

WHEN PATHS CROSS: A LOOK AT THE INTERPLAY BETWEEN FOREIGN LAW AND DOMESTIC LAW IN EXTRADITION CASES

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Within Canadian criminal law the most significant intersection of domestic and foreign law is in the areas of extradition and the extra-territorial application of the *Canadian Charter of Rights and Freedoms*² to investigations and proceedings regarding Canadian nationals. Extradition proceedings and investigations that extend beyond the Canadian border involve unique issues and demand experienced counsel to help guide and effectively represent clients who are subject of these proceedings. This paper will review in brief detail some of the unique evidentiary issues and the interplay of both Canadian and foreign law.

EXTRADITION LAW

Since the thirteenth and fourteenth centuries, it was considered natural for a criminal jury trial to be conducted in the place where the incident occurred. Since that time, our own Canadian system of law has adopted the jurisdictional notion that criminal trials and procedures be treated as local in its nature and that a court's jurisdiction is limited to its own territory. Indeed, there is a strong policy argument for protecting the right of the community to see first-hand that justice is done for matters that are local and for which the community are immediately concerned.³ However, increasing

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² Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11 [hereinafter *Charter*]

³ Delisle and Stuart, *Learning Canadian Criminal Procedure* (3rd Edition), (Toronto: Carswell, 1994) at p. 41

globalization, advancement in technologies, and the movement of peoples between nations or across the globe has made it more challenging to protect the right of the community to see that local crime is prosecuted within its own jurisdiction. Crime in its broadest form encompasses local offences and cross-border offences that are similar and yet very distinct in their features. For example, drug trafficking, fraud and terrorism extend well beyond individual nation borders, yet have very immediate impact on local communities.

Extradition law has traditionally facilitated the right of nations to seek redress of crimes that have occurred within its borders where the alleged offender has either fled or committed the alleged act from another nation. Extradition is intended to be an expedited process by which the requesting state seeks an individual, “fugitive” or “person sought”, for a prosecution or to serve a sentence within their jurisdiction. The process was not meant to be a duplication of the criminal trial process but rather extradition is meant to be a simplified procedure in order to allow Canada to comply with its international obligations. As will be discussed below, evidence at an extradition hearing does not necessarily conform to the traditional common law concepts of admissibility of evidence. For example, hearsay and documentary evidence is *prima facie* admissible. The evidence from the requesting state is usually provided in the “Record of the Case”, which is certified by the requesting state and provided by the Federal Department of Justice in the disclosure phase of the extradition proceeding. The record of the case is a summary of the evidence that tends to establish the identity and involvement of the person sought in a crime that is recognizable in Canada.

Canadian courts have struggled with balancing domestic notions of fairness, fundamental justice and admissibility with ensuring that extradition is completed in a prompt manner while respecting the foreign nation's right to seek redress of a local crime. Extradition law is founded on the principles of reciprocity, comity and respect for differences in other jurisdictions.

These principles have a very immediate impact on the manner in which foreign law is applied in domestic extradition proceedings. Moreover, the growing co-operation between nation states to combat "global" crime has led to the blurring of the centuries old notions of local crime and jurisdiction. This has caused nations to take on prosecutions for crimes partly or even substantially committed beyond their borders, particularly in matters that affect more than one community. One of the most famous global examples of this new trend was the attempt by Spanish Prosecutors to prosecute former Chilean Dictator Augusto Pinochet for violations of Spanish Law in a Spanish court for alleged atrocities that occurred in Chile against Spanish citizens in the 1970s. One may recall that Spain requested the extradition of Mr. Pinochet from England while the former dictator was visiting London.

Differentiating Between the Extradition Process and a Criminal Trial

In order to meet Canada's obligations under international treaties, criminal courts in Canada had to thus distinguish extradition law from the domestic traditional criminal trial process by recognizing the differences in the norms and standards of foreign criminal law while not applying Canadian concepts to impede committal for extradition.

In *Kindler v. Canada (Minister of Justice)*⁴, McLachlin J., as she then was, outlined the differences between extradition proceedings versus the criminal trial process:

While the extradition process is an important part of our system of criminal justice, it would be wrong to equate it to the criminal trial process. It differs from the criminal process in purpose and procedure and, most importantly, in the factors which render it fair. Extradition procedure, unlike the criminal procedure, is founded on the concepts of reciprocity, comity and respect for differences in other jurisdictions.

This unique foundation means that the law of extradition must accommodate many factors foreign to our internal criminal law. While our conceptions of what constitutes a fair criminal law are important process of extradition, they are necessarily tempered by other considerations.

Thus this Court, per La Forest J., recognized in *Canada v. Schmidt*, [1987] 1 S.C.R. 500, at pp. 522-523, that our extradition process does not require conformity with Canadian norms and standards. The foreign judicial system will not necessarily be considered fundamentally unjust because it operates without, for example the presumption of innocence and other legal safeguards we demand in our own system of criminal justice.⁵

In *United States of America v. Ferras*,⁶ the Supreme Court similarly held, in upholding the constitutionality of the evidentiary provisions contained in the current *Extradition Act*,⁷ that “the rules of evidence applicable to a criminal trial in Canada do not necessarily apply to the extradition process”⁸ and that basic fairness to the person sought for extradition does not require “all procedural safeguards of a trial”⁹.

By successfully differentiating the criminal trial process from the extradition process, Canadian courts have been able to apply different legal tests for numerous legal

⁴ [1991] 2 S.C.R. 779 at pp. 844-845.

⁵ *Ibid.*

⁶ [2006] 2 S.C.R. 77

⁷ S.C. 1999, c. 18.

⁸ *Ibid* at para. 14.

⁹ *Ibid.* at para. 21.

problems within extradition law, including the application of hearsay evidence, the abuse of process doctrine and the limited application of the *Charter*.

Admissibility of Hearsay – Traditional Adherence v. Flexible Approach

As mentioned above, evidence can take various forms and still be admissible in extradition proceedings. Affidavits of complainants, witnesses or police officers who have gathered evidence in the foreign jurisdiction are admissible in order to establish a committal for extradition. Hence witnesses need not testify. Excerpts from transcripts of foreign trials can also be admitted in order to establish evidentiary links to the person sought. Thus, traditional notions of admissible evidence have been greatly expanded to permit documentary evidence in order to expedite the process of extradition.

The expansion of categories of admissible evidence has continued to develop particularly in relation to evidence gathered within Canada in support of proof of an offence in another jurisdiction.

In *United States of America and Canada (Minister of Justice) v. Anekwu*,¹⁰ the Supreme Court of Canada went one step further and expanded the admissibility of hearsay evidence gathered in Canada. In *Anekwu* the U.S. sought the extradition of an accused for 13 counts of mail fraud and 7 counts of wire fraud involving a fraudulent telemarketing scheme. The Attorney General of Canada submitted a certified record of

¹⁰ [2009] 3 S.C.R. 3 at para.

the case prepared by the US as required by s. 33(1) of the *Extradition Act*. The summary document described evidence gathered in both the US and Canada. The US evidence consisted of 11 individual statements from representative victims. The Canadian evidence included corporate documents, mailbox records, bank records, police surveillance and an immigration photograph of the accused. This evidence was originally gathered under the authority of the *Mutual Legal Assistance in Criminal Matter Act*,¹¹ an Act designed to assist police agencies between Canada and the US to investigate crime and share information.

The “Canadian” evidence was not filed but simply summarized in the record of the case. Section 32(2) of the *Evidence Act* provides that evidence gathered in Canada must satisfy rules of evidence under Canadian law in order to be admitted. The issue before the Supreme Court of Canada was whether Canadian evidence could simply be summarized or whether that was only required for foreign gathered evidence.

Justice Charron, delivering the judgment for the Court, adopted a flexible approach to the use of hearsay evidence gathered in Canada rather than adhering to the traditional approach on the admissibility of hearsay evidence commonly used in criminal trials. Justice Charron concluded that s. 32(2) permits Canadian gathered evidence to be summarized so long as our extradition partners comply with Canadian Law when gathering evidence in Canada. In addition, hearsay would be admissible in order to maintain the efficiency of the extradition process and to ensure that Canada continues to comply with its treaty obligations. Justice Charron found that traditional adherence to the rule could occasion protracted *voire dire*s to determine whether evidence presented in hearsay form falls into one of the recognized exceptions to the rule or meets the twin

¹¹ R.S.C. 1985, c. 30 (4th Supp).

criteria of necessity and reliability. In her view, traditional adherence to the hearsay rule “would be to allow form to triumph over substance and lead to expensive, time-consuming hearings that would disable Canada from complying with its international obligations in a prompt and efficient manner.”¹²

Conduct by Requesting State that Shocks the Conscience

From time to time, our courts have had to deal with a requesting state whose conduct has been contrary to Canadian values. These cases have been a challenge for our courts because they pit cherished values of fairness and fundamental justice against Canada’s fulfillment of international treaty obligations.

In *United States of America v. Cobb*,¹³ the appellants, who were Canadian citizens, were alleged to have defrauded American residents through a telemarketing scheme executed from Canada. The U.S. requested their extradition on charges of fraud and conspiracy to commit fraud. Many of the co-conspirators had voluntarily attorned to the jurisdiction of Pennsylvania. However the appellants contested their extradition on the basis that extraditing them would violate their rights under s. 7 of the *Charter*, in light of statements made by the American judge and prosecuting attorney with carriage of the matter in the U.S. Section 7 of the *Charter* provides an individual with the right to life, liberty and security of the person and the right not to be deprived except in accordance with the principles of fundamental justice.

¹² *Ibid* at para. 26.

¹³ [2001] S.C.J. No. 20.

In *Cobb*, the American Judge assigned to Cobb's case commented that those fugitives who did not cooperate would get the "absolute maximum jail sentence" while he was sentencing a co-conspirator in the scheme. Additionally, the prosecuting district attorney hinted during a television interview that uncooperative fugitives would be subject to homosexual rape in prison.

Given these outrageous comments, the Canadian extradition judge refused to order committal of the appellants and stayed the extradition proceedings, even though the U.S. had presented a *prima facie* case against them. The Court of Appeal set aside the stay and remitted the matter to the extradition judge, ruling that the extradition judge should not pre-empt the discretion vested in the Minister of Justice to surrender the fugitive in the discharge of Canada's treaty obligations. The appellants appealed to the Supreme Court of Canada. The Supreme Court of Canada allowed the appeal and granted a stay of extradition because of the unacceptable threats made by the prosecutor and trial judge in the foreign jurisdiction. The Court ruled that an extradition judge possesses some *Charter* jurisdiction, so long as the *Charter* issues relate to the initial phase of the extradition process. The Court ruled:

By placing undue pressure on Canadian citizens to forego due legal process in Canada, the foreign State has disintitiled itself from pursuing its recourse before the courts and attempting to show why extradition should legally proceed. The intimidation bore directly upon the very proceedings before the extradition judge, thus engaging the appellant's right to fundamental justice at common law, under the doctrine of abuse of process, and as also reflected in s. 7 of the Charter. The extradition judge did not need to await a ministerial decision in the circumstances, as the breach of the principles of fundamental justice was directly and inextricably tied to the committal hearing.¹⁴

¹⁴ *Cobb* at para. 52.

The Supreme Court concluded in *Cobb* that to proceed further with the extradition hearing would violate “those fundamental principles of justice which underlie the community’s sense of fair play and decency”.

A grimmer example of the battle between domestic notions of fairness and fundamental justice and the application of foreign law, occurred in the context of a death penalty case. The Supreme Court of Canada in one of its most famous decisions¹⁵ tackled the issue of the possible extradition of an accused from Canada to the United States where the person sought faced the death penalty.

In *Burns and Rafay*, the accused were each wanted on three counts of aggravated first degree murder in the State of Washington and if found guilty they were facing either the death penalty or life in prison without the possibility of parole. The accused were both Canadian citizens, 18 years old when the father, mother and sister of the respondent Rafay were found bludgeoned to death in their home in Bellevue, Washington, in July 1994. Both Burns and Rafay, who had been friends at high school in British Columbia, admit that they were at the Rafay home on the night of the murders. They claim to have gone out on the evening of July 12, 1994 and when they returned, they say, they found the bodies of the three murdered Rafay family members. Thereafter, the respondents returned to Canada. They were later arrested by the RCMP.

The Attorney General of British Columbia decided against a prosecution in that province and the United States commenced proceedings to extradite the respondents to the State of Washington for trial. The Minister of Justice for Canada, after evaluating the respondents' particular circumstances, including their age and their Canadian nationality, ordered their extradition pursuant to s. 25 of the *Extradition Act* without seeking

¹⁵ *R. v. Burns*, [2001] S.C.J. No. 8

assurances from the United States under Article 6 of the extradition treaty between the two countries that the death penalty would not be imposed, or, if imposed, would not be carried out.

The British Columbia Court of Appeal ruled that the unconditional extradition order would violate the mobility rights of the respondents under s. 6(1) of the *Charter*. The Court of Appeal therefore set aside the Minister's decision and directed him to seek assurances as a condition of surrender. The government appealed to the Supreme Court of Canada.

The Supreme Court of Canada dismissed the appeal and indicated that assurances that the death penalty will not be imposed are constitutionally required in all extradition cases from Canada in all but “exceptional cases”. The Supreme Court concluded that while the government objective of advancing mutual assistance in the fight against crime was entirely legitimate, the Minister had not shown that extraditing the respondents to face the death penalty without assurances is necessary to achieve that objective.

Furthermore, the Court pointed to the fact that there was no suggestion in the evidence that asking for assurances would undermine Canada's international obligations or good relations with neighbouring states. The extradition treaty between Canada and the United States explicitly provides for a request for assurances and Canada would be in full compliance with its international obligations by making it.

In addition, while international criminal law enforcement including the need to ensure that Canada does not become a "safe haven" for dangerous fugitives is a legitimate objective, there was no evidence that extradition to face life in prison without release or

parole provides a lesser deterrent to those seeking a "safe haven" than does the death penalty. Whether fugitives are returned to a foreign country to face the death penalty or to face eventual death in prison from natural causes, they are equally prevented from using Canada as a "safe haven". The Court found that the elimination of Canada as a "safe haven" depends on vigorous law enforcement rather than on infliction of the death penalty by a foreign state after the fugitive has been removed from this country.

Similarly, in *Philippines (Republic) v. Pacificador*,¹⁶ the accused was being sought by the foreign state to stand trial for the 1986 assassination of a prominent political figure. The accused argued that the evidence against him was a product of political manipulation and that other alleged co-conspirators had been subjected to several years of harsh detention without trial. The Court heard evidence that there was a lack of independence of the judiciary from political influence, a risk of torture for the accused by electric shock, that witnesses were being offered money to provide false statements, bribery allegations of police and other officials, that an alibi defence was not being investigated and that the relative of the slain political figure, now a political heavy weight in his own right, had visited one of the co-conspirators in jail and had threatened him by cocking a loaded gun towards him. In contrast, the Canadian government argued that they had received assurances that no death penalty would be imposed and that the accused would get a speedy trial within a year of surrender.

Nevertheless, the Ontario Court of Appeal denied the extradition of the accused because to surrender the appellant in the circumstances of this case would be "simply unacceptable". The foreign country's criminal procedures have been interpreted and applied in this very prosecution in a manner that "sufficiently shocks the conscience" and

¹⁶ [2002] O.J. No. 3024 (Ont. C.A.)

would violate the accused's right not to be denied life, liberty and security of the person afforded under section 7 of the *Charter*.

EXTRA-TERRITORIAL APPLICATION OF THE CHARTER

Along side extradition law, the extra-territorial application of the *Charter* has set new parameters to the extent to which Canadian law can be applied to investigations or proceedings in other nations. This is a new development in our domestic law given that historically under international law territorial sovereignty was paramount as one nation could not be seen to impose its law or criminal law on another. Traditionally, Canadian Courts have ruled that the *Charter* does not apply outside of Canada. This has had extensive implications in extradition matters where courts have refused to apply the *Charter* to investigative methods used in other jurisdictions, even where the evidence has clearly been improperly obtained by Canadian fairness standards. The Supreme Court of Canada's decision in *R. v. Hape*¹⁷ has had a profound impact on domestic prosecutions where evidence is gathered in a foreign jurisdiction.

In *Hape*, RCMP officers commenced an investigation of the accused, a Canadian businessman, for suspected money laundering activities. They sought permission from the Turks and Caicos Islands authorities to conduct parts of their investigation on the Islands where the accused's investment company was located.

The Turks and Caicos Police Force agreed to allow the RCMP to continue the investigation on Turks and Caicos territory so long as the RCMP officers worked under their authority.

¹⁷ [2007] S.C.J. No. 26

During a one-year period, RCMP officers conducted various searches of the accused's office on the Islands under the auspices of the Turks and Caicos Police Force, often without a warrant or judicial authorization. At trial in Canada, the Crown Attorney adduced documentary evidence that the police had gathered from the Turks and Caicos. The RCMP officers testified at trial that they were aware there were no warrants authorizing the perimeter searches of the accused's office but that they had relied on the foreign police expertise and advice regarding the legalities of investigations conducted on the Islands. The accused sought to have the documentary evidence excluded, pursuant to s. 24(2) of the *Charter*, on the basis that the evidence was obtained in violation of his right under s. 8 of the *Charter* to be secure against unreasonable search and seizure.

The trial judge held that the *Charter* did not apply because the search took place outside of Canada and dismissed the application. The trial judge convicted the accused of two counts of money laundering. The Court of Appeal upheld the convictions. The Supreme Court of Canada also dismissed the appeal by the accused.

However, the Supreme Court of Canada ruled that the *Charter* does not generally apply to searches and seizures in other countries, and that the only reasonable approach is to apply the law of the state in which the activities occur, subject to the *Charter's* fair trial safeguards and to the limits on comity that may prevent Canadian officers from participating in activities that, though authorized by the laws of another state, would cause Canada to be in violation of its international obligations in respect of human rights.¹⁸

The Court further noted that a well-established principle of statutory interpretation is that legislation will be presumed to conform to international law and that the *Charter*,

¹⁸ *Ibid* at paras. 88 and 90

cannot be enforced in another state's territory without the other state's consent. This conclusion is consistent with international law and is also dictated by the words of the *Charter* itself. But the court ruled that while *Charter* standards cannot be applied to an investigation in another country involving Canadian officers, there is no impediment to extraterritorial adjudicative jurisdiction pursuant to which evidence gathered abroad may be excluded from a Canadian trial, as this jurisdiction simply attaches domestic consequences to foreign events. As such, where the Canadian prosecution authorities seek at trial to adduce evidence gathered abroad, the *Charter* provisions governing trial processes in Canada ensure that the appropriate balance is struck and that due consideration is shown for the rights of an accused being investigated abroad. Moreover, the Court stated that in an era characterized by transnational criminal activity, the principle of comity cannot be invoked to allow Canadian authorities to participate in investigative activities sanctioned by foreign law that would place Canada in violation of its international obligations in respect of human rights. Deference to the foreign law ends where clear violations of international law and fundamental human rights begin.¹⁹

After the decision in *R. v. Hape*, few criminal lawyers and scholars believed that the *Charter* could ever apply to Canadian agents abroad. However, the Supreme Court of Canada's recent decision in *Khadr* (2010)²⁰ again tackled the issue of the extra-territorial application of the *Charter* for Canadian conduct abroad in the context of a terrorist suspect. In *Khadr*, the accused is a Canadian citizen who has been detained by the U.S. government at Guantanamo Bay, Cuba, for over seven years. In 2004, the accused was charged with war crimes, but the U.S. trial was still pending. In 2004, a Department of

¹⁹ *Hape* at paras 52, 96, 99-101.

²⁰ *Canada (Prime Minister) v. Khadr*, [2010] S.C.J. No. 3

Foreign Affairs and International Trade (DFAIT) official interviewed the accused knowing that he had been subjected to a sleep deprivation technique called “frequent flier” by U.S. authorities in an effort to make him less resistant to interrogation.

In a 2008 decision the Supreme Court of Canada ordered the Canadian government to disclose to the accused the transcripts of the interviews he had given to CSIS and DFAIT, under section 7 of *Charter*. The accused repeatedly requested that the Canadian government seek his repatriation, but the Prime Minister announced that he would not do so. Thereafter, the accused applied to the Federal Court for a judicial review of the ministerial decision not to request his repatriation. The Federal Court concluded that Canada had a duty to protect the accused and found that the refusal to request his repatriation violated the accused’s rights under s. 7 of the *Charter*. The Federal Court then ordered the government to request his repatriation. The Prime Minister appealed the decision to the Supreme Court of Canada.

The Supreme Court of Canada allowed the appeal in part. The Court ruled that the conduct of the Canadian government deprived the accused of his right to liberty and security of person as guaranteed by section 7 of the *Charter*. More importantly, the Court ruled that the conduct of the Canadian did not conform to the principles of fundamental justice.

Particularly the Court noted that interrogation of a youth in order to obtain statements about the most serious criminal charges while detained and without access to counsel, and while knowing that the fruits of the interrogations would be shared with the U.S. prosecutors offended the most basic Canadian standards about the treatment of detained youth suspects!

While the Court found that the accused established that Canada violated his rights under s. 7 of the Charter and he was entitled to a remedy under s. 24(1) of the Charter, the Court stopped short of providing the remedy. Instead, in a bizarre twist, the Court found that while the executive was not exempt from constitutional scrutiny, the executive was better placed to make the decision of an appropriate remedy within a range of constitutional options. The Court found that the government had to have flexibility in deciding how its duties under the power were to be discharged. Therefore, the Court found that the lower court's remedy that the government's request that the accused be returned to Canada was not an appropriate remedy for the breach under s. 24(1) of the *Charter*.

In making this decision, the Court noted that given the evidentiary uncertainties; the limitations of the Court's institutional competence, and the need to respect the prerogative powers of the executive, the proper remedy was declaratory relief. As a result, the Court was only prepared to grant the accused a declaration that his *Charter* rights had been infringed, while leaving the government to decide how best to respond.

Despite not going beyond a declaratory relief, the decision of the Supreme Court is monumental in holding that Canadian agents abroad were subject to *Charter* scrutiny. For some, it may be difficult to reconcile the Supreme Court of Canada decisions of *Hape* and *Khadr*. Upon a quick review, it would appear that the conduct of the Canadian agents in both cases should have been protected by the laws of the country in which the incidents had occurred. However, a more detailed review of the decision suggests that the Supreme Court of Canada applied common legal values prevalent in the domestic criminal law jurisprudence to analyze the conduct of the Canadian agents such as the

doctrine of good faith, and the protection of a child accused. In so doing, the Supreme Court of Canada may have struck a balance in which foreign law is respected but where Canadian legal values will prevail, is when “bad faith” tactics have been utilized during the course of an investigation.

Conclusion:

Criminal law has often been said to be a reflection of society’s morals, distastes, and tolerances. With the globalization of society and crime, the intersection of domestic law and foreign law has never been greater. This will continue to challenge Canadian courts and courts of many nations when faced with particularly troubling conduct of investigative authorities. Cases of *Cobb*, *Burns* and *Pacificador* are examples where conduct by the requesting foreign nation was so deplorable that the courts were less concerned with Canada’s ability to comply with its international obligations and more concerned with protecting our own cherished legal values and notions of fairness. Indeed, the Courts ruled that to surrender such persons sought may implicitly make our justice system active participants in the foreign conduct. In contrast the case of *Anekwu* demonstrates that our courts are willing to apply a flexible interpretation of statutes and evidence law, specifically hearsay evidence, in order to ensure that the extradition process remains straightforward and expedient so as to permit Canada’s obligations under international treaties.

Finally, the decisions in *Hape* and *Khadr* signal the reality that our Courts will face an increasing need to exercise careful judgment in the extra-territorial application of the *Charter* which is a marked departure from previously held notions of international law. We need to have an ongoing dialogue not only between justice partners, and nations, but within our own local communities as to what we will tolerate or ought to sanction as inappropriate investigative conduct and protect individual rights above political or international relations.

Defence counsel will need to be creative in taking advantage of this opening in the law and seek to introduce greater protections for Canadian nationals caught in foreign investigations and prosecutions.