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The Extradition of Canadian Citizens and Sections 1 and 6(1) of the Canadian Charter of Rights and Freedoms

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INTRODUCTION

THIS ARTICLE IS devoted to the question of whether the extradition from Canada of a fugitive Canadian citizen charged with having committed an act that constitutes a criminal offence for which he or she may be prosecuted both in Canada and in the requesting state is a violation of his or her right as a citizen of Canada to remain in Canada, that is guaranteed by section 6(1) of the Canadian Charter of Rights and Freedoms.¹

In analysing this question we shall (1) give a brief history of and rationale for extradition, with emphasis on the variations in application by states of extradition of citizens; (2) assess whether section 6(1) of the Charter of Rights *ipso facto* does in fact contain a right that extradition infringes; (3) enquire whether if indeed extradition infringes *prima facie* the section 6(1) right to remain in Canada of a Canadian citizen, it is a reasonable limit, prescribed by law as can be demonstrably justified in a free and democratic society, even where he or she could be prosecuted in Canada on the same facts; (4) review the role of the Minister of Justice in extradition matters; (5) look at the comparative interests of states that have concurrent jurisdiction over the criminal offence and their impact on prosecutorial discretion in the requested state; and (6) discuss interpretation of extradition treaties.

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¹ Part I, Constitution Act, 1982, which is Schedule B, Canada Act 1982 (U.K.), c. 11.

EXTRADITION

HISTORY, DEVELOPMENT, AND RATIONALE

Extradition may be defined as the giving up of a person by a state in whose territory he or she is present, at the request of another state in whose jurisdiction that person is accused of having committed or has been convicted of a crime.

The origins of extradition can be traced back to ancient civilizations² and its modern developments traced to the eighteenth century.³ However, from a contemporary perspective it is clear that in the last forty years or so the international community has witnessed increased inter-state co-operation in the suppression of crime. New phenomena exclusive to this period have produced and increased new opportunities for criminal activities. Developments in the fields of transportation, communications, and computer technology, as well as social and economic changes, have resulted in mass movements of people and more particularly criminals who are more organized, more mobile and their activities hence more complex. During this time-frame criminal activities have crossed territorial boundaries and have become international or transnational.⁴ These types of criminal activities, whose perpetrators may be from several states, cannot be adequately dealt with unless, first, states are prepared to use wide, even flexible, bases of jurisdiction over the offence. Reliance upon the territorial principle alone will not be sufficient. It reflects the concept of exclusive territorial sovereignty of the independent nation state and does not meet the present concerns of the interdependence of the international community in repressing international and transnational crime. Second, states agree through bilateral and multilateral treaties to extradite or prosecute (*aut dedere, aut judicare*),

² A. Nussbaum, *A Concise History of the Law of Nations* 9 (1954).

³ G. V. La Forest, *Extradition to and from Canada* 1 (2nd ed., 1977); I. A. Shearer, *Extradition in International Law* 5 (1971); S. A. Williams and J.-G. Castel, *Canadian Criminal Law: International and Transnational Aspects* 348 (1981).

⁴ International crimes, *stricto sensu*, are offences that have been proscribed by the international community through multilateral treaties or customary international law. International crimes include, for example, hijacking and other terrorist acts such as hostage-taking and attacks against internationally protected persons, trafficking in narcotics, piracy, and war crimes. Transnational crimes (although often incorrectly labelled "international") are ordinary common law crimes and the only international law connotation is that they contain one or more foreign elements.

and third, states co-operate in extending mutual assistance to one another in criminal matters.

The adoption of multilateral treaties dealing with international criminal activities containing *aut dedere, aut judicare* provisions,⁵ the entry into force of new bilateral extradition treaties, and the ratification of mutual co-operation treaties in criminal matters⁶ indicate that states have the will to take definite steps to deter and if that does not occur to prosecute and punish those who commit acts recognized as criminal by the states involved. This is necessary to protect the health and welfare of peoples of all states by combatting, through such international co-operation, serious international and transnational crimes.

CANADA

In Canada extradition is a creature of statute, the Extradition Act.⁷ Canada does not extradite if there is not an extradition treaty in force with the requesting foreign state, except in two situations: first, where there is an agreement with a foreign state pursuant to Part II of the Extradition Act.⁸ This was done for the first time in 1974 with the Federal Republic of West Germany⁹ and subsequently with Brazil in 1979 and with India in 1985. It should be noted that such agreements only apply to offences committed after the entry into force of the agreement, whereas extradition treaties, unless there is express provision to the contrary,¹⁰ apply to crimes committed both before and after. Second, Canada does not require an extradition treaty to extradite where the surrender of fugitives from justice from one part of the Commonwealth to another is concerned. It is known as "rendition" and is provided for in Canada by the Fugitive

⁵ See, e.g., Hague Convention for the Suppression of Unlawful Seizure of Aircraft 1970, 1972 Can. T.S. No. 23.

⁶ See, for example, Canada-United States Treaty on Mutual Legal Assistance in Criminal Matters (1985), 24 Int'l Leg. Mat. 1092, not yet in force.

⁷ R.S.C. 1970, c. E-21.

⁸ *Ibid.*

⁹ On July 11, 1977, Canada signed an extradition treaty with the Federal Republic of West Germany, in force as of September 30, 1979. See 1979 Can. T.S. No. 18. Canada signed an extradition treaty with India in February 1987.

¹⁰ See, for example, the extradition treaty between Canada and Israel, 1967 Can. T.S. No. 25.

Offenders Act.¹¹ This statute limits Canada's rendition process to those Commonwealth countries that recognize the Queen as head of state. This would appear to limit rendition from Canada to Australia, Bahamas, Barbados, Fiji (questionable since the 1987 coup), Jamaica, Mauritius, New Zealand, Papua New Guinea, and the United Kingdom.

EXTRADITION OF CITIZENS: VARIATIONS IN APPLICATION

A state's entering into an extradition treaty signifies an acceptance during the negotiation process of an equivalence, more or less, of conceptions of the fundamentals of criminal justice. Is it in keeping with this acceptance to refuse to extradite nationals or citizens, on the one hand, but to surrender permanent residents and other aliens, on the other? If it is conceived that justice in the foreign state is equivalent to that at home, then extradition of all offenders should take place.

The Practice of Common Law States

As far back as 1877, Lord Cockburn declared in *R. v. Wilson*¹² that the nationality exception to extradition was a "blot on the law." In 1878 Lord Cockburn chaired a Royal Commission to inquire into all aspects of extradition law. The traditional arguments for non-extradition of nationals or citizens were as follows: (1) the fugitive ought not to be withdrawn from his natural judges; (2) the state owes to its subjects the protection of its laws; (3) it is impossible to have complete confidence in the justice meted out by a foreign state, especially with regard to a foreigner; and (4) it is disadvantageous to be tried in a foreign language, separated from friends, resources, and character witnesses. The Royal Commission, as far back as 1878, found that Great Britain should not adopt such an approach.¹³

Clearly, if common law countries such as Australia, Canada, the United Kingdom, the United States, and other Commonwealth countries refused to extradite their citizens, the situation would result that the offenders would be able to avoid prosecution, as these states

¹¹ R.S.C. 1970, c. F-32.

¹² (1877), 3 Q.B.D. 42, at 44.

¹³ *Report of the Royal Commission on Extradition*, Parliamentary Papers, 1878, vol. 24, Reports, 907-17.

use for the most part¹⁴ the territorial principle as the primary basis for jurisdiction over offences.

The British approach is that where an extradition treaty contains no reference to nationality or citizenship, it applies to all persons. British courts have not accepted the view that non-extradition of nationals or citizens is a rule of customary international law that should be implied in extradition treaties.¹⁵

In Canada, likewise, the pre-Charter of Rights case law dealing with the question has held clearly that unless there is a provision refusing extradition for nationals in the extradition treaty the fugitive cannot resist extradition on this basis.¹⁶ However, where the treaty specifically provides for this exemption, the extradition judge must discharge the fugitive once his or her citizenship has been established.¹⁷

Most of Canada's treaties that mention the matter provide that the states parties are not obliged to extradite their nationals or citizens. This gives the requested state a discretion whether to agree to surrender or not, even if a *prima facie* case is made by the requesting state and all other procedural requirements are met. In the English case of *Re Galwey*¹⁸ it was held that this is a matter for the Secretary of State to decide and that the extradition judge must commit for surrender if all the requirements are met.

This is clearly a policy matter and a political decision that is within the discretion of the executive, namely the Minister of Justice, as is the case with the political offence exception to extradition¹⁹ and a refusal to extradite where the death sentence may be imposed.²⁰ As Dr., as he then was, La Forest notes: "The decision to surrender in

¹⁴ The nationality principle, as a basis of jurisdiction, is only used for a few serious crimes.

¹⁵ Shearer, *op. cit. supra* note 3, at 101. See *Halsbury's Laws of England* (4th ed., 1977), vol. 18, *Extradition and Fugitive Offenders*, at 84, para. 211.

¹⁶ *Re Burley* (1865), 1 C.L.J. 34; *Re Low* (1932), 41 O.W.N. 468 (C.A.). As La Forest, *op. cit. supra* note 3, at 78, n. 66, indicates, the earlier treaties spoke of "British Subjects." This includes Canadian citizens.

¹⁷ *R. v. Wilson* (1877), 3 Q.B.D. 42; *Re Guerin* (1889), 60 L.T.R. 538.

¹⁸ [1896] 1 Q.B. 230, at 236. See also *R. v. Macdonald, Ex p. Strutt* (1901), 11 Q.L.T. 85, at 90 and *Re Federal Republic of Germany and Rauca* (1983), 145 D.L.R. (3d) 638, at 655; [1983] 4 C.C.C. (3d) 385, at 401, *aff'ing* (1983) 38 O.R. (2d) 705, (1983) 70 C.C.C. (2d) 416 (H.C.).

¹⁹ See s. 22 of the Extradition Act.

²⁰ See, e.g., Art. 6 of the Extradition Treaty with the United States, 1976 Can. T.S. No. 3.

such a case is a political one and the Courts should commit the fugitive to prison pending the decision of the political authorities."²¹

The Practice of Civil Law States

States whose legal systems owe their origins to the Roman law tradition have taken an uncompromising attitude towards the extradition of their nationals or citizens. Refusal to extradite is based on the ground mentioned by the Royal Commission in 1878,²² that is on the perceived duty that these states feel they must demonstrate towards their nationals, to protect them from the vagaries of alien justice systems. It is a form of legal xenophobia no longer warranted today, especially since treaties provide for adequate safeguards. Refusal to extradite is usually justified by possible domestic prosecution based on the nationality principle of jurisdiction over the offence.

This attitude of lack of faith and actual distrust is not in keeping with the spirit behind extradition treaties. As was aptly stated:

The argument advanced . . . for non-extradition of nationals proves too much. If justice as administered in other States is not to be trusted, then there should be no extradition at all. If a State owes to its nationals a duty to apply its own laws to them as to acts, wherever committed by them, then it should demand extradition of nationals who have been taken into custody there. In fact, in the latter situation, the State of allegiance contents itself with watching to see that its nationals obtain justice. The same protection of nationals should suffice after extradition.²³

The nationality exception has also been criticized actively by civilian writers.²⁴ The only rationale given is that the detrimental impact is tempered by the substitution of prosecution for extradition. In some ways it is an application of the *aut dedere, aut judicare* rule.

Nevertheless, it can be argued that even where the requested state has jurisdiction to prosecute based on the nationality of the fugitive, it places the fugitive in a privileged position, as the state of nationality has no real interest in prosecuting him or her for an offence in a foreign state, perhaps against foreign persons, with remote sources

²¹ *Op. cit. supra* note 3, at 78.

²² *Supra* note 13.

²³ Comment on Harvard Draft Extradition Convention (1935), 29 *Am. J. Int'l L. Supp.* 128.

²⁴ See J. C. Lombois, *Droit pénal international* 458 (1971). See also H. Schultz, "The Principles of the Traditional Law of Extradition," in *Legal Aspects of Extradition among European States*, Council of Europe 19-20 (1970).

of evidence and general lack of contact with the scene of the crime. The practical objections that can be raised constitute a grave handicap to both prosecution and defence counsel.²⁵ Shearer suggests that: "[W]here the result is the acquittal of the accused — the chances of which are substantially increased by trial under such conditions — the charge can all too easily be made by the authorities of the *locus delicti* that the prosecuting State performed its duty without effort or enthusiasm."²⁶

SECTION 6(1) OF THE CHARTER OF RIGHTS AND EXTRADITION FROM CANADA

In the past, Canada has extradited Canadian citizens where either the extradition treaty was silent on the matter of nationality or where a discretion existed whether or not to extradite nationals and it was exercised in favour of extradition by the Minister of Justice. The pertinent issue is therefore whether the Charter of Rights has since 1982 altered this position.

Section 6(1) of the Canadian Charter of Rights and Freedoms provides that: "Every citizen of Canada has a right to enter, remain in and leave Canada." The essential question that must be addressed is what does the right to remain in Canada mean? What is the content of that right? Is the right not to be extradited the right being protected? It is only if the Extradition Act is inconsistent with the meaning of section 6(1) and in contravention of the right to remain in Canada that it is necessary to look at section 1 of the Charter. As Dickson, C.J.C. stated in *Regina v. Oakes*: "To my mind, it is highly desirable to keep ss. 1 and 11(h) [the right to be presumed innocent being the right under consideration in that case] analytically distinct. Separating the analysis into two components is consistent with the approach this Court has taken to the Charter to date."²⁷ He held further that: "Accordingly, any s. 1 enquiry must be premised on an understanding that the impugned limit violates constitutional rights and freedoms — rights and freedoms that are part of the supreme law of Canada."²⁸ As Madame Justice Wilson stated in *Operation Dismantle v. The Queen*: "The rights under the Charter not being absolute, their content or scope must be discerned quite apart from

²⁵ Shearer, *op. cit. supra* note 3, at 122.

²⁶ *Ibid.*

²⁷ [1986] 1 S.C.R. 103; (1986), 24 C.C.C. (3d) 321, at 344.

²⁸ (1986), 24 C.C.C. (3d) 321, at 345.

any limitation sought to be imposed upon them by the government under s. 1.²⁹

It is submitted that the courts in *Re Federal Republic of Germany and Rauca*³⁰ who initially tackled the question of section 6(1) and extradition erred in holding that extradition *prima facie* violates the right to remain in Canada. As we shall demonstrate, it can be argued that the right to remain does not include the right not to be extradited. It is our view that the Ontario courts in *Rauca* did not sufficiently analyse this matter but rather went straightaway to the section 1 limitation rationale. Extradition was found to be a reasonable limitation. It was clear in our view that it would be because prosecution of an alleged Nazi war criminal for crimes committed in Lithuania during the Second World War was not possible in Canada at that time.³¹ Thus it is distinguishable on its facts from the subject of this article. Later courts³² have not challenged this analysis, but have unquestioningly adopted the section 1 approach. It is only in the recent case of *Swystun v. U.S.A.*^{32a} that Hannsen J. undertook a more detailed analysis of this matter and held that the language of section 6(1) was broad enough in his view to affect extradition. We respectfully disagree for the reasons that follow.

The *travaux préparatoires* of the Charter indicate that the intent of the drafters of section 6(1) was to provide for the right of citizens to enter and leave Canada and be protected from *expulsion*. Section 6(1) of the Charter would appear to seek to prevent, in this context, a Canadian government from either enacting specific legislation expelling certain groups of Canadian citizens or from amending the Immigration Act and providing for deportation of Canadian citizens who have obtained that citizenship legitimately. It does not seek to prevent in accordance with our long-standing practice and in fulfilment of our treaty obligations the extradition of Canadian citizens who are fugitives from criminal justice.

²⁹ [1986] 1 S.C.R. 441; (1986), 18 D.L.R. (4th) 481, at 517.

³⁰ *Supra* note 18.

³¹ See the Deschênes Report on War Criminals in Canada (1986). Note the legislation adopted by Parliament in September 1987, to provide for such prosecutions to take place: An Act to Amend the Criminal Code, etc., S.C. 1987, c. 37.

³² See, e.g., *Re Decter and United States of America* (1983), 148 D.L.R. (3d) 496 (S.C.N.S.); *Re Voss and the Queen* (1984), 12 C.C.C. (3d) 538.

^{32a} (1987) Man. Q.B., not yet reported.

In this context the replies of the Deputy Minister of Justice Mr. Tassé before the Joint Committee on the Constitution are important. On being questioned about section 6(1) and deportation and exile of Canadian citizens before the Joint Committee on the Constitution of Canada, he stated:

Mr. Tassé: Perhaps I might mention that we do not see Clause 6 as being an absolute right. I will give you an example of a situation where a citizen would, in effect, lose his right to remain in the country; that would be by virtue of an order under the Extradition Act; if someone committed an offence in another country and he is sought in this country, he could be surrendered to the other country.

The same thing would apply in the case of countries belonging to the Commonwealth to which the Extradition Act does not apply, but the Fugitive Offenders Act does apply. In that situation a Canadian would not have the right to remain in the country by virtue of the offences he might have committed in another country and for which he is sought so that justice could be applied.

Mr. Epp: Mr. Tassé, I do not think that is really what we are dealing with. That is not arbitrary and under the Extradition Act there is a process to which the person is entitled before that extradition order can in fact be finalized.³³

The debate centred around *expulsion* and *deportation*. The statements made before the Joint Committee provide the historical background to the drafting of section 6(1). It broadens the scope of the record, a practice that was evident in *Re Upper Churchill Water Rights Reversion Act*³⁴ and noted in *Law Society of Upper Canada v. Skapinker*.³⁵

In order to interpret section 6(1) and the rights contained therein it is permissible to look at international human rights instruments. In many respects the Charter resembles the language of the International Covenant on Civil and Political Rights, which together with its Optional Protocol Canada acceded to in 1976³⁶ and the European Convention on Human Rights and Fundamental Freedoms.³⁷ Canada is obligated under article 2(1) of the International Covenant:

³³ See Proceedings of the Joint Committee on the Constitution of Canada, *Hansard*, January 27, 1981, at 46: 117-18.

³⁴ [1984] 1 S.C.R. 297, at 317 (per McIntyre, J.). See also *Reference re Anti-Inflation Act*, [1976] 2 S.C.R. 373, at 389 (per Laskin, J.).

³⁵ [1984] 1 S.C.R. 357, at 381-82 (per Estey, J.).

³⁶ 1976 Can. T.S. No. 47.

³⁷ 213 U.N.T.S. 221; reprinted in I. Brownlie, *Basic Documents in International*

to take steps . . . to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means, including particularly the adoption of legislative measures.

Is the Charter a response to this obligation? Charter cases to date indicate that our courts are willing to look at the Covenant, at the views of the United Nations Committee on Human Rights under the Optional Protocol, as well as at the jurisprudence under the European Convention for comparative assistance in interpreting the Charter where similar language exists.

Care must be taken when assessing the impact of these instruments on Canadian law. The European Convention is a treaty that only applies to states members of the Council of Europe. Therefore, Canada is neither a party, nor entitled to become one. On the other hand, Canada has acceded to the Covenant and the Optional Protocol. However, it has never been transformed into domestic Canadian law by an implementing statute.

In the European Convention the right to be protected from extradition is not provided for. However, the European Court of Human Rights has held that it may be covered if in particular circumstances one of the possible consequences of extradition to an applicant involves a violation of Article 3 of the Convention, which provides that "No one shall be subjected to torture or to inhuman or degrading treatment," for which the extraditing country could be held responsible.⁸⁸ Article 5(1)(f) of the Convention stipulates that a person may be deprived of his liberty with a view to extradition in accordance with a procedure prescribed by law. One commentator on the Convention has stated:

Article 5(1)(f) clearly permits the Commission to decide on the lawfulness (lawful detention/*détention régulière*) of a person against whom extradition is being taken. . . . The wording of both the French and English texts makes it clear that only the existence of extradition proceedings justifies deprivation of liberty in such a case.⁸⁹

Further, Article 3 of Protocol 4 of the European Convention reads:

Law 194 (1967). See also M. Cohen and A. Bayefsky, "The Canadian Charter of Rights and Freedoms and Public International Law" (1983), 61 *Can. Bar Rev.* 265; J. Claydon, "The Application of International Human Rights Law by Canadian Courts," (1981) 30 *Buffalo L. Rev.* 727.

⁸⁸ Appl. No. 6242/73 (*Brükmann v. F.R.G.*) C.D. 46, at 202, 210.

⁸⁹ Z. M. Nedjati, *Human Rights under the European Convention* 91 (1978).

- (1) No one shall be expelled, by means of an individual or collective measure, from the territory of the state of which he is a national.
- (2) No one shall be deprived of the right to enter the territory of the state of which he is a national.⁴⁰

The European Commission has held that extradition proceedings are not prohibited under Article 3(1) of Protocol 4.⁴¹ In *Brückmann v. Federal Republic of Germany* the European Commission stated: "Expulsion" is the execution of an order to leave the country, while extradition means the transfer of a person from one jurisdiction to another for the purpose of his standing trial or for the execution of a sentence imposed upon him. . . ."⁴²

On this basis it is clear that the European Commission saw an essential difference between "expulsion" and "extradition."⁴³ This interpretation of Article 3(1) of Protocol 4 is substantiated by the preparatory work leading up to the adoption of the Protocol by the Council of Europe. The *Explanatory Report* on Protocol 4, prepared by the Committee of Experts on Human Rights, states expressly that it was understood that extradition was outside the ambit of Article 3(1).⁴⁴

It should be recalled that the drafters of Article 3 specifically used the term "expelled" rather than "exiled" on account of the fact that "exiled" raises a variety of possible interpretations.⁴⁵ As two commentators have, in our view, aptly stated:

According to a definition given by the Commission, expulsion is involved when "a person is obliged permanently to leave the territory of the State, without being left the possibility of returning later." The words "permanently" and "without being left the possibility of returning later" in this definition evidently serve to support the decision of the Commission that extradition does not fall under the concept of expulsion, and consequently not under the prohibition of Article 3 either.⁴⁶

In this context it is our view that Article 3 is not "clear and unam-

⁴⁰ Brownlie, *op. cit. supra* note 37, at 215.

⁴¹ App. No. 6189/73, C.D. 46, at 214.

⁴² *Supra* note 38.

⁴³ Nedjati, *op. cit. supra* note 39, at 136-37.

⁴⁴ See Doc. H (71) 11 of the Council of Europe, and Nedjati, *ibid.*, at 152.

⁴⁵ P. van Dijk and G. J. H. van Hoof, *Theory and Practice of the European Convention on Human Rights* 368 (1984).

⁴⁶ *Ibid.*

biguous” in prohibiting extradition⁴⁷ and that the *travaux préparatoires* are extremely relevant to this end.⁴⁸

The United Kingdom is one of the states parties to this Convention, but it should be noted that in the third edition of *Halsbury's Laws of England* the British position is summarized as follows: “Unless the relevant treaty or Order in Council contains express provisions to the contrary, a fugitive criminal’s amenability to extradition is not affected by his nationality; in particular British subjects are in no better position than aliens. . . .”⁴⁹

A further indication of this stance is contained in the 1985 *Green Paper* presented to the British Parliament by the Secretary of State for the Home Department.⁵⁰ The question under discussion in this paper was whether the United Kingdom should discard the requirement for the establishment of the *prima facie* case against the fugitive by the requesting state, to bring British extradition law into line with the civilian European states. Many extradition requests made to the United Kingdom fail because of the inability to satisfy the *prima facie* case requirement. Paragraph 2.4 of the *Green Paper* is relevant to the question that we are considering :

The case for maintaining the *prima facie* requirement derives some support from the fact that the United Kingdom is, in contrast to some foreign countries prepared to surrender its own nationals. This means that British nationals can be extradited to countries where they face criminal proceedings under a legal system which is different from that which prevails in this country. Anyone who has to face legal proceedings in a foreign country is likely to experience greater hardship than if he faced trial in his own country. There may be difficulties in securing legal advice or, if imprisoned, in communicating with other people (whether inmates or prison officers) or in receiving family visits. In such circumstances, it may be argued, an examination of the evidence in a manner similar to that in English domestic committal proceedings provides an important safeguard. . . .

2.10 The arguments on this issue concern essentially the extent to which the *prima facie* rule in practice acts as a safeguard against individual injustice and the need to balance this principle against that of effective cooperation with other states. . . . It might be possible to retain the *prima facie* case requirement but to combine this with a relaxation of the rules on the admissibility of evidence. . . . Or it might be possible

⁴⁷ See F. Jacobs, *The Convention on Human Rights* 185 (1975).

⁴⁸ van Dijk and van Hoof, *op. cit. supra* note 45, at 368.

⁴⁹ *Extradition and Fugitive Offenders, op. cit. supra* note 15, at 84, para. 211.

⁵⁰ Cmnd. 9421 (1985).

to retain the *prima facie* requirement only in cases where the person whose rendition is sought is a British national, that is a person for whom we would have a responsibility of consular protection after he had been sent to the other country. Such a course would represent a departure from the general principle that all persons accused of crimes should receive equality of treatment; but it may be thought that we should be more cautious about sending our own nationals to face trial in a foreign jurisdiction than with returning foreign nationals for what in most cases would be a trial in their own country.

It should be stressed that the *prima facie* case requirement is part of Canadian extradition law.⁵¹

The provisions of the European Convention on Human Rights and its fourth Protocol have not therefore restricted the British from extraditing their own nationals. The United Kingdom has not become a party to the European Convention on Extradition⁵² because of its *prima facie* case requirement.

A further indication of the United Kingdom's position is based on the interpretation by the English courts of Article 48 of the Treaty of Rome, 1957, setting up the European Economic Community. Article 48(3) reads as follows:

[Freedom of movement of workers] shall entail the right, subject to limitations justified on grounds of public policy, public security or public health . . .

- (d) to remain in the territory of a Member State after having been employed in that State, subject to conditions which shall be embodied in implementing regulations to be drawn up by the Commission.

In *R. v. Governor of Holloway Prison, ex parte Kember*,⁵³ one of the submissions by the fugitive was that the order for committal to await extradition was on account of her being a national of the United Kingdom contrary to her right to freedom of movement guaranteed by Article 48. The submission was rejected by the Divisional Court. Griffith, J. said:

If this submission is right, it will impose a formidable fetter upon extradition. . . . The whole basis of extradition is that the accused has offended against society in another country; in all probability he is no threat to our society. Does that mean that he is not to be extradited to face justice where he has committed the crime? I cannot believe that it was the intention of those who drew the Treaty of Rome that it

⁵¹ See Williams and Castel, *op. cit. supra* note 3, at 343-44.

⁵² 1957, ETS 24.

⁵³ [1980] 1 W.L.R. 1110, [1980] 2 C.M.L.R. 125.

should have the effect of so emasculating the process of extradition. . . . In *R. v. Saunders* [[1979] 3 W.L.R. 359] the European Court of Justice held that Article 48 did not aim to restrict the power of member-states to lay down restrictions, within their own territory, on the freedom of movement of all persons subject to their jurisdiction in the implementation of domestic criminal law. I regard extradition as far more closely analogous to the implementation of domestic criminal law than to deportation. It is in no true sense a banishment from our shores as is deportation. . . . Extradition is no more than a step that assists in the implementation of the domestic criminal law of the foreign State.⁵⁴

In *Re Habeas Corpus Application of Carthage Healy*⁵⁵ the Divisional Court likewise (albeit dealing with an Irish national) held that extradition does not infringe the freedom of movement, which includes the "right to remain" under Article 48.

The European Convention on Human Rights and Protocol 4, as well as Article 48 of the Treaty of Rome, can in our estimation be of assistance in this regard in Canada. The thrust of the *travaux préparatoires* of the Charter indicate that section 6(1) was intended to equate the right to remain in Canada with the right to be free from expulsion. The principles discussed pertaining to Protocol 4, Article 3(1), and Article 48 of the Treaty of Rome clearly indicate that "expulsion" and "extradition" are two different things.

By way of contrast, the International Covenant on Civil and Political Rights of 1966 does not refer to the right to "remain" in the state of one's nationality, or to the right of a national not to be "expelled." It provides in Article 9(1) for the right of everyone to liberty and security of the person and non-deprivation of liberty "except on such grounds and in accordance with such procedure as are established by law." Article 12 states that:

(1) Everyone lawfully in the territory of a State shall, within that territory, have the right to liberty of movement and freedom to choose his residence.

(2) Everyone shall be free to leave any country, including his own.

(3) The above-mentioned rights shall not be subject to any restrictions except those that are provided by law, are necessary to protect national security, public order (*ordre public*), public health or morals or the rights and freedoms of others, and are consistent with the other rights recognized in the present covenant.

⁵⁴ *Ibid.*, at 1127 (W.L.R.), 142 (C.M.L.R.).

⁵⁵ [1984] 3 C.M.L.R. 575.

(4) No one shall be arbitrarily deprived of the right to enter his own country.

Article 13 deals solely with the right of an alien lawfully on the territory not to be expelled, "except in pursuance of a decision reached in accordance with law. . . ." This implies that a national cannot be made subject to an expulsion order.

In summation, Article 3 of Protocol 4, Article 48 of the Treaty of Rome, and Article 12 of the International Covenant on Civil and Political Rights illustrate that those instruments intend to ensure a citizen's right to enter and leave a country and the right not to be arbitrarily expelled without due process of law.

The Proceedings of the Joint Committee on the Constitution indicate that this right to "remain" was put into section 6(1) to prevent a Canadian government passing legislation that would, to use the words of the then Minister of Justice, Mr. Chrétien, "kick out" of Canada Canadians rather than deport them. According to section 4(1) of the Immigration Act,⁵⁶ there cannot be deportation of Canadians but only of non-Canadians, permanent residents or otherwise, who are in Canada. The right of Canadian citizens to remain in Canada contained in section 4(2) of the Act has never been an obstacle to extradition. In the debate on the Charter, the Minister of Justice argued that a Canadian government could before the Charter have sent a Canadian abroad forcefully, making him or her an exile. The section 6(1) right to remain in Canada would now prevent that. It would not cover the situation, however, where a Canadian who obtained citizenship by fraud or other wrongful means is denationalized under section 9 of the Citizenship Act,⁵⁷ and then deported as an alien under section 4(1) of the Immigration Act.⁵⁸ A Canadian in legitimate possession of citizenship would by virtue of section 6(1) be able to oppose an arbitrary deprivation of citizenship and deportation.

On the basis of this analysis it is submitted that section 6(1) of the Charter does not apply to extradition whether or not the fugitive can be prosecuted in Canada and that there is no right to resist extradition carried out in accordance with Canadian extradition law and treaties.

⁵⁶ S.C. 1976-77, c. 52.

⁵⁷ S.C. 1974-75-76, c. 108.

⁵⁸ See *Cooperative Committee on Japanese Canadians v. Attorney General of Canada*, [1947] A.C. 87, at 104-5 (P.C.).

SECTION I OF THE CHARTER

Should Canadian courts decide that section 6(1) of the Charter contains a constitutionally protected right not to be extradited for Canadian citizens charged with offences for which they may be prosecuted in Canada, on the same facts, it would still be necessary to decide whether extradition in such a case, by virtue of section 1 of the Charter, constitutes a "reasonable limit prescribed by law as can be demonstrably justified in a free and democratic society" on their right to remain in Canada.

Section 1 recognizes that none of the rights and freedoms are absolute. As the Ontario High Court held in *Re Lavigne and O.P.S.E.U.*: "It is inevitable that in the application of the Charter, courts will be faced with clashes between the rights of individuals as well as conflicts between individual interests and those of the community."⁵⁹ To answer this question affirmatively it is necessary to consider the two-part test enunciated by Chief Justice Dickson speaking for the majority of the Supreme Court of Canada in *Regina v. Oakes*.⁶⁰

OBJECTIVE TEST

The first part is that the objective which the measures responsible for a limit on a Charter right or freedom are designed to serve must be "of sufficient importance to warrant overriding a constitutionally protected right or freedom."⁶¹ Is the objective served by the extradition of a Canadian citizen of sufficient importance to override his or her right to remain in Canada?

In a series of cases, Canadian courts have recognized that the objective served by extradition is of sufficient importance to warrant overriding a constitutionally protected right. Thus, in *Re Federal Republic of Germany and Rauca*,⁶² the Ontario Court of Appeal considered extradition in general⁶³ and Canada's Extradition Act⁶⁴

⁵⁹ (1986), 55 O.L.R. (2d) 449, at 511.

⁶⁰ *Supra* note 27, at 345 *et seq.* (C.C.C.).

⁶¹ *R. v. Big M Drug Mart Ltd.* (1985), 18 C.C.C. (3d) 385, at 430; 18 D.L.R. (4th) 321, at 366; [1985] 1 S.C.R. 295, at 352.

⁶² *Supra* note 18.

⁶³ (1983), 4 C.C.C. (3d), at 397-98, expressly approving Evans, C.J. in the High Court, *supra* note 18, at 708-9 (O.R.).

⁶⁴ R.S.C. 1970, c. E-21.

and expressed the view that in some circumstances extradition is necessary to preserve certain fundamental social values and objectives, in this case to ensure that a crime that could not be punished in Canada under the rules of territorial jurisdiction did not go unpunished and to respect Canada's international commitments under her Extradition Treaty with Germany.

In *Cotroni v. Gardien du Centre de Prévention de Montréal*,⁶⁵ the Quebec Court of Appeal recognized that the suppression of international crime, especially illicit traffic in drugs, is a significant objective of sufficient importance to legitimate the Extradition Act. Canada has undertaken obligations under bilateral and multilateral conventions, such as the Single Convention on Narcotic Drugs of 1961,⁶⁶ to fight illicit traffic in drugs and to co-operate with foreign states in suppressing it. The Court, referring to the maintenance of peace and order as well as the definition and punishment of criminal conduct as among the essential objectives of a state's activity in the criminal field, said: "The carrying out of this function may interfere with the freedom of citizens in certain cases. The suppression of international crime comes within this objective. It is designed to ensure that Canada's international commitments are respected. From both these points of view, the legislative action found in the *Extradition Act* is in principle legitimate, as has been established by *El Zein* and *Rauca*."⁶⁷

The Court also stated unequivocally that "The extradition treaty is a means of achieving an objective considered to be socially valid by both contracting parties" and, one should add, by most civilized states.⁶⁸ In *El Zein v. Gardien du Centre de Prévention de Montréal*,⁶⁹ one of its earlier decisions, the Quebec Court of Appeal had already recognized the validity of the objectives of extradition treaties.⁷⁰

The Supreme Court of Nova Scotia in *Re Decter and United States of America*⁷¹ approved the view expressed by Chief Justice Evans of the Supreme Court of Ontario in the *Rauca* case that he

⁶⁵ [1986] R.J.Q. 2316.

⁶⁶ 1964 Can. T.S. No. 30, in force December 13, 1964.

⁶⁷ *Supra* note 65, at 2332.

⁶⁸ *Ibid.*, 2333.

⁶⁹ [1986] R.J.Q. 1740.

⁷⁰ *Ibid.*, 1744.

⁷¹ (1983), 148 D.L.R. (3d) 496, *aff'd* at 512, at 508-9.

was "satisfied that such statutory restriction which has as its objective, the protection and preservation of society from serious criminal activity, is one which members of a free and democratic society such as Canada would accept and enhance."⁷² *Rauca* was also approved by the Court of Appeal of British Columbia in *Re Voss and the Queen*.⁷³

Thus, there seems to be a consensus that the objectives extradition is designed to serve, that is, the suppression of international crime and the respect for Canada's international commitments, are of sufficient importance to warrant overriding the right of a Canadian citizen to remain in Canada.

In *Regina v. Oakes*,⁷⁴ Chief Justice Dickson when determining whether the reverse onus provision found in section 8 of the Narcotic Control Act⁷⁵ was a reasonable limit on the right to be presumed innocent until proven guilty beyond a reasonable doubt, as can be demonstrably justified in a free and democratic society, examined the nature of Parliament's interest or objective for adopting section 8 of the Narcotic Control Act. His finding seems equally applicable to the Extradition Act.⁷⁶

In our view the objective behind extradition from Canada is one "that relate[s] to concerns which are pressing and substantial in a free and democratic society . . . [and] can be characterized as sufficiently important."⁷⁷ The Quebec Court of Appeal in *El Zein*⁷⁸ also supported the view that "The prevention of crime and in particular transnational or transborder crime, is therefore a sufficiently important objective to justify legislative action." It is not a matter that is affected by the possibility of prosecution in Canada. The real issue is whether the second part of Chief Justice Dickson's test in *Oakes* is satisfied, that is, the test of proportionality.

⁷² *Supra* note 18, 70 C.C.C. (2d), at 429.

⁷³ (1984), 12 C.C.C. (3d) 538.

⁷⁴ *Supra* note 27.

⁷⁵ R.S.C. 1970, c. N-1.

⁷⁶ At 349-50, esp. at 350: "The objective of protecting our society from the grave ills associated with drug trafficking is, in my view, one of sufficient importance to warrant overriding a constitutionally protected right or freedom in certain cases. Moreover, the degree of seriousness of drug trafficking makes its acknowledgement as a sufficiently important objective for the purposes of s. 1, to a large extent, self-evident. The first criterion of a s. 1 inquiry, therefore, has been satisfied by the Crown."

⁷⁷ *Regina v. Oakes*, *supra* note 27, S.C.R. at 138-39.

⁷⁸ *Supra* note 69, at 1745. See also *Cotroni*, *supra* note 65, at 2332.

PROPORTIONALITY TEST

The second part of the test in *Oakes* is that “the challenged governmental action must be subjected to a three-pronged ‘proportionality test’ which seeks to balance the interests of society against those of the individual.”⁷⁹ The three parts of the test to be addressed individually in this section can be summarized as follows:

1. Is there a rational connection between the governmental objective sought to be achieved and the governmental action that is being challenged?
2. Does the means chosen by the government impair the rights and freedoms of the applicant as little as possible?
3. The Court must consider and balance the proportionality between the effects of the measures responsible for limiting the right or freedom in the Charter and the objective which has been identified as of sufficient importance that it may justify the abridgment of an individual’s rights.⁸⁰

The burden of proof is on the Crown to satisfy the Court in this regard on a balance of probabilities. This involves a proportionality test that will vary depending on the circumstances. The interests of society must be balanced with those of the fugitive. We shall consider the three parts of the test in order.

Is there a rational connection between the government objective sought to be achieved and the government action that is being challenged?

The measure adopted, the extradition, must be carefully designed to achieve the objective in question. It must not be arbitrary, unfair, or based on irrational considerations. It is clear that extradition is one of the means necessary to suppress international crime. Extradition is not arbitrary or unfair since both the Extradition Act and the treaties on extradition to which Canada is a party contain a series of safeguards for the protection of fugitive criminals.

We disagree with the Quebec Court of Appeal in *El Zein*,⁸¹ where it was stated that the extradition in that case had no “rational connection with the purpose of the legislation, namely the prevention

⁷⁹ *Re Lavigne and O.P.S.E.U.*, *supra* note 59, at 513.

⁸⁰ *Ibid.*, 513-15.

⁸¹ *Supra* note 69.

of transborder crime.” Whether or not there is a basis for prosecution in Canada, this does not make irrational the connection between the governmental objective and the action being challenged. The Extradition Act and agreements that Canada has entered into are based on the reciprocal will to fight crime and prevent fugitive criminals from escaping by crossing borders. If it is viewed as a matter of policy that in a given instance it is better to extradite than to prosecute this cannot alter the rational connection. This view was adopted by the Manitoba Court of Queen’s Bench in *Swystun*.^{81a}

The *travaux préparatoires* to the International Covenant on Civil and Political Rights and the purposes behind the extradition process make extradition of citizens a reasonable limitation on the right to remain in Canada.

Regard must also be had to the rationale and purposes of both the Extradition Act and the relevant Extradition Treaty, as well as the Fugitive Offenders Act.⁸² In the context of serious international criminal offences, such as trafficking in narcotics, Canada has obligations by way of multilateral treaty commitments to other members of the international community who are parties. Emphasis must also be placed on the long history of such legislation and treaty arrangements in free and democratic societies.

In *Rauca*,⁸³ the Ontario Court of Appeal held that the extradition order made and its consequences, *prima facie*, interfered with the right of the fugitive as a Canadian to remain in Canada.⁸⁴ However, the court proceeded as follows:

The discretion of the executive has been a recognized and accepted qualification in extradition treaties for over a century. Free and democratic societies have refused to extradite for “political crimes” as they determine them. It must be noted that here the discretion is entirely in favour of the “fugitive.” The Minister can accept the extradition order made by the court, or he can refuse to follow it where the treaty provides for the discretionary surrender of nationals; the discretion is exercisable by the executive only and is not a question cognizable by the courts: *Re Galwey*, [1896] 1 Q.B. 230 at p. 236; *R. v. MacDonald, Ex p. Strutt* (1901), 11 Q.L.J. 85 at p. 90.

^{81a} *Supra* note 32a.

⁸² R.S.C. 1970, c. F-32.

⁸³ *Supra* note 18, 70 C.C.C. (2d), at 429 (H.C.); 4 C.C.C. (3d), at 400 (C.A.).

⁸⁴ See argument presented in the section on Extradition, as to what “remain in” means and that there is no *prima facie* interference.

In reviewing international agreements and their history, it can be seen that there is no international convention, written or otherwise, that militates against the extradition of a State's own nationals.⁸⁵

The Court of Appeal on this question, of course, was dealing with a case where prosecution was not possible in Canada. Yet, in response to the suggestion by the fugitive that if prosecution was an alternative, extradition was not a reasonable limit on his right as a citizen to remain in Canada, the Court stated: "Even if there were such a right to prosecute, in light of the described purpose and reason for and lengthy history of extradition, it would not turn a reasonable limit on the citizen's right to remain in this country into an unreasonable limit."⁸⁶

There is no uniform practice in the world concerning non-extradition of nationals. In *Rauca* the Ontario Court of Appeal also stated⁸⁷ that there is no international convention or rule of customary international law militating against the extradition of nationals. The majority of states of the common law tradition, including those of the Commonwealth and the United States, allow the extradition of their nationals. It has for centuries been the accepted practice, based on the belief that if "justice as administered in other States is not to be trusted, then there should be no extradition at all."⁸⁸ As the Court of Appeal stressed, the Charter of Rights "has been placed in a fabric of existing laws to which consideration has to be given."⁸⁹ It went on to say: "the Charter was not enacted in a vacuum and the rights set out therein must be interpreted rationally having regard to the then existing laws and, in the instant case, to the position which Canada occupies in the world and the effective history of the multitude of extradition treaties that it has had with other nations."⁹⁰ Thus, it is submitted that, in *El Zein* the Quebec Court of Appeal erred when it said:

Both the *Extradition Act* and international conventions or treaties which Canada may have signed before the Charter came into effect are thus at least in part rendered of no force or effect (s. 52(1) of the

⁸⁵ *Supra* note 18, at 655 (D.L.R.).

⁸⁶ *Ibid.*, 659.

⁸⁷ *Ibid.*, 655. The European Convention on Extradition merely permits a state to refuse to extradite its nationals.

⁸⁸ See Comment on Harvard Draft Convention on Extradition, (1935) 29 *Am. J. Int'l L. Supp.* 128.

⁸⁹ *Supra* note 18, at 657 (D.L.R.).

⁹⁰ *Ibid.*, 658.

Constitution Act, 1982), because they are *inconsistent with the right of a Canadian citizen to remain in Canada* (s. 6(1) of the Charter), since the acts constituting the crime with which he was charged were committed in Canada and constitute a crime in both Canada and in the requesting State.⁹¹

The conclusion does not follow from the premises.

It is our view that section 6(1) must not be construed narrowly. Extradition should not be a reasonable limitation only if there is no right under the Canadian Criminal Code or other Act of Parliament to prosecute in Canada. There are only a few situations where concurrent jurisdiction with a requesting state under an extradition treaty could arise: where the substantive offence occurred partly in Canada and partly in the foreign state; where the offence occurred in Canada but detrimental effects were felt in the foreign state or vice versa; where (for a few crimes such as treason, hijacking, acts against internationally protected persons, hostage-takings, war crimes, and crimes against humanity) a Canadian commits the crime in the foreign state *in toto*; where (for a few crimes such as hijacking, acts against internationally protected persons, hostage-takings, war crimes, and crimes against humanity) the victims are Canadians; where (for a few crimes such as hijacking, acts against internationally protected persons, hostage-takings, war crimes, and crimes against humanity) the offender is found in Canada and this is Canada's sole connection with the offence; and in a case of conspiracy in Canada to violate foreign law or vice versa.

In the absence of a power to prosecute in Canada and if section 6(1) were to be interpreted as in *Rauca* and were unfettered by section 1, the right to remain in Canada would be absolute. Extradition of a fugitive regardless of the individual's nationality is either a reasonable or an unreasonable limitation on the individual's right to remain in Canada. The nationality of the fugitive is irrelevant as long as the procedural safeguards for the protection of the fugitive's interests contained in the Extradition Act and the relevant treaty are met.

Extradition of citizens of the requested state is a common practice among civilized states, especially democratic common law states, in order to achieve the objective of fighting international and transnational crimes. It is justified in a free and democratic society even if the accused could also be prosecuted for the extraditable offence in Canada. The principle *aut dedere aut punire*, that is, to extradite

⁹¹ *Supra* note 69, at 1746.

or to prosecute and punish, does not apply where it is not mentioned in the relevant treaty on extradition. A fugitive Canadian citizen is not deprived of his or her right to stay in Canada since once convicted and having served the sentence or been acquitted in the requesting state, he or she can return to Canada. Extradition from Canada is not tantamount to being exiled to the requesting state or to being denationalized. Even in the case of conviction he or she may serve the sentence in Canada if there exists a treaty on the transfer of offenders with the foreign state.⁹² The Canadian Constitution does not prohibit the extradition of Canadian citizens. As already noted, section 6(1) of the Charter has nothing to do with the extradition of Canadian citizens. It is concerned with a political matter, i.e., to prevent the deportation or exile of Canadian citizens with whom the government of the day disagrees.⁹³

It is worth repeating that in the Joint Committee on the Constitution of Canada, Mr. Tassé specifically indicated that section 6(1) does not confer an absolute right and that a person could lose his or her right to remain in Canada by virtue of an order under the Extradition Act.⁹⁴ Nor does section 6(1) give Canadian citizens the right to be tried in Canada for offences committed in Canada or abroad. Again, section 4(2) of the Immigration Act, which states that a Canadian citizen has the right to remain in Canada,⁹⁵ has never been an obstacle to the extradition of Canadian citizens.

States that do not extradite their nationals specifically provide for this exception in their treaties of extradition. They also use the nationality principle as the basis of jurisdiction to prescribe to the full extent, which is not the case in Canada. For instance, subsections (3) and (4) of section 423 of the Criminal Code dealing with conspiracy do not confer jurisdiction over an alleged offender on the basis of his or her nationality, but rather on the territorial link between Canada and the offence. Therefore the principle of nationality, which is used by some states as a bar to extradition, is not applicable in Canada.

⁹² See for instance, Treaty between the United States and Canada on the Transfer of Offenders, 1978, C.T.S. No. 12.

⁹³ See, *supra* 00-00, and Proceedings of the Joint Committee on the Constitution of Canada, 27-1-1981, at 46:118-23, esp. 118-19. Note that Art. 3(1) of Protocol No. 4 to the European Convention on Human Rights has been held not to prohibit measures of extradition.

⁹⁴ *Ibid.*, 46:118.

⁹⁵ S.C. 1976-77, c. 52.

Does the means chosen by the government impair the rights and freedoms of the applicant as little as possible?

Extradition must impair as little as possible the right of a Canadian citizen sought to be extradited, to remain in Canada. This raises the question whether a valid distinction should be made between the situation where the accused Canadian citizen could be prosecuted for the offence both in Canada and in the requesting state and where he or she could be prosecuted only in the requesting state.

In both cases the right to remain in Canada is impaired. However, if the extradition of a fugitive is for reasons of policy held by the Canadian government to be important for the collective good of Canada, this should override the fugitive's right to remain. The fugitive when prosecuted in the requesting state will have the substantive and procedural safeguards of a criminal justice system that Canada recognizes as having an equivalence to its own, since otherwise Canada would not have entered into an extradition treaty with the requesting state. Also, the procedural and substantive protection of the Extradition Act are available to the fugitive. Thus, the objective is not disproportionately prejudicial to the fugitive in such a case.

Most certainly in *El Zein* and *Cotroni*, where the requesting state was the United States, it is difficult to accept the view that the fugitives' rehabilitation would suffer on account of being imprisoned abroad. There would be no language problem and the fugitives could in an appropriate case seek to return to Canada to serve their sentence under the Transfer of Offenders Treaty with the United States.⁹⁶ As was recently held in *Swystun*, the impact on the citizen is minimal.

The Court must consider and balance the proportionality between the effects of the measures responsible for limiting the right or freedom in the Charter and the objective, which has been identified as of sufficient importance that it may justify the abridgment of an individual's rights.

The effect of extradition is the sending of the fugitive accused Canadian citizen to the requesting state to stand trial for the crime for which he or she is charged. This achieves the objectives of prosecuting transnational offences and of fulfilling Canada's international commitments.

⁹⁶ *Supra* note 92.

According to Dixon, C.J.C., even if an objective is of sufficient importance and the first two elements of the proportionality test are satisfied, it is still possible that because of the severity of the deleterious effects of the measure on the accused, such measure will not be justified by the objective or purpose it is intended to serve. The more severe the deleterious effects of a measure, the more important the objective must be if the measure is to be reasonable and demonstrably justified in a free and democratic society. In extradition cases, the question is whether the extradition would have more deleterious effects on the fugitive accused by having him or her prosecuted in the requesting state rather than if he or she were prosecuted in Canada. That extradition is reasonable is suggested by the practice of common law states that extradite their nationals. It is justified in a free and democratic society, as most states resort to extradition to fight transnational and international crimes. It is justified even where the accused could also be prosecuted in Canada, since in cases of concurrent jurisdiction, although both states may prosecute the accused, it is reasonable for a state to defer to the state that has primary jurisdiction as the state most detrimentally affected.

To exempt fugitive accused Canadian citizens or fugitive foreign convicted Canadian citizens from extradition and not landed immigrants or other aliens when both categories of accused can be tried in Canada would also, in our opinion, create an unfair distinction between citizens and aliens, thus violating the equality rights guaranteed by the Canadian Charter of Rights and Freedoms,⁹⁷ since "every individual is equal before and under the law . . . without discrimination . . . based on . . . national or ethnic origin."

THE ROLE OF THE MINISTER OF JUSTICE AND REVIEW OF MINISTERIAL DISCRETION

It is interesting to note that although the Supreme Court of Canada has not, as yet, had the opportunity to address directly the issue of the meaning of the right to remain contained in section 6(1) of the Charter and whether it is necessary to look at section 1 of the same, the Court has recently had cause to look at other matters concerning extradition and the Charter. Of relevance to this article is the analysis of the respective roles of the extradition judge and the Minister of Justice. If as the Supreme Court suggests the role of the

⁹⁷ Section 15(1).

extradition judge "is a modest one"⁹⁸ related to ensuring that the evidence establishes a *prima facie* case and that an extradition crime has been committed and that responsibility for the conduct of Canada's foreign relations, including obligations assumed under extradition treaties, lies with the executive, in this case the Minister of Justice, can it not be argued further that any plea that the right to remain is interfered with must at any rate await the Minister's decision. Hanssen J. in the *Swystun* case has taken this position. The extradition judge under section 18(1)(b) of the Extradition Act shall commit the fugitive offender for surrender if such evidence is produced as would justify a trial in Canada. The judge's role ends there. It is the Minister who makes the final decision when a committal has been made by the extradition judge. Section 25 of the Act provides that the Minister may surrender such a person. Since *Operation Dismantle Inc. v. The Queen*,⁹⁹ it would appear possible, based on section 7 of the Charter of Rights, that the fugitive could at this juncture seek a review of the Minister's discretion.

COMPARATIVE INTERESTS OF STATES WITH CONCURRENT JURISDICTION AND PROSECUTORIAL DISCRETION

In this era of a rapid growth in international and transnational crimes it is necessary for states to co-operate through extradition. However, to ensure that co-operation in cases where, for whatever reason, extradition proves impossible, there must be a universal acceptance by states of elastic jurisdictional principles that are moulded to fit the realities of modern-day crime.¹⁰⁰ The application of the criminal law should not be focused rigidly on one or other of the aspects of the territorial principle of jurisdiction over the offence, or on the nationality of the accused principle. To do so could result in a jurisdictional void, with the accused slipping through the loose strands of international co-ordination. It would be better to have the potential for prosecution lying with more than one state.

The purpose of this section is to indicate briefly some of the situations that can present us with concurrent jurisdiction, and to assess how overlapping claims and interests of states may be accommodated

⁹⁸ In *Schmidt v. U.S.A.*, [1987] 1 S.C.R. 500, at 520. La Forest, J. stated that section 6 was not raised in the case, "no doubt because her counsel believed, as I do, that it was properly disposed of in the *Rauca* case. . . ."

⁹⁹ *Supra* note 29.

¹⁰⁰ See S. A. Williams and J.-G. Castel, *op. cit. supra* note 3, at vii.

and what impact prosecutorial discretion in Canada must play in this respect.

In a relatively few instances, Canada may under Canadian criminal law have concurrent jurisdiction over an offence with a foreign state or states. This may arise where the offence begins in Canada but is consummated in another state. In this situation Canada could invoke the subjective territorial or initiatory theory of jurisdiction and the foreign state the objective or terminatory theory. In the reverse situation, Canada could base its claim on the objective theory and the foreign state on the subjective theory. In both cases Canada would claim jurisdiction if significant elements of the crime occurred there, based on the *Libman* case.^{100a} In another scenario, Canada or the foreign state may simply be claiming jurisdiction on the basis of detrimental effects occurring there. This is called the "effects felt" or injured forum principle. Other bases that may be relied upon are the active and passive nationality principles that take into account the nationality of the perpetrator and accused respectively and the presence of the alleged offender within the territory of the prosecuting state, which is akin to the universal principle of jurisdiction and is part of the framework of the various anti-terrorist conventions to which Canada and many other states are party to.

Where a conspiracy occurs in Canada to violate the laws of a foreign state¹⁰¹ and the act if done in Canada would be a criminal offence, and in the reverse situation also, where a conspiracy is hatched abroad to violate Canadian law,¹⁰² there would exist concurrent jurisdiction if the foreign state had similar legislative provisions to those contained in the Criminal Code.

Crimes committed on board Canadian ships registered under the Canadian Shipping Act¹⁰³ when they are in foreign territorial waters, inland waters or ports and harbours, or those committed on board foreign ships in similar locations in Canada will also result in potential concurrent jurisdiction, as will crimes committed on board aircraft.

The classic case of the *Lotus*¹⁰⁴ is always cited for the proposition that a state may exercise jurisdiction, as long as it does not violate

^{100a} [1985] 2 S.C.R. 178.

¹⁰¹ Section 423(3), Criminal Code.

¹⁰² Section 423(4), Criminal Code.

¹⁰³ R.S.C. 1970, c. S-9.

¹⁰⁴ (1927), P.C.I.J., Ser. A., No. 10.

international law. Clearly, in using the various applications of the territorial and nationality principles no such violation would occur. Likewise, in some instances the universal principle may be validly applied.

In order to solve the potential for conflicts of jurisdiction by two or more states claiming the right to prosecute, it has been suggested that jurisdiction can be claimed only by the state where the primary effects of the criminal acts are felt: "In order to determine whether the effects are primary or secondary, two factors should be considered: (1) are the effects felt in one State more direct than the effects felt in other States? (2) are the effects felt in one State more substantial than the effects felt in other States?"¹⁰⁵ This suggestion, if adopted, would justify jurisdiction being exercised only by states that have a superior legitimate interest in applying their criminal laws.

The influence of this reasoning can be seen in Article 4 of Canada's recent Extradition Treaty of February 1987 with India, which provides that although a request for extradition may be refused by the requested state if the fugitive may be tried for the same offence in its own courts, in deciding whether or not to refuse, the requested state shall consider whether it or the requesting state has felt or will feel more gravely or imminently the effects or consequences of the offence. Section 12 of the Canadian Extradition Act also specifically allows the extradition of a fugitive criminal "whether there is or is not any criminal jurisdiction in any court . . . [of Canada] over the fugitive in respect of the crime."

It is useful to consider that section 403 of *The Restatement of the Law, Foreign Relations Laws of the United States, Third*¹⁰⁶ subjects the exercise of jurisdiction to the principles of reasonableness and fairness in accommodating the overlapping interests of the states and individuals involved:

403. Limitations on Jurisdiction to Prescribe

(1) Even when one of the bases for jurisdiction under s. 402 is present, a state may not exercise jurisdiction to prescribe law with respect to a

¹⁰⁵ M. Akehurst, "Jurisdiction in International Law," (1973) 46 *Brit. Y.B. Int'l L.* 146, at 198.

¹⁰⁶ (1987). See also *U.S.A. v. Allard and Charette*, [1987] 1 S.C.R. 564, at 572, where the Supreme Court of Canada held at p. 7 that: "to arrive at the conclusion that the surrender of the respondents would violate the principles of fundamental justice, it would be necessary to establish that the respondents would face a situation that is simply unacceptable." See also *Argentina v. Mellino*, [1987] 1 S.C.R. 536, at 555.

person or activity having connections with another state when the exercise of such jurisdiction is unreasonable.

(2) Whether exercise of jurisdiction over a person or activity is unreasonable is determined by evaluating all relevant factors, including, where appropriate,

(a) the link of the activity to the territory of the regulating state, i.e., the extent to which the activity takes place within the territory, or has substantial, direct, and foreseeable effect upon or in the territory;

(b) the connections, such as nationality, residence, or economic activity, between the regulating state and the person principally responsible for the activity to be regulated, or between that state and those whom the regulation is designed to protect;

(c) the character of the activity to be regulated, the importance of regulation to the regulating state, the extent to which other states regulate such activities, and the degree to which the desirability of such regulation is generally accepted;

(d) the existence of justified expectations that might be protected or hurt by the regulation;

(e) the importance of the regulation to the international political, legal or economic system;

(f) the extent to which the regulation is consistent with the traditions of the international system;

(g) the extent to which another state may have an interest in regulating the activity; and

(h) the likelihood of conflict with regulation by another state.

(3) When it would not be unreasonable for each of two states to exercise jurisdiction over a person or activity, but the prescriptions by the two states are in conflict, each state has an obligation to evaluate its own as well as the other state's interest in exercising jurisdiction, in light of all the relevant factors in Subsection (2); a state should defer to the other state if that state's interest is clearly greater.

In a study¹⁰⁷ of existing extradition practices with specific reference to drug-related offences, the United Nations Division of Narcotic Drugs stated that the principles of jurisdiction contained in the *Restatement* are limited by the notion of "reasonableness" and that jurisdiction will be unreasonable "if its assertion is exorbitant, for example if another state has a significant interest in asserting jurisdiction. The role of reasonableness thus appears to be an attempt to determine the proper forum."

¹⁰⁷ *Extradition for Drug-Related Offences* 64 (1985).

It is our contention that whether Canada can prosecute under the jurisdictional principles of (1) territorial connection (either subjective, objective, effects felt or substantial connection, as per *R. v. Libman*)¹⁰⁸ or (2) nationality of the offender being Canadian, this does not obviate the responsibility that Canada has to the requesting state under a valid bilateral extradition treaty. It is not in issue that Canada must have a sound basis of jurisdiction for this question of non-extradition to arise, otherwise the *dictum* in *Rauca* would govern. Therefore the question squarely put is as follows: in a case of concurrent jurisdiction with a sound basis for initiating proceedings in Canada and in the requesting state, may prosecutorial discretion be exercised in Canada so as to proceed with extradition rather than prosecution in Canada or does section 6(1) give the accused Canadian citizen a right to be prosecuted in Canada?

Historically, in the field of criminal law the exercise of prosecutorial powers has been unfettered.¹⁰⁹ Prosecutorial discretion has been viewed as both necessary and desirable.¹¹⁰ There has been judicial reluctance to enter into a review of these powers.¹¹¹ The powers are derived from either the common law grant of prerogative power to the Attorney General and his agents or by way of statute.

It has been suggested that the reasons for judicial restraint are based on historical, constitutional, and practical grounds.¹¹² Apart from the historical grounds, some decisions have posited the view that the courts are not a suitable forum for deciding or interfering with matters containing high policy considerations.¹¹³ Madame Justice Wilson stated in *Operation Dismantle Inc. v. The Queen*¹¹⁴ that the question of judicial capacity has often been raised by the

¹⁰⁸ [1985] 2 S.C.R. 178.

¹⁰⁹ D. C. Morgan, "Controlling Prosecutorial Powers," (1986) 29 Crim. L.Q. 15, at 16. See the Law Reform Commission of Canada, Working Paper 15, *Criminal Procedure: Control of the Process* (1975).

¹¹⁰ *Ibid.*

¹¹¹ *Ibid.*, 20.

¹¹² *Ibid.*, 22.

¹¹³ *Ibid.*, 30-31. See P. Cane, "'Prerogative Acts, Acts of State and Justiciability," (1980) 29 Int'l and Comp. L.Q. 680, at 681. See *Swystun v. U.S.A.*, (1987) Man. Q.B., not yet reported, where Hanssen J. states at p. 13 that ". . . if the courts were to adopt the approach taken in *El Zein* and *Cotroni*, they would be usurping a function delegated to the Minister of Justice by Parliament."

¹¹⁴ *Supra* note 29, at 500.

courts. She would appear to take the view that the non-involvement of the courts should be grounded on unsuitability or non-justiciability. In our view, Madame Justice Wilson was correct in her categorization of the issue as not being the "ability" of the courts to decide the issues presented but the "appropriateness of doing so."¹¹⁵ On a practical note the floodgates argument has been raised. As the Law Reform Commission of Canada noted in 1975: "To subject each decision of the Crown to judicial scrutiny would place an intolerable burden on the judiciary, and present the theoretical, if not real, possibility of endless litigation."¹¹⁶

However, the bottom line appears to be that the criminal justice system best operates through a broad grant of prosecutorial discretion.¹¹⁷ As Chief Justice Fauteux delivering the judgment of the Supreme Court of Canada in *R. v. Smythe* noted:

Enforcement of the law and especially of the criminal law would be impossible unless someone in authority be vested with some measure of discretionary power. The following statements made in the *Lafleur* case . . . are to the point and I adopt them.

I cannot conceive of a system of enforcing the law where someone in authority is not called upon to decide whether or not a person should be prosecuted for an alleged offence. Inevitably there will be cases where one man is prosecuted while another man, perhaps equally guilty, goes free. A single act, or series of acts, may render a person liable to prosecution on more than one charge, and someone must decide what charges are to be laid. If an authority such as the Attorney General can have the right to decide whether or not a person shall be prosecuted, surely he may, if authorized by statute, have the right to decide what form the prosecution shall take.¹¹⁸

There may be valid reasons why the Attorney General decides not to prosecute. These should not be interfered with by the courts. To do so would in effect be saying "you must prosecute here." This would overstep the bounds of the division of powers.¹¹⁹ As the Law Reform Commission of Canada stated in 1975:

An analysis of the discretionary powers presently possessed by the Crown reveals that many of these powers have important political aspects in

¹¹⁵ *Ibid.*

¹¹⁶ *Op. cit. supra* note 109, at 21.

¹¹⁷ *Ibid.*, 31. See, e.g., *R. v. Smythe* (1971), 3 C.C.C. (2d) 98; 13 C.R.N.S. 7 (Ont. H.C.), aff'd 3 C.C.C. (2d) 97 (Ont. C.A.), aff'd 3 C.C.C. (2d) 366 (S.C.C.).

¹¹⁸ *Ibid.*, 370.

¹¹⁹ Law Reform Commission of Canada, *supra* note 109, at 22.

the sense described above. By way of illustration, charging decisions, including the decision whether to enforce a particular prohibition, who to charge, what to charge and whether to continue a prosecution, are pre-eminently political. . . . In other cases, invoking the machinery of criminal justice involves balancing factors peculiar to that case, such as the hardship to the accused compared to the benefit to society derived from a prosecution, or the necessity to sacrifice one potentially successful prosecution to increase chances of success in another more important case, or the need to satisfy the demands of a public sympathetic to the cause of the accused. The vigour with which laws are enforced is, or should be, a reflection of the relative importance of the laws in preserving public order and the moral imperative of the legal system. In all cases, the decision to prosecute or not is one affecting the allocation of resources.

Decisions relating to these matters with important political overtones should generally be within the discretionary powers of the Attorney General and his agents. The exercise of this discretion should not be subject to judicial control. Various techniques could be invoked to bring such matters under judicial control, but none, in our view, would be desirable or feasible. *As stated above, it is essential to the proper administration of justice to confer on some authority some degree of discretion to decide matters, such as, whether or not to prosecute.* The infinite number of variables that affect such decisions would defeat any attempt to eliminate discretion by creating a code of detailed legal rules to govern the decision-making authority. Even if possible, formal legal rules as a substitute for discretion would eliminate from the system the flexibility that is essential in order to permit dispositions appropriate to the particular circumstances of the offence, the offender, the locality and the times.

If it is impossible to eliminate prosecutorial discretion in relation to matters that we have characterized as political, it would likewise be undesirable and impractical to subject the exercise of this discretion to judicial review, and thus, in a sense, substitute judicial discretion for prosecutorial discretion. This would impose upon the judiciary an onerous task that could only be performed if the size of the judiciary were significantly increased and if the system were radically changed to put them in possession of information necessary for such decisions. As explained above, such a system would jeopardize their impartiality in the adversary process, and involve them in matters both political and controversial that would imperil their independence and reputation. Though the political accountability of the Attorney General and the other restraints on Crown power are far from being a perfect guarantee against mistakes, they are, we believe, preferable to the unnecessary politicization of the judiciary.

If politics is the realm of the Crown, adjudication is the realm of the judiciary. We recognize that political and justiciable issues are not mutually exclusive. To a certain extent there will always be an overlapping of the two. The judiciary cannot, and should not, be insensitive

to policy or political considerations. We are not suggesting a system of mechanical jurisprudence that would require the judiciary to ignore such matters. What we do propose is one that will exclude from the adjudicative function those political issues that can best be resolved by the Crown. In excluding such matters we seek, not to belittle the judicial process, but rather to strengthen it by preserving judicial impartiality and independence.¹²⁰

Before the Charter of Rights there is no evidence of any case law whereby our courts enquired into and reviewed the reasons behind not laying charges in Canada. The decision to engage in extradition proceedings rather than to prosecute in Canada may be taken for (1) practical reasons such as location of evidence, witnesses, expense of transporting such to Canada; (2) consideration that on balance even though Canada has sufficient jurisdictional bases for prosecution of the offence the requesting state has been affected to a greater extent; (3) other co-accused may have prosecutions pending or have been convicted in the requesting state; and (4) foreign policy reasons. It would in our view be unwise and unprecedented for the courts to review prosecutorial reasons.

The interests of Canadian society as a whole in seeing that fugitive offenders are brought to justice in the most effective locale and that the Canadian criminal justice system is not impaired must be attended by weighty consideration. It is worth noting the remarks by Madame Justice Wilson in *Operation Dismantle Inc. v. The Queen* albeit that they concern section 7 of the Charter, where she stated:

Even an independent substantive right to life, liberty and security of the person cannot be absolute. . . . The concept of "right" as used in the Charter postulates the interrelation of individuals in society, all of whom have the same right. . . .¹²¹

The concept of "right" as used in the Charter, must also, I believe, recognize and take account of the reality of the modern State.

and further that:

there must be a strong presumption that governmental action which concerns the relations of the state with other states, and which is therefore not directed at any member of the immediate political community, was never intended to be caught by section 7, even though such action may have the incidental effect of increasing the risk of death or injury that individuals generally have to face.¹²²

¹²⁰ *Ibid.*, 31, 33-35 (emphasis added).

¹²¹ *Supra* note 29, at 516-17 (D.L.R.). See also J. Rawls, *A Theory of Justice* 213 (1971).

¹²² *Ibid.*, 518.

One commentator has suggested¹²³ that while the above statement can be distinguished from the situation where the right of the individual is directly affected "the conservatism evident here is likely to surface in other contexts." It is our opinion that it would be inherently justifiable in the case of section 6(1) of the Charter of Rights.

INTERPRETATION OF THE TREATIES ON EXTRADITION

Canada is bound by a number of extradition treaties and under the Fugitive Offenders Act to extradite her nationals in the absence of any specific prohibition. By refusing to do so, Canada would violate such treaties and international law in not fulfilling her international commitments,¹²⁴ one of the objectives of extradition. Thus, the treaties, the Extradition Act, and the Canadian Charter of Rights and Freedoms must be interpreted so as not to violate Canada's international obligations.

By far the greatest number of extradition requests to and from Canada involve the United States of America. It is therefore instructive to consider the Treaty on Extradition between the Government of Canada and the Government of the United States of America signed in Washington on December 3, 1971 as amended by an Exchange of Notes and entered into force for Canada on March 22, 1976.¹²⁵ It provides in Article 1 that:

Each Contracting Party agrees to extradite to the other, in the circumstances and subject to the conditions described in this Treaty, persons found in its territory who have been charged with, or convicted of, any of the offenses covered by Article 2 of this Treaty committed within the territory of the other, or outside thereof under the conditions specified in Article 3(3) of this Treaty.

Article 2(2) states that:

(2) Extradition shall also be granted for attempts to commit, or conspiracy to commit or being a party to any of the offenses listed in the annexed Schedule.

Furthermore, Article 3(3) contains the following provision:

(3) When the offense for which extradition has been requested has been committed *outside the territory of the requesting State*, the executive or other appropriate authority of the requested State shall have

¹²³ Morgan, *op. cit. supra* note 109, at 54.

¹²⁴ See La Forest, J. in *Schmidt v. U.S.A.*, *supra* note 98.

¹²⁵ 1976 C.T.S. No. 3.

the power to grant the extradition if the laws of the requested State provide for jurisdiction over such an offence committed in similar circumstances.¹²⁶

Part I of the Extradition Act applies to extradition under treaty.

Article 4, which deals with cases where extradition shall not be granted, does not contain an exception in favour of the citizens of the contracting states. Therefore, under the treaty it is clear that the contracting states are obliged to extradite their own citizens whether or not they can be prosecuted in the requested state. Citizenship does not play a role in extradition between Canada and the United States of America. The preamble to the treaty, by declaring that both countries desire to make more effective their co-operation in the repression of crime by way of reciprocal extradition of offenders, does not contain such limitation. To read into the treaty a provision that citizens of Canada cannot be extradited for offences for which they can be tried in Canada is contrary to the express terms not only of the treaty but also the Extradition Act.

It is a well-established principle that: "Every treaty in force is binding upon the parties to it and must be performed by them in good faith."¹²⁷ Furthermore: "A party may not invoke the provisions of its internal law as justification for its failure to perform a treaty. . . ."¹²⁸ No question of treaty interpretation arises where the terms of the relevant treaty of extradition are clear. Thus, a refusal to extradite a fugitive on the ground of citizenship would constitute a breach of an international obligation under the treaty. If the terms of the treaty were unclear, Canadian courts would still have to construe them and the relevant provisions of the Extradition Act so as to fulfil Canada's international obligations.¹²⁹

¹²⁶ Italics added.

¹²⁷ Vienna Convention on the Law of Treaties (1969), Art. 26.

¹²⁸ Vienna Convention on the Law of Treaties (1969), Art. 27.

¹²⁹ G. V. La Forest, *op. cit. supra* note 3, at 22, who relies on *Re Warner* (1864), 1 C.L.J. 16 (Chamb.); *Re Burley* (1865), 1 C.L.J. 34 (Chamb.); *R. v. Morton and Thompson* (1868), 19 U.C.C.P. 9; *Ex p. Phelan* (1883), 6 L.N. 261; *Re Arton* (No. 2), [1896] 1 Q.B. 509; *Re Collins* (No. 3) (1905), 10 C.C.C. 80 (B.C.S.C.). (No. 2) (1906), 11 C.C.C. 62 (Ont. H.C.J.); *Grossberg v. Choquet* (1923), 39 C.C.C. 131 (Que. S.C.); *Loosberg v. Sequin* (1933), 61 C.C.C. 77 (Que. S.C.); *Re Deakins* (1962), 133 C.C.C. 275 (Ont. H.C.J.); *Re Stegeman*, [1967] 2 C.C.C. 97 (B.C.C.A.), affg 58 D.L.R. (2d) 415 (S.C.); *Re Whipple* (1972), 6 C.C.C. (2d) 517 (B.C.S.C.); *Re United States of America and Couche* (1976), 30 C.C.C. (2d) 443 (Fed. C.A.). See also *Zingre, Wiest and Reiser v. The Queen*, [1981] 2 S.C.R. 392, at 409-10.

International law is part of the law of Canada.¹³⁰ Thus, in interpreting the Charter of Rights and Freedoms or a statute, the courts, following Anglo-American tradition, will presume that the legislature did not intend to derogate from international law. There is a rule to the effect that legislation is to be construed so as to avoid this effect whenever possible.¹³¹ "In other words, there is an interpretative presumption, applicable in the context of construing the Charter, that Parliament and the legislatures intend to fulfill Canada's international obligations."¹³²

On the other hand, when the intention of the legislature to derogate from international law is clearly to be ascertained from the Act itself, a municipal court is bound by its own jurisdictional rule to give effect to the overriding supremacy of the legislative will.¹³³ Even if, contrary to our opinion, section 6(1) of the Charter is taken to be *prima facie* in conflict with the Extradition Act, it must be remembered that it is subject to section 1. In the *Rauca* case it did not override the Treaty on Extradition with Germany. Therefore, it is possible to conclude that Canadian courts must attempt to reconcile the Charter with Canada's international obligations and that the extradition of Canadian citizens is a reasonable limit prescribed by law within the context of Canada's international obligations, as can be demonstrably justified in a free and democratic society *in all cases*, since many free and democratic states extradite their nationals unconditionally.

¹³⁰ *Reference re Exemption of U.S. Forces from Canadian Criminal Law*, [1943] S.C.R. 483, at 516; [1943] 4 D.L.R. 11, at 41; *Foreign Legations Case*, [1943] S.C.R. 208, at 230-31; [1943] 2 D.L.R. 481, at 501.

¹³¹ For instance, in *Re The Annapolis, Lush*, 295, at 306 (1861); *Solomon v. Commrs. of Customs and Excise*, [1967] 2 Q.B. 116, at 143; [1966] 3 All. E.R. 871 (C.A.): "But if the terms of the legislation are not clear but are reasonably capable of more than one meaning, the treaty itself becomes relevant, for there is a presumption that Parliament does not intend to act in breach of international law, including therein specific treaty obligations. . . ." *Post Office v. Estuary Radio*, [1967] 1 W.L.R. 1396; [1968] 2 Q.B. 740, at 757; [1967] 3 All E.R. 663 (C.A.); *Stag. Line Ltd. v. Foscolo, Mango & Co.*, [1932] A.C. 328, at 350 (H.L.); *Murray v. The Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64, at 118 (1804); *R. v. Keyn* [1876-77] 2 Ex. 63, at 85 (1876) (per Sir R. Phillimore); *Mortensen v. Peters*, 14 Scots L.T.R. 227 (1906).

¹³² M. Cohen and A. F. Bayefsky, "The Canadian Charter of Rights and Freedoms and Public International Law," (1983) 61 Can. Bar Rev. 265, at 281. See also at 288.

¹³³ E.g., *The Marianna Flora*, 24 U.S. (11 Wheat) 1 (1826); *Swait v. Board of Trustees of Maritime Transportation Union* (1967), 61 D.L.R. (2d) 317; [1967] B.R. 315 (Que. C.A.).

CONCLUSION

It is our opinion based on the above analysis that the right to remain in Canada is not the right to resist extradition, with its built-in safeguards for the fugitive. Alternatively, should section 6(1) be read to apply to extradition, then extradition, even if prosecution in Canada is possible on the same facts, is a reasonable limit prescribed by law, as can be demonstrably justified in a free and democratic society.

Sommaire

L'extradition des citoyens canadiens et les articles 1 et 6(1) de la Charte canadienne des Droits et Libertés

Les auteurs soutiennent que l'extradition d'un citoyen canadien qui a commis un acte criminel pour lequel il pourrait être poursuivi au Canada ne constitue pas une violation de l'article 6, premier alinéa de la Charte canadienne des Droits et Libertés, qui stipule que tout citoyen canadien a le droit de demeurer au Canada. Même si, à première vue, l'extradition devait violer ce droit, les auteurs estiment qu'en vertu de l'article 1 de la Charte, il peut être restreint par une règle de droit dans des limites raisonnables et dont la justification peut se démontrer dans le cadre d'une société libre et démocratique.