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## The Double Criminality Rule Revisited

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## THE DOUBLE CRIMINALITY RULE REVISITED

Sharon A. Williams\*

### I. Introduction

Extradition law and process is the complex vehicle for the return by one state of accused or convicted fugitives from the criminal justice of another state. From an international law perspective, it is for the most part, a treaty matter bearing on the rights and duties of states and the emphasis is on inter-state cooperation, reciprocity and mutuality of obligations.<sup>1</sup> However, it is also part of the domestic criminal law process and as the result will be the potential or actual deprivation of the liberty or even the life of the fugitive, if the requesting state retains the death penalty, today extradition is seen as necessarily protecting the human rights of the fugitive.

The focus of this article is on the protection given to the fugitive by the double or dual criminality rule under the extradition law of Canada.<sup>2</sup> Two major issues will be analyzed. Firstly, whether the crime for which

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1 M. C. Bassiouni, *International Extradition and World Public Order* (Leyden, Sijthoff, 1974) 314.

2 See the *Extradition Act*, R.S.C. 1985 c. E-23. Hereinafter "*Extradition Act*". It should be noted that the rendition of fugitives from Canada to reciprocating states in the Commonwealth scheme under the *Fugitive Offenders Act*, R.S.C. 1985 c. F-32 will not be addressed. This is a separate process with no treaties required and no list of extraditable offences appended to the statute, premised upon the historical connection of the member states and the belief at the inception of the scheme towards the end of the nineteenth century that the formal safeguards and rigidity of extradition with "foreign" states was not necessary or appropriate. There is in the Canadian *Fugitive Offenders Act* no list of extraditable offences and no provision for double criminality. This is to be contrasted with the enactment by several other Commonwealth countries, including the United Kingdom, of new legislation that provides for the same safeguards for the fugitive as extradition such as double criminality. It is suggested that Canada's rendition process should be brought into line in this regard. See for more detail Sharon A. Williams, "The Double Criminality Rule and Extradition: A Comparative Analysis" (1991) 15 *Nova L. R.* 582, 584, 618-623.

the extradition request is made by the foreign state is an extraditable crime meeting the requirement of double criminality and secondly, whether the extradition judge in Canada is mandated to inquire into and seek evidence of the foreign criminal law.

## II. *Foundations of the Double Criminality Rule*

It is a basic precept of extradition law, contained in many states' domestic extradition legislation and bilateral treaties, that there be the threshold requirement of double criminality. Under this rule, the offence for which the fugitive is sought must, based upon reciprocity, be one for which the requested state could in turn be able to make a request. It may be seen as being premised on the maxim *nulla poena sine lege*, or "no punishment without law".<sup>3</sup> As Oppenheim succinctly stated: "No person may be extradited whose deed is not a crime according to the criminal law of the state which is asked to extradite as well as the state which demands extradition".<sup>4</sup>

Double criminality has nevertheless not been viewed as a principle of customary international law that is automatically part of domestic law. Rather, it is a creature of treaty and statute. One writer has argued that it "is not so much a rule of international law as a consideration based on policy and expediency".<sup>5</sup> Thus, the fugitive cannot raise double criminality as a bar to extradition if the applicable treaty or statute is silent. In *Factor v. Laubenheimer*,<sup>6</sup> the Supreme Court of the United States held that the rule is based not on international law but on treaty. This position has recently been reinforced by the Supreme Court of

3 I. Shearer, *Extradition in International Law* (Manchester U.P., 1971) 137-141. See also Karle, "Some Problems Concerning the Application of the European Convention on Extradition", in *Legal Aspects of Extradition Among European States* (1970) 51, and H. Schulz, "The Principles of the Traditional Law of Extradition", in *ibid.*, at 7, 12-13.

4 L. Oppenheim, *International Law* (8th ed., 1955) 701.

5 H. V. E. Hartley Booth, *British Extradition Law and Procedure* (1980) 50, citing O'Higgins, *British and Irish Extradition Law and Practice* (1961) (unpublished Ph. D. thesis). See also Brabyn, "Exceptional Accusation Cases under the Extradition Acts 1870 to 1935" [1987] *Crim. L. R.* 796, at 797 n. 7.

6 290 U.S. 276 (1923).

Canada in *United States v. Charles McVey II*<sup>7</sup> where in that court and the lower courts “reference was made to abstract principles and ‘rules’ of extradition such as double criminality, specialty and reciprocity as if they had independent force”. The court concluded that this was not the case; that there is no obligation to extradite under customary international law or under the common law; that treaties create the obligation to do so and that therefore the parameters of those obligations must be found within the four corners of the treaties. The customary international law based upon the practice of states “may no doubt have a certain value in interpreting the law’, [as noted in another decision of the same court in *United States v. Allard*<sup>8</sup>] but in the end the international duty must be found in the terms of the appropriate treaty”.<sup>9</sup>

There appears in the past to have been some confusion between the distinct principle of double criminality and that of the extraditable offence. Section 2 of the Canadian *Extradition Act* provides that an “extradition crime” is one that if committed in Canada or within Canadian jurisdiction would be one of the crimes listed in Schedule I of the Act. The majority of Canada’s older extradition treaties which pre-date the new “no list” approach, to be discussed later, also have a schedule. Section 3 of the Act provides that where there is an inconsistency between the Act and the treaty, the treaty will prevail. In these schedule or “list” treaties, the approach can be said to be two-tiered. The first issue is whether the offence is listed or not in the treaty. If it is not, then extradition is not possible. On the other hand, if the offence is so listed, it is necessary to move to the second issue and consider whether double criminality exists. As will be developed later in this article, in the new treaties which adopt the “no list” approach, the principles of double criminality and duality of punishability are of primary importance. As one author has argued: “[t]he requirement of double criminality pro-

7 [1992] 3 S.C.R. 475, hereinafter “*McVey II*”.

8 [1991] 1 S.C.R. 861, 865.

9 *Supra* n. 7, at 508. This was also the position in *R. v. Parisien*, [1988] 1 S.C.R. 950. But see I. Shearer, *supra* n. 3, at 138: “The rule seems to be universally established by practice, however, that it could without much doubt be regarded as a customary rule of international law should the question ever arise as a result of some chance omission in the wording of a treaty”. This does not seem to gel with actual state practice as evidenced in the case law. See also *In re Assarsson*, 687 F. 2d 1157 (8th Cir. 1982); *In re Assarsson*, 635 F. 2d 1237 (7th Cir. 1980).

vides the substantive basis needed to ensure that the process shall not . . . be arbitrary".<sup>10</sup>

### III. Recent Trends

At the outset of this discussion, it must be mentioned that there is a recent trend in Canadian negotiation of new bilateral extradition treaties, as is evidenced by the treaties with France,<sup>11</sup> India,<sup>12</sup> the Netherlands,<sup>13</sup> the Philippines<sup>14</sup> and the United States of America,<sup>15</sup> which shows that Canada and other states are opting for the "no list" scheme. This determines extraditability on the basis of double criminality and a minimum punishability requirement rather than on an enumerated schedule of offences in the treaty. This approach will prevent outmoded lists and allows for more offences potentially to be extraditable.<sup>16</sup> However, it is still a requirement that the offence is criminal in both the requesting and requested states. The concentration is not on the strict denomination of the offence but upon the conduct constituting the criminal offence. The denomination or enumerative approach, may vary radically between countries and even between states in a federal

10 Bassiouni, *supra*, n. 1, at 322. There has been considerable debate as to the two potential ways to interpret double criminality. The *in concreto*, or objective, approach looks to the exact labelling of the offence and its constituent elements. See (1970) 41 *R. Int. Dr. Pen.* 12 for resolutions adopted by the 1969 10th Congress of the International Association of Penal Law, which indicates a preference for the *in concreto* approach. The *in abstracto*, or subjective, approach looks to the actual criminal nature of the act without undue preponderance on the label and full identity of the elements in the states. See C. van den Wyngaert, "Double Criminality as a Requirement to Jurisdiction" in N. Jareborg, ed., *Double Criminality Studies in International Law* (1989) 43 for an example of preference for the *in abstracto* approach.

11 1989 Can. T. S. No. 36.

12 1987 Can. T.S. No. 14.

13 1991 Can. T.S. No. 32.

14 1990 Can. T.S. No. 36.

15 1976 Can. T. S. No. 3 as amended by Protocol 1991 Can. T.S. No. 37. Hereinafter "1976 Extradition Treaty".

16 Fiscal offences that are not extraditable at present under "list" treaties unless specifically provided for in treaties are a case in point. Note, however, that the exception, even in "list" treaties was eroded by the House of Lords in *R. v. Chief Metropolitan Magistrate, ex parte Secretary of State for the Home Department*, [1988] 1 W.L.R. 1204 (H.L.).

system such as the United States of America. The move of the "no list" approach is away from a rigid interpretation of extraditable offences within treaty schedules and the consequent emphasis is on the conduct of the fugitive.

#### IV. Canadian Jurisprudence Interpreting Double Criminality

The position long taken by Canadian courts has been that where there was an applicable schedule of offences appended to a treaty, it was not necessary for Canada and the requesting state to use the same terminology or denomination. The key factor appears to have been that the offender has committed what amounts to an offence in both states and that a *prima facie* case is established. In the Supreme Court of Canada decision in *Cotroni v. A.G. of Canada*,<sup>17</sup> the court held that the test to be used is what is the essence of the offence. Accordingly, it does not matter that the specific indictment if it had been issued in Canada would have been under the *Criminal Code* or any other statute. There is consequently no requirement of exact identity between the offence charged in the requesting state and the Canadian offence. The emphasis is on the criminal conduct. Illustrative of this position is *United States v. Smith*,<sup>18</sup> where Justice Borins held that the conduct alleged against the fugitive is central to the hearing that results from the extradition request; that the inquiry is not focused on the legal framework of the requesting state, but rather the set of facts that constitute the fugitive's conduct must be fitted into Canadian criminal law in order to see whether an offence and if so, what offence is constituted under that law. Using this so-called "conduct test", it is not necessary to determine whether the requesting state can make out a *prima facie* case under its criminal law. The essence is the sufficiency of evidence in Canada.<sup>19</sup>

This issue was brought before the Supreme Court of Canada once again in *Washington v. Johnson*<sup>20</sup> where the applicable treaty was the 1976 Extradition Treaty between Canada and the United States, which contained a list of offences. Justice Wilson, writing for the majority,

17 [1976] 1 S.C.R. 219. See also *In re Brisbois* (1962), 133 C.C.C. 188 (Ont. H.C.) and *Virginia v. Cohen*, [1973] F.C. 622.

18 (1984) 15 C.C.C. 3d 16.

19 *United States v. Caro-Payan*, Ont. D.C., Feb. 18, 1988 (unreported).

20 (1988), 40 C.C.C. 3d, 548.

stated that the issue was whether the requesting state must establish that the offence charged in the requesting state is an offence in Canada or whether it is sufficient to show that the conduct charged would have amounted to a Canadian crime, listed in the treaty, if it had occurred in Canada.<sup>21</sup> The Court noted that Article 2 of the Treaty required a combination of extraditable crime and double criminality, with a minimum punishability of one year, and held that the double criminality rule looks to the conduct of the fugitive.<sup>22</sup> As in the *Cotroni*<sup>23</sup> and *Smith*<sup>24</sup> cases the Court held that there is no need for exact identity in terminology nor for the elements of the crime to be the same in both states. This would as a practical matter be an impossible task to accomplish,<sup>25</sup> even in two common law states with similar criminal systems. In *McVey II*,<sup>26</sup> Justice La Forest, speaking for the majority, clearly articulated the Canadian approach when he noted that in Canada the practice developed of giving the extradition judge the role of identifying the crime for which the fugitive was charged according to Canadian law. Thus, the crime as it is known in the requesting state is set out in the information and the arrest warrant and the extradition judge at the extradition hearing identifies the equivalent Canadian crime.

However, there was some controversy in recent Canadian jurisprudence as to whether the extradition crime had to be listed in the schedule of offences attached to an extradition treaty in the names under which it is known in the requesting state and Canada. In other words was a double listing necessary? This restrictive approach was taken by Justice Borins in *Smith*<sup>27</sup> and by Justice Wilson in *Johnson*,<sup>28</sup> both relying on the following passage from La Forest's *Extradition To and From Canada*:<sup>29</sup>

21 *Ibid.*

22 *Ibid.*, at 553.

23 *Supra* n. 17.

24 *Supra* n. 18.

25 See Hartley Booth, *supra* n. 5, at 50, where he states that the extradition court cannot become a tribunal of foreign law. See also *R. v. Governor of Pentonville Prison ex parte Elliott*, [1975] Crim. L.R. 516 and *R. v. Governor of Pentonville Prison ex parte Narang*, [1978] A.C. 247.

26 *Supra* n. 7, at 512.

27 *Supra* n. 18, at 28.

28 *Supra* n. 20. In *In re Osgoshi*, No. CC891575 (British Columbia Supreme Court, Nov. 3, 1989) (unreported) a similar line of reasoning was adopted.

29 G. V. La Forest, *Extradition To and From Canada* (2nd ed., 1977) 42.

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

A different view was taken by Justice Smith sitting as extradition judge in *United States v. Caro-Payan*<sup>30</sup> and *United States v. Golitschek*.<sup>31</sup> She stressed that "a treaty must be [given] a liberal interpretation in working to achieve its stated ends".<sup>32</sup> She applied the British cases of *In re Neilsen*<sup>33</sup> and *United States v. McCaffery*<sup>34</sup> and held that the old double criminality test, which required an almost exact pairing of all the constituent elements of the offence, is not the requisite test today. Instead, the conduct test should be applied. The extradition judge "need only consider whether the evidence against the fugitive would justify a committal for trial if the 'conduct alleged' had been committed in Canada, and that conduct is a crime listed in the Treaty".<sup>35</sup> The *Caro-Payan* decision with respect to there being no need for an exact pairing of the constituent elements is non-controversial. However, most pertinent to this article is Justice Smith's underlying rationale which appears to have been that as long as the conduct would be criminal if committed in Canada, and if that conduct is a listed crime in a treaty, then there is no necessity for it to be also referred to in the treaty list under a name by which it is known in the requesting state. This view would appear to go against the grain of the La Forest text, that both crimes would have to be listed in the treaty before extradition could be granted. As this writer has commented elsewhere, however much assistance a doctrinal view may be, it is clearly not binding on the courts.<sup>36</sup> There is a good argument to be made that Article 2(1) of the 1976 Canada-United States Extradition Treaty does not require such double listing.

The most recent case in Canada on point is of especial interest as it has cleared up the single or double listing dispute. *United States v.*

30 *Supra* n. 19.

31 (Ont. D.C. January 1986) (unreported).

32 *Supra* n. 19.

33 [1984] 2 All E.R. 84 (H.L.).

34 [1984] 2 All E.R. 570 (H.L.).

35 *Supra* n. 19.

36 Williams, *supra* n. 2, at 608.

*McVey II* involved an extradition request for the offence of conspiracy to export high-technology equipment to the former U.S.S.R. and ten counts of making false statements to the United States Department of Commerce and the United States Customs Service to put such export into effect. The applicable 1976 Extradition Treaty did not list this making of false statements as an extraditable offence. However, the extradition judge was of the view that he could commit the fugitive for the purposes of extradition because firstly, the conduct of the fugitive would if done in Canada have constituted the crime of forgery under the Canadian *Criminal Code*,<sup>37</sup> and secondly, because forgery is listed in the 1976 treaty. *McVey's* conduct did not constitute forgery in the United States. The extradition judge rejected the argument that it was necessary for the crime to be listed in the treaty under the name by which it is known in the United States. This decision was reversed upon *habeas corpus* which was subsequently upheld by the British Columbia Court of Appeal.<sup>38</sup> The Court of Appeal interpreted the *Johnson* case to mean that double listing was essential, referring also to the passage from the *La Forest* text.<sup>39</sup>

None of the earlier cases, apart from *Caro-Payan* and *Golitschek*, bear directly upon the *McVey* case, in that in the *Smith* case murder and manslaughter, the names by which the fugitive's conduct was classified respectively in the United States and Canada were both contained in the treaty list. In *Johnson*, the Supreme Court was concerned with the question of whether the crime for which the fugitive was sought would be a crime contained in the treaty list by a name known under the criminal law of Canada. The difficult question is to decide what construction must be placed upon Article 2(1) of the treaty which provides:

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

37 See R.S.C. 1985 c. C-46, ss. 366 and 321.

38 (1989), 33 B.C.L.R. 2d 28.

39 *Ibid.*, at 30.

When the wording of this Article is examined closely, it is apparent that it can be divided into two parts. Firstly, the person shall be extradited according to the provisions of the treaty for any of the offences listed in the Schedule and secondly, that the listed offences must be punishable by the laws of both contracting parties by a term of imprisonment of no less than one year. As indicated above there is agreement that there is no need for the denomination of the offence to be the same in both states and neither does the scope of liability need to be co-extensive. The criminality of the conduct in both states is the keynote. The intention of the parties to the treaty was to extradite on the basis of reciprocity and the second part of Article 2(1) should be read in this light. There must be a fair and liberal interpretation of extradition treaties that will not unduly narrow the operation of the Treaty. It is submitted that the term "offences" in Article 2(1) should be read to mean "conduct" and any "conduct" listed in the Treaty should be extraditable, provided it meets the two part test contained therein. This would fit well with the analysis of *Neilsen*,<sup>40</sup> *McCaffery*<sup>41</sup> and *Caro-Payan*.<sup>42</sup> It should also be recognized that Article 9(3) of the 1976 Treaty provides that there is to be "such evidence, as according to the terms of the requested state, would justify his arrest and committal for trial if the offence had been committed there. . . ." This is an important safeguard for the fugitive. The basis for these Articles is found in section 18 of the *Extradition Act*.

Double criminality interfaces with the principle of specialty. This principle holds that a person extradited shall not be tried or punished in the requesting state for an offence other than that for which extradition was granted.<sup>43</sup> It is linked to the rigid approach of non-extradition exhibited by the Court of Appeal in *McVey II*. However, if a rigid technical interpretation is made of Article 2(1) of the 1976 Treaty, it would result in complex difficulties concerning criminal conduct. The Court of Appeal held that as *McVey's* conduct would not be prosecuted as "forgery" under the U.S. Code and other legislation, this would result

40 *Supra* n. 33.

41 *Supra* n. 34.

42 *Supra* n. 19.

43 E.g., Art. XII of the 1976 Canada-United States Extradition Treaty.

in a violation of the specialty principle.<sup>44</sup> This type of analysis seems artificial and would defeat the purpose of the Treaty, which is reciprocity and recognition by both states of the fact that the alleged conduct is criminal. The emphasis must lie on the conduct for which extradition was granted and not upon the denomination; unrelated offences allegedly committed before the extradition took place are not included.

The Supreme Court of Canada in *McVey II* noted that the Court of Appeal considered itself bound by *Johnson*, although the latter conceded that the facts were the reverse. In *Johnson*, the issue was that the requesting state had to establish that the crime for which the fugitive was wanted would constitute a crime listed in the treaty according to the law of Canada. Justice La Forest, speaking for the majority, found that the Court of Appeal in coming to its decision "was obviously affected by a reference to the definition of extradition crime in [his] text . . . which had been cited by Justice Wilson [in *Johnson*]". He went on to note, as has been argued earlier in this part, that the definition in a book is not a substitute for the *Extradition Act* itself, and it should be added, the Treaty. The definition in the text was, he stated, meant to be "a broad description viewed from the perspective of the whole of the extradition process" and not to be used in lieu of the Act itself. He, therefore, dispatched with a requirement for double listing.

In sum, the *McVey II* Court held that what must be established is that the conduct of the fugitive would, if it had occurred in Canada, constitute a crime listed in the Treaty according to a name by which it is known under the law of Canada. Justice La Forest concluded that "[t]he issue is not whether the crime charged is called forgery or not in either country, but whether the conduct charged can fairly be said to fall within the expressions 'forgery' and 'conspiracy' in the treaty". With respect to specialty Justice La Forest alludes briefly to the fact that under Article 12(1) of the 1976 Treaty, the fugitive may only be prosecuted by the requesting state for the offence for which extradition is made. He states that ". . . the identity of that offence can be determined

44 (1988), 30 B.C.L.R. 2d 197. See in accord the dissenting judgment of Justice Sopinka in the Supreme Court of Canada. For cases dealing with offences under United States' laws such as the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. §§ 1961-1968 (1970) and the Continuing Criminal Enterprise Act (CCE), 21 U.S.C. § 848(b) (1970) see *Sudar v. United States* (1981), 39 N.R. 433; *Riley v. Commonwealth* (1985), 60 A.L.J.R. 106 (Austl.) and *Hagerman v. United States* (1988), 44 C.C.C. 3d 157.

by reference to the text of that law supplied with the requisition".<sup>45</sup> The appeal was allowed and the order of committal of the extradition judge reinstated.

The Supreme Court's decision in *McVey II* is to be applauded. Even though the 1991 Protocol to the 1976 Treaty has adopted the no-list approach and applies to all extradition requests between Canada and the United States made after its entry into force, even where the criminal conduct took place before that date, the decision is of critical importance to the interpretation of those treaties that retain the schedule of extraditable offences.

#### V. Evidence of Foreign Law

The extradition judge is not mandated under the *Extradition Act* to consider the foreign law. It is the role of the executive, in the person of the Minister of Justice that has that task. In *McVey II* Justice La Forest stated that it is not unreasonable for the Minister to rely on the material supplied by the requesting state with the requisition as proof of the foreign law. This is supported by similar acceptance by the Supreme Court in *Johnson* and by the House of Lords in *Government of Belgium v. Postlewaite*.<sup>46</sup> It should also be noted that under section 22 of the Act the Minister may at any time refuse to surrender the fugitive and order her discharged. As Justice La Forest noted, the Act "does not deal with proof of foreign law at all".<sup>47</sup> In his opinion to require proof of foreign law in an extradition proceeding would serve no useful purpose and would seriously impede the effective cooperation of the two states in the repression of criminal conduct.<sup>48</sup>

This is in accord with the view expressed in *Argentina v. Mellino*<sup>49</sup> that the function of the extradition hearing and the role of the extradition judge is a modest one, albeit of critical importance to the fugitive. The extradition judge has to determine whether there is sufficient

45 *Supra* n. 7, at 535.

46 [1987] 3 W.L.R. 365, 390-91. (H.L.)

47 *Supra* n. 7.

48 *Ibid.*

49 [1987] 1 S.C.R. 536.

evidence of an extraditable offence, based on the criminality of the conduct. As was held in *Canada v. Schmidt*:<sup>50</sup>

The hearing thus protects the individual in this country from being surrendered for trial for a crime in a foreign country unless *prima facie* evidence is produced that he or she has done something there that would constitute a crime mentioned in the treaty if committed here.

Recently, Lord Acker in the House of Lords decision in *R. v. Governor of Pentonville Prison, ex parte Sinclair*<sup>51</sup> stated in a similar vein that an extradition judge "has important but very limited functions to perform".

The concern here as expressed in *McVey II* is that it would put into question the good faith or competence of the foreign requesting state to doubt that the crime does not exist under the foreign law,<sup>52</sup> when most treaties including the 1976 Canada-United States Treaty provide that the request be accompanied by the pertinent text of the criminal law of the foreign state, describing the offence and prescribing the requisite punishment, as well as the warrant of arrest issued in that state.

In the previous section on double criminality, it was seen that the Canadian extradition judge is concerned with the criminality of the conduct, if it had occurred in Canada. The Canadian court deals with the criminal offence under Canadian law. In *McVey II*, Justice La Forest stated that he could not see how the proof of foreign law would advance the purpose of the extradition hearing and that to require evidence beyond the documents currently supplied with the request could cripple the extradition proceedings.<sup>53</sup> He viewed it as unthinkable that the states parties would have contemplated this when they entered into the treaty relationship. In a pragmatic way he states that "[t]he criminal community would certainly welcome the need to prove foreign law. Flying witnesses in to engage in abstruse debates about legal issues arising in a legal system with which the judge is unfamiliar is a certain recipe for delay and confusion to no useful purpose, particularly if one contemplates the joys of translation and the entirely different structure

50 [1987] 1 S.C.R. 500, 515.

51 [1991] 2 A. C. 64, 82 (H.L.).

52 *Supra* n. 50, at 516.

53 *Supra* n. 7, at 528. He notes the exception of political offences that may be expressly assigned to the judge.

of foreign systems of law".<sup>54</sup> Support for this position may be found in *In re Neilsen*<sup>55</sup> where Goff L.J. in the Divisional Court stated that the proceedings "do not involve any consideration of foreign law at all",<sup>56</sup> and in *Sinclair* where Lord Acker stated poignantly that:<sup>57</sup>

Your Lordships are concerned with the construction of an Act passed over a hundred years ago. I cannot accept that the legislature intended that it was to be part of the function of the police magistrate to preside over lengthy proceedings occupying weeks, and on occasions months, of his time hearing heavily contested evidence of foreign law directed to whether there had been due compliance with the many and varied obligations of the Treaty. The inconvenience of such a procedure is well demonstrated by the current litigation.

## VI. Conclusion

The conduct test coupled with a dual punishability requirement is the most practical and appropriate mode of determining the extraditable nature of the offence. In list treaties, unless so provided in the treaty, double listing of the offence should not be required. The focus is on the legal framework of the forum state and proof of the requesting state's law is not required beyond the documents supplied with the requisition. This is in keeping with inter-state cooperation in criminal matters and also adheres to the protection of the individual fugitive's interests.

54 *Ibid.*

55 (1983), 79 Cr. App. R. 1.

56 *Ibid.*, at 11. He also notes the exception of offences of a political character.

57 *Supra* n. 51, at 91.