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The Impact of Recent Extradition Cases Involving Canada and the United States: A Canadian Perspective

by L. M. Bloomfield*

The history of cooperation between Canada and the United States in extraditing fugitives stretches back to the Jay Treaty of 1794¹ and later to the Ashburton-Webster Treaty of 1842 (article X),² thus pre-dating the Canadian Confederation of 1867 and the very existence of Canada as a nation.³ The logic of such cooperation was, and continues to be dictated by the geographic proximity of the two countries as well as by the friendliness of the relations. Indeed, upon the expiration of the Jay Treaty in 1807 and before the commencement of the Ashburton-Webster Treaty, the surrender of the fugitives continued⁴ (although it would appear that aliens alone were involved).⁵

On March 22, 1976, a new extradition treaty came into force between Canada and the United States⁶ which, in the opinion of at least two authors, will probably serve as a model for all future Canadian extradition treaties.⁷ The Treaty expressly terminates all previous agreements on extradition between the two countries.⁸

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¹ Introductory Comment, 29 AM. J. INT'L L. 41 (Supp. 1935).

² Ashburton-Webster Treaty of 1842, Oct. 26, 1952, United States-Canada, art. X, 1952 Can. T.S. No. 12, 3 U.S.T. 2827, T.I.A.S. No. 2454.

³ Both the Jay Treaty and the Ashburton-Webster Treaty and its Supplementary Conventions were of course signed by Her Britannic Majesty on behalf of Her dominions in British North America. Note, however, that the final Supplementary Convention of 1951 to the Ashburton-Webster Treaty was signed by Canada in her own right. *Id.* at art 1.

⁴ Green, *Immigration, Extradition, and Asylum in Canadian Law and Practice*, 11 CAN. PERSP. ON INT'L L. & ORG. 244, 373 (1974). Note, however, that Canadian law now regards extradition as being purely a creature of treaty and statute and the courts without inherent jurisdiction to send a person out of the country against his will. *Federal Republic of Germany v. Rauca*, 30 C.R.3d 97, 101 (Ont. High Ct. 1982) (Evan, C.J.), *aff'd*, 41 Ont. 2d 225 (Ont. Ct. App. 1983), *citing* *Re Insull*, [1933] 3 D.L.R. 709 (Ont. High Ct.).

⁵ Green, *supra* note 4, at 273.

⁶ Treaty on Extradition, Mar. 22, 1976, United States-Canada, 1976 Can. T.S., No. 3, 27 U.S.T. 983, T.I.A.S. No. 8237 (as amended by an Exchange of Notes) [hereinafter cited as Extradition Treaty].

⁷ S. WILLIAMS & J. CASTEL, *CANADIAN CRIMINAL LAW: INTERNATIONAL AND TRANSNATIONAL ASPECTS* 338 (1981). For the recognized Canadian authority in the field of extradition, see generally G. LAFOREST, *EXTRADITION TO AND FROM CANADA* (2d ed. 1977).

⁸ Extradition Treaty, *supra* note 6, at art. 18(2). Note, however, that art. 18(2) restricts the operation of this Treaty to crimes committed subsequent to its entry into force. Al-

In light of the entry into force of a new treaty on extradition, and as importantly, the proclamation into force of the new Canadian Charter of Rights and Freedoms,⁹ an examination of recent extradition cases involving Canada and the United States is appropriate. Such examination will focus on extradition proceedings that have arisen in Canada pursuant to requests for extradition emanating from the United States. Hence, these extradition proceedings will necessarily entail a consideration of both the Extradition Act and the Extradition Treaty, as well as the impact upon both of the Charter. In addition, a most recent and rather spectacular case of what may be described as extra-legal rendition will be reviewed: the abduction from Canada of Sidney Jaffe, a Canadian citizen, and his successful prosecution by the state of Florida.

I. GENERAL PRINCIPLES OF EXTRADITION: PUBLIC INTERNATIONAL LAW AND CANADIAN LAW

It is a well-established rule of customary international law that there is no duty incumbent upon states to accede to a request for extradition in the absence of a treaty.¹⁰ Moreover, a state which, in the exercise of its sovereignty, does not grant extradition without resort to proceedings required by an existing treaty does not violate international law,¹¹ although the state may be constitutionally incapable of granting extradition according to its own domestic law. In Canada, extradition cannot be effected without the use of the procedures set forth in the Extradition Act.¹² Furthermore, extradition from Canada in the absence of a treaty is only possible under Part II of the Act, provided it has been proclaimed to be in force by the Governor-General of Canada in respect of the requesting state prior to the date of the receipt of the request.¹³ To date, Part II has been proclaimed into force as applicable only to two states—Brazil and the Federal Republic of Germany.¹⁴

though the Canadian Extradition Act provides in § 12 that the extradition of a fugitive from Canada can be secured in respect of a crime committed before the entry into force of an extradition agreement, this must be read together with § 3 of the Extradition Act. In the event of an inconsistency between the terms of the Extradition Act and of an extradition treaty, the Extradition Act must be so construed as to provide for the execution of the treaty. In the result, it is the Ashburton-Webster Treaty and its Supplementary Conventions which continue to apply in respect of crimes committed before Mar. 22, 1976. See Extradition Act, CAN. REV. STAT., ch. E-21 (1970), as amended by Can. Stat., ch. 125, § 31 (1980-81-82-83) [hereinafter cited as Extradition Act, CAN. REV. STAT., ch. E-21 (1970)].

⁹ Canada Act, 1982, ch. 11, sched. B, pt. I [hereinafter cited as Charter]. The Charter was proclaimed into force on April 17, 1982; 116 Can. Gaz. part II 1808 (1982).

¹⁰ Green, *supra* note 4, at 246.

¹¹ Cole, *Extradition Treaties Abound but Unlawful Seizures Continue*, 9 LAW SOC'Y UPPER CAN. GAZ. 177, 183 (1975).

¹² Extradition Act, CAN. REV. STAT., ch. E-21 (1970); *Rauca*, 30 C.R.3d at 97.

¹³ Extradition Act, CAN. REV. STAT., ch. E-21, § 35(1) (1970).

¹⁴ S. WILLIAMS & J. CASTEL, *supra* note 7, at 338. The authors note that a new extradition treaty with the Federal Republic of Germany came into force Sept. 30, 1979.

The Extradition Act is a statute passed by the Parliament of Canada under authority of section 91(27) of the British North America Act,¹⁵ which confers on Parliament the power to make laws in relation to the criminal law. Unlike U.S. agreements, treaties in Canada are not self-executing; an international agreement signed and ratified by Canada that purports to effect a change in Canadian domestic law must be implemented by legislation.¹⁶ Although its wording is less than satisfactory, section 3 of the Act operates to implement automatically an extradition arrangement from the moment of its entry into force for Canada.¹⁷

Generally, the Extradition Act regulates the procedure by which a request for extradition is determined. Because granting extradition is of concern to the requested state, the regulation of the procedure is invariably left to the municipal law of such state.¹⁸ While an examination of the Act in detail must await consideration of the case law, it may be noted that the list of extradition crimes comprised in Schedule I to the Act is not exhaustive; definition section 3(c) provides, in effect, that a crime is extraditable if it is listed in a treaty even though it may not be listed in Schedule I.¹⁹ However, the so-called condition of double criminality must still be satisfied in that the criminal offense must be an offense in the requested state as well as in the requesting state.²⁰

It is important to enumerate the more peculiar provisions of the 1976 Treaty. Generally, the Treaty was concluded in December 1971 with a view "to consolidate extradition arrangements between Canada and the United States in a single instrument, and at the same time revise and update the list of extraditable crimes."²¹ In other respects, however, the Treaty is innovative. First, the territorial scope of the Treaty is extended to airspace and territorial waters, vessels and aircraft registered in the contracting parties and aircraft leased without crew to a lessee having his principal place of business or permanent residence in the territories of

¹⁵ Technically, the British North America Act is now the Constitution Act, 1867; see Canada Act, 1982, ch. 11, § 53(2), sched. I. (U.K.).

¹⁶ See, e.g., *Opinion of the Legal Bureau of the Department of External Affairs*, 1982 CAN. Y.B. INT'L L. 289, 291. The authority to pass implementing legislation may be either federal or provincial, depending on the subject matter of the agreement.

¹⁷ S. WILLIAMS & J. CASTEL, *supra* note 7, at 338.

¹⁸ *Id.* See also Extradition Treaty, *supra* note 6, at art. 8. The determination that extradition should or should not be granted under the Act is partly judicial, partly ministerial. The discretion of the Federal Minister of Justice, at least with respect to the extradition of political offenders, has posed problems for the courts. See *Re Sudar v. United States*, 62 C.C.C.2d 173 (Fed. Ct. T.D. 1981) (Jerome, A.C.J.); *Sudar v. United States*, 39 N.R. 433 (Fed. C.A. 1981).

¹⁹ Extradition Treaty, *supra* note 6, at sched. II comprises a narrower list of extraditable crimes applicable in cases of extradition in the absence of treaty.

²⁰ S. WILLIAMS & J. CASTEL, *supra* note 7, at 343; Extradition Act, CAN. REV. STAT., ch. E-21, §§ 2(c), 10(1), 18(1) (1970).

²¹ DEPARTMENT OF EXTERNAL AFFAIRS COMMUNIQUÉ NO. 92, CANADA-UNITED STATES EXTRADITION TREATY (Dec. 3, 1971).

the contracting parties if any such aircraft is in flight or if any such vessel is on the high seas when the offense is committed.²² Second, the Treaty defines as extradition crimes the attempt or conspiracy to commit any of the listed crimes²³ and any offense against a federal law of the United States as extradition crimes.²⁴ Third, fugitives accused of hijacking or assaults on the life or physical integrity of an internationally protected person will be disentitled from claiming the political offender exception.²⁵ Fourth, extradition may be refused if the offense for which extradition is requested is punishable by death and the laws of the requested state do not permit such punishment for the same offense.²⁶ This article is of particular importance to Canadians, given that capital punishment has been abolished in Canada.

II. JUDICIAL REVIEW BY THE FEDERAL COURT OF CANADA AND PROCEEDINGS IN HABEAS CORPUS

Since the Canadian Supreme Court decision in *Puerto Rico v. Hernandez*²⁷ in 1973, it has become settled law in Canada that the order of a judge sitting under the authority of the Extradition Act was an order of a

²² Extradition Treaty, *supra* note 6, at art. 3(1).

²³ *Id.* at art. 2(2).

²⁴ *Id.* at art. 2(3). The interpretation of art. 2(3) has given rise to some interesting litigation. See *Sudar*, 39 N.R. at 433.

²⁵ Extradition Treaty, *supra* note 6, at art. 4(2)(i)(ii). The political offender exception, set out in art. 4(1)(iii), holds that a fugitive cannot be extradited for a crime of a political character, or if it is shown that the proceedings in fact are being taken with a view to prosecute the fugitive for an offense of a political character. See also Extradition Act, CAN. REV. STAT., ch. E-21, §§ 15, 22 (1970). The definition of an offense of a political character is not found in the Treaty or the Act and is, in effect, left to the courts of the requested state. It is not the intention of this writer to review the Canadian cases on point and the English jurisprudence on which the judgments were based. These have been thoroughly canvassed elsewhere. See, e.g., Castel & Edwardh, *Political Offences: Extradition and Deportation—Recent Canadian Developments*, 13 OSGOODE HALL L.J. 89 (1975). For the major Canadian cases, see *Puerto Rico v. Hernandez*, 30 D.L.R.3d 260 (Ont. County Ct. 1972) (Honeywell, J.), *aff'd*, 42 D.L.R.3d 541 (Fed. C.A. 1973); *Re Wisconsin v. Armstrong*, 28 D.L.R.3d 513 (Ont. County Ct. 1972) (Waisberg, J.), *aff'd*, 32 D.L.R.3d 265 (Fed. C.A. 1973).

It is, however, interesting to note that art. 4(1)(iii) of the Treaty further provides that in case of doubt, the "authorities of the government" of the requested state will decide whether a case will fall within the exception. The question is whether the expression "authorities of the government" comprehends the courts. In *Armstrong*, Judge Thurlow pointed out that the Extradition Act nowhere authorized a judge to make any decision regarding the political character of an offense; section 15 was seen as merely empowering a judge to receive evidence presented to show the political character of the offense. 32 D.L.R.3d at 279-80. Query, could a Canadian judge derive his authority to adjudicate such an issue from a liberal interpretation of the Treaty or is the matter to be left exclusively to the discretion of the Minister of Justice under § 22 of the Extradition Act?

²⁶ Extradition Treaty, *supra* note 6, at art. 6. Extradition in such cases may be refused unless the requesting state gives assurances deemed sufficient by the requested state that the death penalty will not be imposed, or if imposed, will not be executed.

²⁷ 14 C.C.C.2d 209 (Can. 1973).

"federal board, commission or other tribunal" and hence reviewable by the Federal Court of Appeal under section 28 of the Federal Court Act.²⁸ The *Hernandez* decision turned on the finding that the extradition judge was not acting as a federally appointed judge but rather as a *persona designata*, a person who derived his authority not from his appointment but from a special Act of Parliament,²⁹ thus falling within the definition of a federal board in section 2 of the Federal Court Act.³⁰ Judicial review was thus made available to both the fugitive and the demanding state. Moreover, the fugitive retained his right to apply for habeas corpus³¹ and the right of appeal to a provincial court of appeal from the dismissal of an application for habeas corpus.³² The sole obstacle in the way of habeas corpus proceedings posed by the *Hernandez* decision was the fact that habeas corpus could no longer be pleaded with *certiorari* in aid. Canadian practice has been to apply for habeas corpus with *certiorari* in aid in order to bring the entire record before the court and to permit the filing of affidavit evidence.³³ Because section 18 of the Federal Court Act gave jurisdiction to the Trial Division of the Federal Court in the matter of *certiorari* against federal boards, however, a provincial superior court judge could not entertain an application for habeas corpus with *certiorari* in aid.³⁴

In September 1982, the Supreme Court of Canada reversed itself in *Minister of Indian Affairs v. Rainville*³⁵ and abandoned the very notion of *persona designata*. Justice Dickson stated that the "continued recognition of the distinction approved by this Court in *Puerto Rico v. Hernandez* can only have the effect of creating doubt as to which review or appeal route a party should follow. The judge made concept of *persona designata* . . . serves no useful purpose . . . and can readily be jettisoned without prejudice to legal principle."³⁶ As Kasting relates,³⁷ some eight days later, the Federal Court of Appeal in *California v. Meier*³⁸ dismissed

²⁸ CAN. REV. STAT., ch. 10 (2d Supp. 1970).

²⁹ *Hernandez*, 14 C.C.C.2d at 216 (Pigeon, J.).

³⁰ CAN. REV. STAT., ch. 10, § 2 (2d Supp. 1970).

³¹ Extradition Act, CAN. REV. STAT., ch. E-21, § 19(a) (1970).

³² The fugitive's right of appeal to a provincial court of appeal upon a writ of habeas corpus arising out of a claim for extradition appears to be a matter of some controversy. Kasting, *Extradition—Position of Extradition Judge—Persona non Designata: The Unmaking of Judician Fiction*, 61 CAN. BAR. REV. 519, 527 (1983). The Ontario Court of Appeal, in *Rauca*, 41 Ont. 2d at 232-35, recently found the right of appeal to exist in extradition matters because the right exists under the Criminal Code of Canada, CAN. REV. STAT., ch. C-34 (1970) [hereinafter cited as Criminal Code, CAN. REV. STAT., ch. C-34 (1970)].

³³ Chevette, *Protection upon Arrest or Detention and Against Retroactive Penal Law*, 10 CAN. CHARTER RTS. & FREEDOMS 219, 391 (1982).

³⁴ *Id.* at 319.

³⁵ 139 D.L.R.3d 1 (Can. 1983).

³⁶ *Id.* at 9.

³⁷ Kasting, *supra* note 32, at 526.

³⁸ *California v. Meier*, No. A-184-82 (Fed. C.A., Oct. 6, 1983). Note that Meier's motion

an application by Meier for review of his committal and an application by the state of California for review of co-defendant Hazlewood's release on the ground of want of jurisdiction under section 28 of the Federal Court Act.³⁹

The *California v. Meier* decision indicates that, short of reintroducing the same request for extradition through the diplomatic channel, the demanding state is without recourse in the event the fugitive is discharged.⁴⁰ Insofar as the fugitive is concerned, his recourse is habeas corpus⁴¹ alone and the right to appeal the dismissal therefrom.⁴²

III. THE RIGHT TO BAIL

The most controversial aspect of the Extradition Act is the right of the fugitive to be granted bail before or after committal for surrender.⁴³ This right has been seriously questioned before the Canadian courts as to whether county or superior court judges sitting as judges under the Extradition Act have the power to grant bail either because of a want of jurisdiction or of express authority under the Act. This has been so notwithstanding the fact that the Canadian Bill of Rights has, since 1960, protected the right of a person charged with a criminal offense "to reasonable bail without just cause."⁴⁴

Although there now appears to be a limited consensus that at least county courts have the power to grant bail,⁴⁵ whatever the source of the authority,⁴⁶ it remains controversial whether the bail provisions of the

for leave to appeal to the Supreme Court of Canada was dismissed without reason on Feb. 8, 1983; *Meier v. California*, 47 N.R. 396 (Can. 1982).

³⁹ CAN. REV. STAT., ch. 10, § 28 (2d Supp. 1970).

⁴⁰ *Kasting*, *supra* note 32, at 526. There is, of course, no appeal from a decision of a judge at an extradition hearing; see, e.g., *United States v. Link*, [1955] 3 D.L.R. 386 (Que. Sup. Ct.), where the Supreme Court held that the decision of an extradition judge on Committal is not a judgment within the meaning of the Supreme Court Act. The extradition hearing is in the nature of a preliminary inquiry under the Criminal Code and is not final, and the fugitive cannot plead *res judicata* (*chose jugée*) at a subsequent hearing. G. LAFOREST, *supra* note 7, at 118.

⁴¹ *Kasting*, *supra* note 32, at 527.

⁴² *Id.*

⁴³ Extradition Act, CAN. REV. STAT., ch. E-21, § 18 (1970).

⁴⁴ Canadian Bill of Rights, CAN. REV. STAT., App. III, § 2(f) (1970). The Bill of Rights was an act of Parliament of Canada and hence was applicable only to federal legislation. *Re di Stefano*, 30 C.C.C.2d 310 (N.W.T. Sup. Ct. 1976) is the lone case where a judge assumed jurisdiction to conduct a bail hearing on the basis of § 2(f) of the Bill of Rights, but this was only one of three grounds for the decision. Note that the Constitution Act, 1982 did not repeal the Canadian Bill of Rights. The new Charter provides for the same guarantee in identical words, § 11(e), but to date no decision of a Canadian court has touched on the matter. The Charter is now the supreme law of Canada, Charter § 52(1), and therefore applies to both federal and provincial legislation.

⁴⁵ *Re Armstrong v. Wisconsin*, 37 C.C.C.2d 397, 400 (Ont. High Ct. 1977) (Graburn, J.).

⁴⁶ The Extradition Act is silent on the matter of bail, unlike the Fugitive Offenders Act, CAN. REV. STAT., ch. F-32, § 11 (1970), which regulates the procedure for rendition to and

Criminal Code of Canada⁴⁷ apply in extradition cases. The effect of the 1972 Bail Reform Act⁴⁸ and the 1975 Criminal Law Amendment Act⁴⁹ is to place upon the prosecutor the burden of showing cause why an accused should not be released once he has been given an unconditional undertaking to return into custody.⁵⁰ Prior to 1972, it had been necessary for the accused to show cause why the court should exercise its discretion to grant bail in his favor. In reality, the argument that the bail provisions of the Criminal Code should not be applicable in extradition matters meets the same sort of objections that underlay the rationale of the argument against the right to bail. As LaForest has written:

The reasons why judges are reluctant to release an accused on bail on extradition cases are not hard to find. Canada is bound by treaty to extradite certain persons, and the courts should take all reasonable steps to give effect to this obligation. It is unwise, then, to take unnecessary chances that the prisoner will escape.⁵¹

In the recent case of *United States v. Khan*,⁵² the Manitoba Court of Appeal ruled that an extradition judge's authority to remand in custody or on bail derives from section 13 of the Extradition Act and that the whole of the Criminal Code including its bail provisions are incorporated by that section.

IV. AFFIDAVIT, DEPOSITION AND DOCUMENTARY EVIDENCE

The interplay of sections 16 and 17 of the Act with article 10(2) of the Treaty in respect to the admissibility of documentary evidence has recently proved to be a source of some confusion to the Canadian courts.

from Canada regarding fellow members of the British Commonwealth of Nations. The Extradition Act has been interpreted as impliedly conferring on judges the power to grant bail by virtue of § 9; see, e.g., *Re State v. Thompson*, 30 C.C.C. 2d 148 (Ont. County Ct. 1977) (Borins, J.). Note further *Re Cotroni v. United States*, 15 C.C.C.2d 76 (Fed. C.A. 1973), where it was held that there was no power conferred by the Federal Court Act on the Federal Court of Appeal to order a bail hearing pending review by the Court on a § 28 application. See also *Re Virginia v. Cohen*, 12 C.C.C.2d 1 (1973) where it was said in *obiter* by Judge Heald in the Federal Court, Trial Division that § 13 of the Extradition Act merely provides for the procedure at the bail hearing and that bail was a collateral matter.

⁴⁷ Criminal Code, CAN. REV. STAT., ch. C-34 (1970).

⁴⁸ CAN. REV. STAT., ch. 2 (2d Supp. 1970).

⁴⁹ Can. Stat., ch. 93, § 47 (1974-75-76).

⁵⁰ S. WILLIAMS & J. CASTEL, *supra* note 7, at 394.

⁵¹ G. LAFOREST, *supra* note 7, at 94. It is by no means certain to the present writer why a person charged with an offense under the laws of a foreign state and whose extradition from Canada is requested by such state is worse off than a person charged in Canada with an offense under the Criminal Code. For that matter, it is also by no means certain why a person whose extradition is sought by a fellow Commonwealth member under the Fugitive Offenders Act has the right to apply for bail whereas a person sought to be extradited under the Extradition Act is not expressly guaranteed such right.

⁵² 17 Man. 2d 121 (Man. Ct. App. 1982) (O'Sullivan, A.J.).

In *Re California v. Meier*⁵³ it was argued on behalf of the fugitives that documentary evidence tendered by the requesting state at the extradition hearing satisfied the requirements of sections 16 and 17 of the Act but not those of article 10(2) of the Treaty. This meant that the evidence was not duly authenticated by an officer of the U.S. Department of State and certified by the principal diplomatic or consular officer of Canada in the United States. In finding against this submission, Judge Toy considered the implication of the decision of the Federal Court of Appeal in *Re Watson v. United States*⁵⁴ to be that the two sets of requirements were alternative and not cumulative. A second submission was that sections 16 and 17 of the Act and article 10(2) of the Treaty were inconsistent and that therefore section 3 of the Act required the provisions of the Treaty to prevail.

Judge Toy neatly disposed of this argument by finding that an extradition judge was not considering a "request for extradition" within the meaning of article 10(2) of the Treaty but rather was conducting a hearing in accordance with sections 13-19 of the Act. Since the affidavit evidence in question was tendered at the hearing and was in conformity with sections 16 and 17 of the Act, no argument as to its admissibility before the court could be raised.⁵⁵ As a result, the conformity of documentary evidence given in support of a request for extradition with article 10(2) of the Treaty is a matter of concern only for the government of the state to whom the request is addressed.

V. PROCEDURE

In *Re Sudar v. United States*,⁵⁶ the Federal Court of Canada was presented with a rather ingenious argument. An application was first sought in the trial division for an order restraining the Federal Minister of Justice from participating in the request by the United States for a warrant of committal of the fugitive Sudar. The argument proceeded on the premise that the discretion conferred on the Minister of Justice by section 22 of the Act to cancel a judicial order for surrender⁵⁷ of a political offender ought to be exercised in a quasi-judicial basis and that the Minister could not be acting impartially if he participated in the extradi-

⁵³ 69 C.C.C.2d 177 (B.C. Sup. Ct. 1982) (Toy, J.).

⁵⁴ 57 C.C.C.2d 217 (Fed. C.A. 1980).

⁵⁵ Note that the court's finding on this second submission may have been morally required in light of the Federal Court of Appeal's judgment in *Re Watson*, 57 C.C.C.2d at 217. Although the decisions of the Federal Court of Canada are not binding on provincial superior courts, it is clear that Judge Toy was mindful of the Federal Court's *obiter* regarding the apparent inconsistency of §§ 16-17 of the Extradition Act and art. 10(2) of the Extradition Treaty. That part of the judgment was not necessary to the Federal Court's decision in view of its finding that not only did the documentary evidence not conform to §§ 16-17 of the Extradition Act, it also did not conform to art. 10(2) of the Extradition Treaty.

⁵⁶ *Re Sudar*, 62 C.C.C.2d at 173.

⁵⁷ Extradition Act, CAN. REV. STAT., ch. E-21, § 18 (1970).

tion hearing as acting counsel for the requesting state. Without deciding the matter, Acting Chief Judge Jerome of the trial division held that the Minister could still discharge his obligations, but that, in any event, Sudar's application was premature.

The matter was then considered by the Federal Court of Appeal in the course of a section 28 application to review the warrant of committal issued shortly after the trial court's decision.⁵⁸ The argument alleged that the participation of the Minister at the extradition hearing raised a reasonable apprehension of bias and thus violated principles of natural justice.⁵⁹ However, as Judge Heald, speaking for the court correctly pointed out, the allegation was made against the Minister and not against the extradition judge whose order for committal was under review. Hence, in the court's opinion the application was premature. Thus the court did not have to consider the allegation of reasonable apprehension of bias in any future determination by the Minister under section 22 of the Act and, indeed, expressly reserved its opinion as to whether such determination would be reviewable by the Federal Court.⁶⁰

VI. THE RIGHT TO CROSS-EXAMINATION

A peculiar feature of the Extradition Act lies in its allowance of the admissibility of foreign affidavit evidence at an extradition hearing even though the affiants have not been subjected to cross-examination by opposing counsel.⁶¹ In the vast majority of cases, this evidence is alone tendered to show the commission of the offense and the identification of the fugitive. The absence of a right of cross-examination has proven to be a source of much controversy and, with the proclamation into force of the Charter, promises to be problematic.

Prior to the Charter, the absence of the right of cross-examination was attacked on two grounds. First, it was argued that the absence of such right violated the Canadian Bill of Rights, in particular sections 1(a) and 2(e), which encompass the right of the individual not to be deprived of his liberty except by due process and the right of a person not to be deprived of a fair hearing in accordance with the principles of fundamental justice. In *Re Wisconsin v. Armstrong*⁶² the Federal Court of Appeal disposed of the argument in a most authoritative manner. Judge Thurlow, in an opinion cited in two subsequent cases before the same court,⁶³ said:

While the Extradition Act provides that the procedure is to follow that

⁵⁸ *Sudar*, 39 N.R. at 433.

⁵⁹ Natural justice is one of the grounds for review by the Federal Court of Appeal in a § 28 application.

⁶⁰ *Sudar*, 39 N.R. at 433.

⁶¹ Extradition Act, CAN. REV. STAT., ch. E-21, § 16 (1970).

⁶² 10 C.C.C.2d 271 (Fed.C.A. 1973).

⁶³ *Re Cotroni v. Attorney General of Canada*, 15 C.C.C.2d 378 (Fed. C.A. 1974); *Sudar*, 39 N.R. at 433.

of a preliminary inquiry it is to do so only as nearly as may be and the use in such proceedings of affidavits in proof of the alleged crime is specifically provided for. If the proceedings were in the nature of a trial on the subject of guilt or innocence the absence of a right or opportunity to test the evidence of the applicants by cross-examination might well be a serious objection to the fairness and justice of such a rule but . . . that is not the situation. The hearing is a mere inquiry and what the extradition judge has to determine is not the guilt or innocence of the fugitive but the question whether evidence produced would justify his committal for trial *He (the extradition judge) is not empowered to decide the merits of guilt or innocence or to pass upon the credibility of witnesses but simply to determine whether there is a sufficient case against the fugitive to justify his committal.*⁶⁴

A second argument stemmed from a section 28 application to the Federal Court of Appeal, in that the absence of a right or opportunity to cross-examine constituted a violation of natural justice. In *Sudar v. United States*⁶⁵ this argument was rejected by the Federal Court of Appeal on the ground that "natural justice" in section 28 of the Federal Court Act was in substance the equivalent of "fundamental justice" in section 2(e) of the Canadian Bill of Rights, thus duplicating the ruling of *Re Wisconsin v. Armstrong*.⁶⁶

Under the Charter, there have been renewed attacks upon the constitutional validity of section 16 of the Extradition Act. In *North Carolina v. Copses*,⁶⁷ Judge Locke of the Ontario County Court ruled that section 16 of the Act was inconsistent with section 11(d) of the Charter. Section 11(d) provides that any person charged with an offense has the right to be presumed innocent until proven guilty according to law in a fair and public hearing by an independent and impartial tribunal. In interpreting section 11(d) Judge Locke noted that the word "hearing" was used rather than the word "trial," concluding that this must comprehend a judicial hearing and further, that fairness must include equal treatment to both sides. However, in *Re Legault*,⁶⁸ Judge Riopel of the Quebec Superior Court held that a fair hearing implied that the fugitive be informed of the specific offense with which he is charged and of the evidence adduced as to its commission. Judge Riopel also reiterated that the extradition hearing was not a determination of guilt or innocence. To the same effect is *Re De Marco*,⁶⁹ where Judge Kane of Ontario County Court expressly referred to the decision of *Wisconsin v. Armstrong*⁷⁰ and its interpretation

⁶⁴ *Armstrong*, 10 C.C.C.2d at 276-77 (emphasis added).

⁶⁵ *Sudar*, 39 N.R. at 433.

⁶⁶ *Armstrong*, 10 C.C.C.2d at 271.

⁶⁷ [1983] 2 C.R.D. 500-01 (Ont. County Ct.) (Locke, J.); Locke followed his own judgment in *New York v. Green*, [1983] 2 C.R.D. 500-02 (Ont. County Ct.).

⁶⁸ [1983] 2 C.R.D. 500-11 (Que. Super. Ct.) (Riopel, J.).

⁶⁹ [1983] 2 C.R.D. 500-04 (Ont. County Ct.) (Kane, J.).

⁷⁰ *Armstrong*, 10 C.C.C.2d at 271.

of the Canadian Bill of Rights. It appears more than likely that Canadian courts in this regard will follow the advice of Judge Steele in *R. v. Schmidt*: "While the Charter is the Supreme Law of the land, it must be read in the context that foreign treaties should not be defeated unless they are clearly in violation thereof."⁷¹

VII. DOUBLE CRIMINALITY

The rule of double criminality, that the crime must be an offense according to the laws of the requested state as well as of the requesting state, is a condition of extradition under Canadian law.⁷² This requirement has given rise to some confusion in connection with article 2(3) of the Treaty, which defines as an extraditable crime any offense against a federal law of the United States provided that one of the listed offenses "is a substantial element, even if transportation, the use of the mails or interstate facilities are also elements of the specific offense."⁷³

The issue was put squarely to Judge Smith in *Re Sudar v. United States*⁷⁴ in an application for habeas corpus.⁷⁵ Sudar had been charged in the United States with the federal offense of conspiracy to racketeer under the RICO⁷⁶ statute. Sudar argued at his extradition hearing that the offense of racketeering was unknown in Canada. Judge Smith ap-

⁷¹ [1983] 2 C.R.D. 500-08 (Ont. High Ct.) (Steel, J.). An interesting judgment is that of Judge Keenan in *California v. Yue*, [1983] 2 C.R.D. 500-06 (Ont. County Ct.). There Judge Keenan was presented with the argument that the absence of a right to cross-examine violated § 7 of the Charter, the right of the individual not to be deprived of his liberty except in accordance with the principles of fundamental justice. However, as Judge Keenan rightly pointed out, the rights and freedoms guaranteed by the Charter are subject to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society (Charter, § 1). Judge Keenan, said, however, that Canadian courts should not be restricted to Canadian society and should look as well to the standards set by other "free and democratic" societies, particularly when the issue has international implications or involves relations between friendly nations. Having found that American courts had rejected similar arguments concerning the absence of a right to cross-examine foreign affiants in extradition proceedings, he concluded that the reasonable limitation had been "demonstrably justified."

⁷² S. WILLIAMS & J. CASTEL, *supra* note 7, at 343.

⁷³ Extradition Treaty, *supra* note 6, at art. 2(3).

⁷⁴ 63 C.C.C.2d 512 (Ont. High Ct. 1981) (Smith J.).

⁷⁵ Note that in *Re Virginia v. Cohen*, 14 C.C.C.2d 174 (Ont. High Ct. 1973) (Haines, J.), it had been held that the existence of double criminality was a matter into which a superior court judge in habeas corpus proceedings could properly inquire. With the judgment of the Federal Court of Appeal in *Meier*, what may or may not be pleaded in an application of habeas corpus becomes critical. In *Re Cohen*, 14 C.C.C.2d at 174, Judge Haines considered that on an application for habeas corpus in extradition matters, a superior court judge had jurisdiction to determine whether a prima facie case had been made for the extradition judge to order committal for surrender under § 18(1) of the Extradition Act. In this connection, it is important to bear in mind that the test the extradition judge must employ in deciding "whether or not to order committal is whether or not there is any evidence upon which a reasonable jury (*i.e.*, in Canada) properly instructed could return a verdict of guilty." *United States v. Sheppard*, 30 C.C.C.2d 424, 427 (Can. 1976).

⁷⁶ 18 U.S.C. § 1961-68 (1976 & Supp. V 1981).

peared to agree that the state crimes which trigger the application of the RICO statute were not the most important elements of the offense. Yet, Judge Smith concluded: "But the only real substantive component of the indictment against Sudar for the purposes of extradition are the conspiracy . . . and the activities of murder, threat to murder, etc. There is no doubt as to the criminality of these activities and of any conspiracy in relation thereto."⁷⁷

Sudar then came before the Federal Court of Appeal by way of a section 28 application for judicial review.⁷⁸ It was submitted that the extradition judge who had committed Sudar to be surrendered erred in law in his application of article 2(3) of the Treaty. In interpreting an earlier decision of the same court in *United States v. Meier*,⁷⁹ the court held that the fugitive, at minimum, have employed conduct constituting an offense listed in the Treaty and that such offense be a substantial element of the federal offense.

In *Meier* the Federal Court properly disposed of the fugitive's argument that the United States had not made out a prima facie case because transporting, transportation, the use of the mails or interstate facilities was not alleged and indeed could not be alleged because it was not an element of the specific federal offense charged against Meier. In other words, *Meier* suggested that only federal offenses involving transporting, transportation or use of the mails or interstate facilities came within the purview of article 2(3) of the Treaty.

In *Sudar*, however, it was alleged that the United States had not made out an essential element of the federal offense of conspiracy to racketeer, an effect on the interstate or foreign commerce of the United States. The court also said that even if the United States had not established that the fugitive's alleged activity could have had the necessary effect, that would have been immaterial since there was a prima facie case that the fugitive had committed several of the listed offenses in the Treaty.⁸⁰ To many, this is not a proper application of the Treaty. Article 2(3) guarantees, from the Canadian point of view, that extradition will be requested only in case of an offense of sufficient gravity against a federal law of the United States, in view of the requirement that a listed offense be a substantial element of the federal offense. But, a prima facie case must be made if the fugitive is to be extradited for the alleged commission of a federal offense. In such cases, the fugitive could not, subsequent to his extradition, be prosecuted under state law for it is axiomatic that a person cannot be tried for an offense other than that for which his extradition has been granted.⁸¹ Of course, in *Sudar*, the court could have dis-

⁷⁷ *Re Sudar*, 62 C.C.C.2d at 173.

⁷⁸ *Sudar*, 39 N.R. at 445.

⁷⁹ 2 F.C. 461 (C.A. 1979).

⁸⁰ *Sudar*, 39 N.R. at 445.

⁸¹ This is known as the doctrine of specialty and has been incorporated into the Extra-

posed of the extradition by finding that the effect on the interstate or foreign commerce of the United States was not an essential element of the offense since in extradition matters in Canada, proof of foreign law is a question of fact. Yet, the court preferred to rest its decision on the ground that there need only be established one of the listed offenses.

VIII. THE CITIZEN'S RIGHT TO REMAIN IN CANADA

Section 6 of the Charter guarantees the right of every Canadian citizen to enter, remain in and leave Canada. In *Federal Republic of Germany v. Rauca*,⁸² the Ontario High Court and, later, the Ontario Court of Appeal were presented with a fundamental challenge to the Extradition Act.⁸³ Rauca was a naturalized Canadian citizen wanted on a West German warrant for crimes allegedly committed in the course of the Nazi occupation of Lithuania during World War II. Rauca submitted, *inter alia*,⁸⁴ that extradition was a violation of his right as a citizen to remain in Canada under section 6 of the Charter and that he therefore could not be extradited because the Charter is the supreme law of Canada.⁸⁵ The *Rauca* case turned on the decision whether the right to remain is subject to "such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society."⁸⁶ The Ontario Court of Appeal disposed of the matter in the following manner:

[When] the rationale and purpose of the Extradition Act and the treaty and considering that crime should not go unpunished, Canada's obligations to the international community and the history of such legislation in free and democratic societies, the burden of establishing that the limit imposed by the Extradition Act and the treaty on section 6(1) of the Charter of Rights is a reasonable one demonstrably justified in a free and democratic society was discharged.⁸⁷

The difficulty with this decision is that the history of extradition legislation in "free and democratic" societies other than Canada's is not, in fact, uniform. Indeed, as Williams and Castel suggest, two distinct trends have emerged.⁸⁸ Civil law countries such as France and the Federal Republic of Germany do not permit the extradition of their nationals. In

dition Treaty in art. 12.

⁸² 30 C.R.3d at 97.

⁸³ Extradition Act, CAN. REV. STAT., ch. E-21 (1970).

⁸⁴ *Rauca*, 41 Ont. 2d at 249. Note that Rauca also argued that the acts complained of were not committed within the territorial jurisdiction of the Federal Republic but rather in Nazi-occupied Lithuania. The court of appeal considered it to be sufficient that Germany then had de facto control of Lithuania, even if its claims to sovereignty there were never recognized by the world community.

⁸⁵ Charter, § 52(1).

⁸⁶ *Id.* § 1.

⁸⁷ *Rauca*, 41 Ont. 2d at 246.

⁸⁸ S. WILLIAMS & J. CASTEL, *supra* note 7, at 346-47.

contrast, the extradition of nationals is permitted in the common law world, including Canada, the United States and the United Kingdom.⁸⁹ Although "free and democratic" societies have a common interest in the suppression of crime and hence a need for extradition treaties, some societies subordinate this interest to the principle that an individual should only be tried according to the criminal law of the state of which he is a national. The justification presumably lies in the fact that civil law countries permit their courts the assumption of criminal jurisdictions on the basis of the nationality of the offender, even if the crime was committed outside the territory of the state of which the offender is a national.⁹⁰ It would appear, therefore, that the Ontario Court of Appeal undertook a rather selective view of the practice of "free and democratic societies."

IX. THE JAFFE AFFAIR: A CASE OF EXTRA-LEGAL RENDITION

While the courts of the province of Ontario were denying to a Canadian citizen the right not to be extradited from Canada under statute and treaty, the state of Florida was prosecuting a Canadian citizen abducted from Canadian territory⁹¹ and brought to Florida to answer charges for violations of the Florida Uniform Land Sales Practices Act.⁹² In that case,⁹³ Sidney Jaffe, a Canadian national who had been released on bail in August 1980 and had gone back to Canada, failed to return for his trial. On his forced return in September 1981, he was convicted, fined \$152,000 and in February 1982 was sentenced to 145 years in prison, with 35 years to run concurrently, including a five-year term for failure to appear at his trial. In June 1983, the government of Canada filed a petition of habeas corpus to secure Jaffe's release in U.S. District Court, Middle District of Florida. In August 1983, the Fifth District Court of Appeals of Florida overturned the original conviction but upheld the conviction on the failure to appear.⁹⁴ In addition, the Florida Parole Board voted to release Jaffe. As a result, Mr. Jaffe, whose long legal battle has become a major irritant in Canada-United States relations, is now free. His parole condition is that he must surrender himself to face new charges, which were brought against him only a few days before his release on Friday, October 7, 1983. Bail on these charges has been set at \$150,000. Florida State Attorney Steven Boyles, who prosecuted Jaffe on the original charges, told

⁸⁹ Each country has proclaimed into force several Extradition Treaties.

⁹⁰ *Id.* at 127.

⁹¹ The two bail bondsmen who carried out Jaffe's abduction were charged with kidnaping in Canada and their extradition was requested by Canada. Both were found extraditable and were surrendered to Canadian authorities. Canada's *Memorandum of Law in Support of Petition for Habeas Corpus*, at 28-29 [hereinafter cited as *Memorandum*] (on file at Canada-United States Law Journal office).

⁹² FLA. STAT. §§ 498.033, 843.15 (1981).

⁹³ *Memorandum, supra* note 91, at 5.

⁹⁴ *Toronto Star*, Aug. 20, 1983, at 1, col. 1.

the parole board that new charges allege that Jaffe illegally deposited more than \$330,000 in payments from investors in a Florida development that Jaffe's company owned. The deposits were made after a receiver had been put in place to handle the company's bankruptcy. The original case against Jaffe was settled on October 4, 1983 when Florida's Fifth District Court of Appeals made final its reversal of his conviction on 28 violations of unlawful land sales transactions.⁹⁵

The significance of the Jaffe case lies in the alleged violation of Canada's sovereignty since a naturalized Canadian was removed from the country against his will. In September 1981, Jaffe was jogging outside his Toronto apartment when two men lured him into a car and took him across the border to Niagara Falls, New York, where he was then taken by a chartered jet to Florida. Jaffe says he was beaten by two men, Tim Johnson and Daniel Kear, who were bounty hunters working for the company which had posted the original \$137,500 bail bond. Johnson and Kear were extradited from the United States through normal channels and faced criminal charges in Toronto in November 1983.

The abduction of Jaffe is objectionable under international law on two grounds.⁹⁶ First, it is a violation of the treaty on extradition between Canada and the United States in that no request for extradition was made through the proper diplomatic channel.⁹⁷ In addition, the determination that extradition should or should not be granted was not made in accordance with the law of Canada, as the requested state, or with the remedies and recourses provided by such law.⁹⁸ Second, it is a violation of Canadian sovereignty in that Canada has "sovereign jurisdiction over its territory and all persons therein, to the exclusion of attempts by other nations to take into custody any person within Canada's borders without Canada's consent."⁹⁹ In the case of seizures in violation of international law, there is an obligation to free the person apprehended and return him to the state from which he was taken, in accordance with the principle of *restitutio in integrum* as the normal remedy for breaches of international law.¹⁰⁰

The difficulty in *Jaffe* lies in the requirement that the victim must have been seized by persons acting as agents of a foreign state or of its political subdivisions.¹⁰¹ For this reason, the government of Canada in its petition for habeas corpus must prove that the authorities of the state of Florida connived at or at least had prior knowledge of the plan for Jaffe's abduction.

⁹⁵ 438 So. 2d 72 (Fla. App. 1983).

⁹⁶ Memorandum, *supra* note 91, at 50.

⁹⁷ Extradition Treaty, *supra* note 6, at art. 9(1).

⁹⁸ *Id.* at art. 8.

⁹⁹ Memorandum, *supra* note 91, at 32.

¹⁰⁰ Cole, *supra* note 11, at 184.

¹⁰¹ *Id.* at 183.

There can be no doubt that the Jaffe affair has caused a strain in Canada-United States relations. Although the United States cannot, for constitutional reasons, intervene to secure Jaffe's release, the obligation to repair a breach of international law lies with the state, for it is well-established that the law of state responsibility does not recognize a distinction between the state and its political subdivisions,¹⁰² nor, for that matter, does it recognize a distinction between the different branches of government.¹⁰³

X. CONCLUSION

Extradition procedures are extremely delicate and follow precise rules and patterns. In the field of criminal law, probably more so than any other field of law, states are extremely jealous of their authority. This is also true for Canada and the United States, both of whom protect their people and their institutions by the same basic legal system and democratic traditions.

The new Charter in Canada has enshrined the rights of Canadian citizens against any unlawful violation. It is more than just the personal condition of the alleged offender that has an implication on the relationship of the two states. In the *Jaffe* case,¹⁰⁴ in addition to the violation of the personal rights, the violation of Canadian sovereignty and basic principles of international law were denounced by Canada. Canada was only given half satisfaction with the extradition of the two bounty hunters. The normal procedure would have been a request for extradition of Jaffe by the United States through diplomatic channels. Obviously, the fear that the Canadian courts would not allow the extradition of a Canadian citizen prompted the illegal action arbitrated through the intervention of bounty hunters. These kinds of kidnappings have often occurred throughout history in obscure political environments or intricate circumstances.¹⁰⁵

This type of mistrust is occasionally, though rarely, justified in certain political situations. It cannot, however, be the normal course of action between two nations whose legal and political systems have the same roots and which have a vested interest in maintaining the traditionally amicable relationship. Canada-United States relationships are best served

¹⁰² I. BROWNIE, *PRINCIPLES OF PUBLIC INTERNATIONAL LAW* 448 (3d ed. 1979).

¹⁰³ *Id.* at 448-49.

¹⁰⁴ 438 So. 2d at 72.

¹⁰⁵ One example was the arrest of the Algerian revolutionary leader by French forces, in the airspace over the Mediterranean Sea, in the aircraft also carrying the King of Morocco travelling from his kingdom to Tunisia with the Algerian leader (see, de la Pradelle, *L'enlèvement des chefs fellagah*, *REVUE GÉNÉRALE DE L'AIR* 1956, at 235). One should also recall the kidnapping of the Congolese leader Moïse Tshombé in a chartered flight over Spain rerouted to Algeria where he was imprisoned.

by mutual respect of each other's legal systems by the proper use of extradition agreements between these neighbors.

