the Board may, ...

(b) in the case of a person who was not a permanent resident at the time
of the making of the order of deportation, having regard to

(i) the existence of reasonable grounds for believing that if execution of
the order is carried out the person concerned will be punished for activities
of a political character or will suffer unusual hardship, or

(ii) the existence of compassionate or humanitarian considerations that in
the opinion of the Board warrant the granting of special relief,

direct that the execution of the order of deportation be stayed, or quash the order
and direct the grant or entry or landing to the person against whom the order
was made.

The amendment replaces section 15(1) (b) (i) by the following
language:

(i) the existence of reasonable grounds for believing that the person concerned
is a refugee protected by the Convention or that, if execution of the order is
carried out, he will suffer unusual hardship, ....

The convention referred to is the United Nations Convention relating
to the Status of Refugees signed at Geneva on the 28th day of July, 1951. The
definition used in the Act also embraces any subsequent protocols

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208 Id.
738 (F.C.) which seems to give a ray of hope.
210 S.C. 1973, c. 27, s. 6.
211 189 U.N.T.S. 137.
which are ratified or acceded to by Canada and thus includes the 1967 Protocol relating to the Status of Refugees signed in New York. On June 4th, 1969, Canada ratified the Convention and gave notification of accession to the Protocol.

One additional feature of the 1973 amendments to the Immigration Appeal Board Act should be noted. The new provisions, although drastically altering the grounds of appeal to the board, did not alter the right of appeal on any question of law, fact, or mixed law and fact if, at the time the order of deportation was made, the person claimed to be a refugee protected by the Convention. This provision preserves, in these special circumstances, the broad right of appeal found in the Act before it was amended on any question of law, fact, or mixed law and fact. Thus, access to the Board remains relatively unfettered by the 1973 amendments.

One of the first cases in which the Board was called upon to exercise its equitable jurisdiction under section 15 was Petersen v. Minister of Manpower and Immigration. Petersen, a black South African journalist, argued that the deportation order, if executed, would result in his return to South Africa where he would be punished for political activities, and where he would suffer unusual hardship. Furthermore, he maintained that he should be granted special relief on the basis of compassionate or humanitarian considerations. In support of the contention that he would be punished for political activities if returned, proof was given that comments made by him while in Canada and at the hearing about apartheid had received considerable press coverage in South Africa and were likely to have repercussions, which would probably include incarceration. The Board, in granting special relief under this heading, seemed to rely, partly at least, on the fact that several incidents of this kind were well known to have occurred, chiefly the case of Alan Peyton, who had spoken in Toronto against the South African regime and had his passport removed on his return. In addition, the Board took notice of the laws of South Africa which authorized the detention of a person for up to 180 days on the mere word of the Minister of Justice. In the Board’s opinion, Petersen would be a prime target for such treatment.

These facts, as well as the general nature of the restrictions placed upon Blacks as part of South Africa’s apartheid policy, were considered to be grounds for the exercise of humanitarian and compassionate jurisdiction.

The decision thus far is eminently praiseworthy and clearly shows that the Board was prepared to recognize that the exercise of one’s right to freedom of speech was a political activity falling within the purview of section 15. The granting of special relief for compassionate and humanitarian considera-

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214 R.S.C. 1970, c. 1-3, s. 11, as am. by S.C. 1973, c. 27, s. 5.
215 Id. s. 11.
217 Id. at 33. The reference is probably to Alan Paton, author of Cry, the Beloved Country and Too Late the Phalarope.
218 Id.
tions also indicates the Board's willingness to compare the nature of the restrictions facing the appellant on his return to South Africa with the relative freedom he would have to pursue his occupation in Canada. Unfortunately, the Board went on to examine the question of whether Petersen would suffer unusual hardship if he returned to South Africa. The reasoning of the Board is extraordinary on this point. In examining the meaning of the word "unusual" it adopted the dictionary definition of "not often occurring or observed; different from what is usual; out of the common, remarkable, exceptional." Turning its attention to the doctrine of apartheid, the Board pointed out that it imposed "a mode of life circumscribed by restrictions and regulations" upon the whole of the Black population. As a result, they concluded:

... there was no evidence ... from which ... to find that the Appellant will himself suffer unusual hardship, over and above that shared and suffered by all "coloureds" if he should be returned to South Africa.

It is submitted that the Board's interpretation of the expression "unusual hardship" does not follow from the wording of the Act or from common sense understanding of the words. The Board has imparted into these words the requirement that a person qua individual, as opposed to a group, must be singled out and treated more harshly than others. The expression "unusual hardship" may undoubtedly embrace circumstances where a particular person has conducted himself in a manner which results in his being treated uniquely, but this is surely not the outer limits of the meaning to be ascribed to "unusual hardship". That a group may be selected for persecution or elimination needs no historical documentation; thus it is almost self-evident that the Act means the unusual hardship faced by an individual as a member of a social group persecuted for religious, ethnic, political or other reasons.

In the case of Lancelot Chirwa v. Minister of Manpower and Immigration, the Board also saw fit to exercise its discretion under section 15 in a manner favourable to the appellant. Chirwa, a citizen of the Republic of Malawi, contended that if returned to that country he would be punished for activities of a political character. To support this contention he attempted to show the generally oppressive political climate in his country. This evidence included: being questioned over a term paper he had written on the Soviet Union while attending a university in the United States; fearing to discuss even in the privacy of his own home any views in opposition to those held by the government; believing that he would not be permitted to leave the country again if he were returned; apprehending persecution because he had failed to return to Malawi, when required. In spite of the guarantees given by the Government of Malawi to the effect he would not be persecuted, the Board determined that Chirwa had established to the point of reasonable belief that he would be punished for activities of a political character.

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210 Id. at 34-35.
220 Id. at 35.
222 (1973), 4 I.A.C. 338.
The most striking aspect of this judgment is the very wide view taken by the Board as to what activities the appellant had engaged in that could be termed political. In fact, the Board did not focus on this issue, but accepted as evidence of the likelihood of punishment for political activities the fact that Chirwa had fallen from the regime's favour and was a man regarded with suspicion as a result of his term paper and his failure to return when required. Actually, the decision seems to be based more upon considerations of the political climate of Malawi. The Board also felt that the circumstances of the case called for the exercise of its jurisdiction on the basis of compassionate and humanitarian considerations, as permission to remain in Canada would enable Chirwa to keep his family together and permit him to obtain the expert medical treatment he needed.

One of the clearest cases calling for the grant of relief under section 15(1) (b) (i) was that of Luong Chau Phuoc, a Vietnamese citizen who, prior to being ordered deported, was attending Laval University on a scholarship under the Colombo Plan. Phuoc was a well-known activist among the Vietnamese student community in Canada and had been the editor-in-chief of a Vietnamese review which had openly and frequently expressed opposition to the war. As editor-in-chief, Phuoc had to take full responsibility for the contents of the review and thus was personally identified with what clearly amounted to traitorous comments in the eyes of South Vietnamese authorities. In the light of the war in Viet Nam, the profoundly political nature of the appellant's conduct was apparent, as well as the fact that on his return he would probably be incarcerated or killed. In such circumstances, the Board did not hesitate to permit Phuoc to remain in Canada.

It is interesting to note that the decisions of the Immigration Appeal Board refusing to grant asylum under section 15 are of greater import to the political offender seeking asylum than are the other cases so far discussed. For instance, in Carlos Rolando Segura and Mario Rene Aldana Solorzano v. Minister of Manpower and Immigration, both Segura and Solorzano sought to invoke the equitable jurisdiction of the Board to quash a deportation order against them on the ground that its execution would result in their being punished for activities of a political character and in their suffering unusual hardship. The appellants, who were both Guatemalan citizens, adduced evidence to the effect that when in Guatemala, they were actively engaged in activities directed against the government. In July of 1968, the military police of Guatemala raided Solorzano's home and found literature which the authorities regarded as seditious. The appellants also argued that the police planted weapons in the house and took photographs which were published in the newspaper along with the names of Segura and Solorzano. As a result of this incident, the two men fled to the Mexican embassy in Guatemala City to seek political asylum. The embassy offered them shelter until August 6th, when it was arranged that they would fly to Mexico
City. On arriving in Mexico, they stayed with a young Mexican student until they were arrested by the Mexican secret police and charged with the murder of a Mexican soldier that had occurred while they were in the sanctuary of the embassy in Guatemala. In addition, they were charged with theft of a rifle and criminal conspiracy. The two men were found guilty and sentenced to twenty-three years imprisonment, of which they served three until the Mexican Supreme Court quashed the convictions with respect to homicide and theft, as they were found to be groundless. The charge with respect to criminal conspiracy was upheld on the basis of a confession obtained from the appellants to the effect that they had formed part of a group, of at least four individuals, that had intended to “perpetrate an assault to an armoury or to a banking institution to obtain funds to return to Guatemala as guerrillas.”

They were sentenced to six months imprisonment, but having already served three years were ordered released. On their release they were promptly deported from Mexico.

The Board dealt with the plea for political asylum under section 15(1) (b) (i) somewhat expeditiously. Their comments are well worth quoting:

The evidence discloses that the appellants were associated with revolutionaries, both in Guatemala and in Mexico, that as a result of these activities they were compelled for fear of their lives to leave Guatemala and as a result of similar activities were ejected from Mexico. The evidence reveals that the appellants would probably be in difficulty if returned to either Guatemala or Mexico, but the Board finds that in the overriding interest of the State (Canada), the appellants are not desirable immigrants as they might well continue their activities in Canada and, therefore, in the public interest, the Board orders that the deportation orders, in respect of each of the appellants be executed as soon as is practicable.

This decision is of paramount importance to those seeking asylum from prosecution, as it is highly illustrative of the far less lenient attitude of the Board towards political offenders. The appellants in this case were held deportable at first instance under section 5(d) of the Immigration Act for having been convicted of a crime involving moral turpitude. That most persons who have committed offences of a political character would fall within this prohibited class seems an unquestionable proposition given the Board’s assessment of the only crime for which these two men can be said to have been convicted or to have confessed to, namely criminal conspiracy. At least, it is not unreasonable to suggest that the political nature of their conduct did not weigh heavily against the categorization of their crime as one involving “moral turpitude.”

The second, and by far the most interesting aspect of this decision, was the Board’s willingness to read into section 15(1) (b) a discretion on the grounds of public policy and national security which would permit it to deny the appellants’ application to remain in Canada. This discretion was used to perform virtually the same function as the discretion vested in the Minister by section 21 of the Act whereby he may pre-empt the jurisdiction of the Board under section 15 by delivering the appropriate certificate.

225 Id. at 305.
226 Id. at 305-06.
It is submitted that the Board erred in law and acted in excess of its jurisdiction by appropriating to itself a function belonging exclusively to the executive branch of the government. Indeed, by doing so, the Board ran directly counter to its decision in *Nikolaos Agouros v. Minister of Manpower and Immigration* where it held that

... if proof is made for one or both of the conditions very specifically set out in section 15(1) (b) (i), and there is no ground to reject such proof, the Board must take action under the last part of section 15(1); it has a duty and obligation to do so. There is no question of discretion whatsoever, except in the degree of remedy to be granted to the person concerned.\(^{227}\)

That the discretion to exclude persons for reasons of “national interest” or “national security” does not lie with the Board also seems clear from the decision of the Federal Court of Appeal in *Re Prata and the Minister of Manpower and Immigration*.\(^{228}\) The court, in considering the interplay of section 21 and section 15, said:

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\text{[It is clear, when s.15 and s.21 are read together, that those sections are based on a view that, while certain deportable persons may be allowed the privilege of staying in Canada by reason of such grounds as political persecution, unusual hardship, and compassionate or humanitarian considerations notwithstanding the prohibitory provisions of the statute, and while the selection of the deportable persons to whom such privilege may be extended may be left to an independent Court to be exercised on the basis of evidence taken in a judicial way, such a privilege cannot be extended to persons who may be a threat to the national interest because of security considerations or suspected criminal activity or involvement and that the responsibility of deciding what persons fall into this latter class of persons (to whom, in the national interest, that privilege cannot be extended) must be imposed on members of the executive arm of Government for traditional reasons.}\(^{229}\)
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This reasoning applies equally to the case of *Humberto Pagan Hernandez v. Minister of Manpower and Immigration*,\(^{230}\) where the Board discussed at some length its right to deny relief on the basis of public policy considerations. The reasoning of the Board on this point seems confused, as it stated that issues of public policy were always of concern in the exercise of discretion and this was the case with respect to section 15(1) (b) (i), despite the fact that the Board held this section to contain no element of discretion.\(^{231}\)

The *Pagan* case is also relevant to the issue of the Board’s approach to political offenders. Evidence was adduced before the Board of the general treatment that had been accorded the Independistas of which Pagan was a member, who were in some cases, “victims of violence, threats, intimidation, deprivation of their constitutional rights, including the right to work, and oppression, all these proceeding variously from... the party in power, the right wing terrorists, vigilante groups, the police, or persons unknown”.\(^{232}\) Pagan himself, after being charged, had been subject to harassing phone calls, police

\(^{228}\) *Prata*, supra, note 206.
\(^{229}\) *Id.* at 471.
\(^{230}\) (1973), 5 I.A.C. 1. For a discussion of the facts of the case, see text, *supra*, pp. 105-06.
\(^{231}\) *Id.* at 32-33.
\(^{232}\) *Id.* at 15.
comments to the effect he would be killed, and one unsuccessful attempt on his life. All the witnesses on his behalf expressed the opinion that he would be killed or maimed before he got to trial and if he did reach trial he would not get a fair one.  

In dealing with the question of whether Pagan should be granted relief on the basis of reasonable grounds for believing he would be punished for activities of a political character, the Board accepted the evidence that Pagan had been involved in political activity but ruled that there was no evidence to show he would be punished for this conduct. With respect to the meaning of punishment in section 15(1) (b) (i), the Board said it embraced only punishment by the state, both legally and extralegally. However, the Board concluded that the evidence that Pagan would be subject to mistreatment or death at the hands of the police was not relevant to the issue of whether he would be punished for political activities. It is submitted that this decision is clearly wrong as police forces may well be the effective extralegal mechanism for the infliction of punishment by the state. Indeed, this is usually so, in countries with repressive regimes.

The Board took the same view of the evidence that Pagan would not receive a fair trial on the charge of murder, commenting that such evidence raised “a question... outside the purview of the court” and “[t]he courts of one country... cannot pronounce as to the administration of justice by courts of any other country”. The Board also rejected Pagan’s claim that he would suffer unusual hardship, as the evidence indicated he was no worse off than any other Independentista.

It is interesting to note that the court did not consider whether the charge of murder and a subsequent conviction might not constitute punishment for a political activity. Instead, it considered the fact that Pagan was a fugitive from justice in order to determine whether relief should be granted for compassionate or humanitarian reasons. The court’s attitude on this point is instructive:

...consideration must be given to the evidence which weighs in the scales against the appellant: the fact that he has an obligation to return to his home country in order to stand trial there in respect of the outstanding criminal charges against him. He is of course... innocent until he is proven guilty, and deportation is not a substitute for extradition — it is not in any way connected with it — but a claimant to equitable relief, who has an obligation to return to his own country must, if he seeks to outweigh this obligation produce practically conclusive evidence in support of his claim to equitable relief, which the claimant in the instant case has entirely failed to do.  

There is no basis in law for the Board’s requirement that a higher standard of proof be met, if the person in question has charges pending

238 Id. at 16.
239 Id. at 18-19.
240 Id. at 19.
241 Id.
242 Id. at 20.
243 Id. at 31 (Emphasis added).
against him. The civil standard, which the Board has reiterated again and again, should apply and it is not for the Board to vary such a standard at its whim. It is also submitted that in the exercise of its discretion on compassionate or humanitarian grounds, the question of a person's "obligation to return to face trial" is an extraneous consideration which should not be weighed against him; otherwise the Board could easily use deportation as a substitute for extradition in spite of its claim to the contrary.

In conclusion, it appears that the Board treats quite differently persons involved in general political activity that would be legal in Canada and persons who have been engaged in extralegal or revolutionary political conduct. In the latter case, the Board seems willing to exercise an arguable jurisdiction on the basis of national security or national interest in order to refuse permission to remain. The fact that a person has been charged with or convicted of an offence seems to be a decisive factor in any determination under section 15. Therefore, a person requesting asylum from prosecution might well find himself deported to the country from which he has fled for political reasons.

A very recent case could be the beginning of a new trend. In Toan Cong Vu v. Minister of Manpower and Immigration,230 the Federal Court of Appeal allowed an appeal and sent the matter back for rehearing on the ground that the Board had failed to exercise its jurisdiction under section 15. The appellant in this case was a young soldier who had deserted the South Vietnamese army. Under the law of South Viet Nam he was liable to imprisonment and hard labour for from five to twenty years and could also be sent to the front lines in a penitentiary unit while serving the sentence and be stripped of all rights and advantages, including rights to pay and pension if disabled. The Immigration Appeal Board, in considering whether to grant relief on the basis of compassionate and humanitarian considerations, raised a series of questions about the nature of section 15:

Subparagraph (ii) of Section 15(1) mentions the existence of compassionate or humanitarian considerations that may warrant the granting of special relief. Should the Court have compassion on the appellant and deem it inhuman to subject him to the laws of his own country? Where the appellant now stands, does he come under the jurisdiction of Canadian courts or the courts of his own country? Because he deserted from the South Vietnamese Navy, is it up to the Board to judge his act? Because he is liable to punishment, is it up to the Board to shield him from the penalties to which he may be exposed? Even if it feels compassion for the appellant, this Court cannot, in the circumstances, assume the right to accept him when he is not admissible to Canada as an immigrant.240

The response of the court to these questions was very short and care must be taken not to read too much into it. However, the court did seem to say that the question of the appellant's legal obligations was extraneous to the exercise of the Board's jurisdiction. Speaking for the majority, Thurlow, J. A. said:

It will be observed that what the majority of the Board has done in this part of its reasons is to pose a series of questions without answering any of them. The relevance of answers to these questions is, moreover, not apparent and since the

240 Id. at 639. (Emphasis added).
subject matter of the questions is not confined to the existence, by present-day Canadian standards, of compassionate or humanitarian considerations or to whether such considerations warrant the granting of special relief; the judgment is open to the objection that it has been based on irrelevant considerations.\textsuperscript{241}

Whether this will herald a change in the Board's approach is not clear. What is needed is a decision of a higher court or some change in the Act clearly outlining the relationship of offences to the exercise of the Board's equitable jurisdiction under section 15.

That the courts are not anxious to interfere with the Board's discretion is apparent from the decisions of the Supreme Court of Canada in \textit{Boulis v. Minister of Manpower and Immigration}\textsuperscript{242} and \textit{Grillas v. Minister of Manpower and Immigration}.\textsuperscript{243} In \textit{Boulis}, Laskin, J. (as he then was), speaking for the majority of the court, said that although the discretion of the Board under section 15 must be exercised carefully and with due regard for all evidence presented before it concerning an issue as sensitive as political asylum, its reasons are not to be read microscopically, it is enough if they [the Board] show a grasp of the issues that are raised by section 15(1) (b) and of the evidence addressed to them, without detailed reference.\textsuperscript{244}

\textbf{F. CONCLUSION}

It does not seem unreasonable to suggest that the provisions of the Immigration Act do not facilitate the granting of asylum to anyone, let alone those who have been active revolutionaries. Nor is the equitable jurisdiction of the Immigration Appeal Board being used to alter this situation in the case of political offenders. Rather, this jurisdiction has been used in a manner which countenances, through the pretext of national security, the return of political offenders to their state of origin. In order to prevent the evasion of any provision exempting political offenders by the use of deportation proceedings as a substitute for extradition, it is essential that it be provided by statute that the return of a fugitive from justice should take place only in accordance with the procedure laid down for extradition. It would also be essential to define extradition by statute. It is submitted that any such definition must embrace situations where a person's return would result in his punishment for previous political conduct. Since this needs to be reconciled with the power of the state to deport undesirable aliens, provision should also be made that if asylum is not granted in Canada and a person faces charges or has been convicted in the state to which he may be deported, he must be permitted to choose the country of his destination. Only in this way can effect be given to the right of a person to seek asylum from prosecution. Until this is done the decision to extradite or to deport a fugitive from justice when political offences are involved will essentially remain a political decision, whether it is made by the courts or by the government. This is such a sensitive question that domestic and international policy considerations are likely to continue to play a major role for some time in the future.

\textsuperscript{241} Id.

\textsuperscript{242} (1972), 26 D.L.R. (3d) 216 (S.C.C.).


\textsuperscript{244} \textit{Boulis}, supra, note 242 at 223.