Executive Power, Territorial Jurisdiction, and the (Non-)Protection of Human Rights in Canadian Extradition

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Abstract

This thesis grapples with the complexity of the relationship between the political executive, embodied in the Minister of Justice, and the individual. It examines the trajectory of individual rights under the current *Extradition Act*, in the context of extradition requests for prosecution of alleged criminal offences that occurred primarily, or entirely, within Canada's territorial jurisdiction. This project uses a mix of doctrinal and empirical methods to analyse both the law as it is, and the law as it is practised. I argue that the current state of rights protections in Canadian extradition law, at least where the person is sought for prosecution of alleged criminal offences committed within Canada's territory, fails to provide meaningful protection to individual constitutional rights. These failures appear to be the result of both design and implementation of the *Act* and the *Canadian Charter of Rights and Freedoms*, by both the Minister of Justice and by provincial appellate courts.

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Table of Contents

List of Tables

Chapter 1: Introduction: What are we Doing Here?

Extradition is a peculiar phenomenon. It is one of the few ways in which different states come into contact with each other's criminal law systems. It is a creature of treaty – generally speaking, without express agreement between states, it does not occur. In Canadian law, it is a rare area of law in which the executive branch of the government, embodied in the Minister of Justice, takes a decision that directly impacts a specific, named individual. As a result of this feature, it is also a legal process through which Canada disavows its responsibility towards said individual, in an act which, once taken, cannot be undone or repaired. Once Canada has sent a person away to face criminal charges or a criminal sentence abroad, Canada cannot undo or fix this act.[1] This disavowal of responsibility, amongst other impacts, extends to the requirement of the state to uphold and enforce the constitutional rights of those within its jurisdiction, and it is signed by the Minister of Justice, the Minister most responsible in cabinet for overseeing the application of the *Canadian Charter of Rights and Freedoms*[2] (the *Charter*) in legislative contexts.

This thesis seeks to grapple with the complexity of this relationship – between the executive and the individual – by examining the trajectory of individual rights under the current *Extradition Act*,[3] (the *Act*) in the context of extradition requests for prosecution of alleged criminal offences that occurred primarily, or entirely, within Canada's territorial jurisdiction. Approached from another angle, this thesis is concerned with extradition for criminal offences that Canada could presumably have prosecuted domestically, and thus could have retained responsibility for the enforcement of rights protections throughout the individual's interactions with the criminal law system. In studying this phenomenon, this project uses a mix of doctrinal and empirical methods to analyse both the law as it is, and the law as it is practised. The outcomes of this study raise serious concerns about the adequacy of right protections in Canadian extradition law and practice, both in terms of the legal tools available for the individual facing extradition to demand enforcement of their rights, and in terms of the ability for key state actors to adequately protect these rights.

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[1] As best as this author can tell, there have been no cases of Canada requesting or securing the return of an individual following the extradition of that individual, such as if the death penalty is sought by prosecutors in the requesting state, or a breach of the rule of specialty.
[2] Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act, 1982* (UK), 1982, c 11 [*Charter*].
[3] SC 1999, c 18 [*Act*].

Ultimately, this thesis argues that the current state of rights protections in Canadian extradition law, at least where the person is sought for prosecution of alleged criminal offences committed within Canada's territory, fails to provide meaningful protection for the affected individual's constitutional rights. These failures appear to be the result of both design and implementation of the *Act* and the *Charter*, by both the Minister of Justice and by appellate courts. The result is a relationship between the Minister of Justice and the individual in which executive power largely goes unchecked when the latter decides to abdicate responsibility towards the individual.

After this first introductory chapter, this project is divided into three substantive chapters and a brief conclusion. The second chapter will review existing academic literature relevant to the project. Canadian extradition has been largely understudied in legal scholarship, with the most recent book-length treatment of the topic, outside of professional guidebooks or annotated legislation, published in 1991 before the most recent *Act* came into effect. More recent trends in writing about Canadian extradition tend towards case commentaries. Literature regarding extradition and international human rights will also be reviewed for its insights, as will some administrative law literature.

Chapter three dives into the state of domestic extradition law in Canada, and turns also to international law and jurisprudence, and two comparator jurisdictions. The doctrinal component will explore the current state of Canadian extradition law, grounding it in its history and context. This section will rely on a combination of sources, including legislation, treaties, the constitution, jurisprudence, the *Independent Report* on Dr Hassan Diab's extradition (the *Diab Report*),[4] and scholarship to sketch out the extradition process from arrest through surrender, including appeal and review mechanisms. Following the procedure set out in the *Act*, each step will be traced as the system acts upon a sought individual. The responsibilities of the executive and the judiciary will be delineated in their relation to this sought individual, with particular focus on the rights available at various stages. This chapter will then turn to international human rights law and international human rights jurisprudence, as well as comparator jurisdictions, in order to provide further insight into the state of Canadian extradition law and practice. This chapter ends with preliminary

[4] Canada, Department of Justice, *Independent Report on the Extradition of Dr Hassan Diab*, by Murray Segal (May2019) [Diab, *Independent Report*].

conclusions regarding the state of rights protection in Canadian extradition law where the alleged criminal offences occurred primarily or entirely in Canada.

Chapter four comprises the empirical research, studying all available published extradition decisions between 17 June 1999 (the date on which the current *Act* came into effect), and 31 December 2020 in which requesting states sought the extradition of individuals for prosecution of alleged criminal offences which were largely or entirely committed within Canada's territorial jurisdiction. This dataset comprises 166 cases resulting in decisions for 197 individuals sought for extradition for prosecution of alleged criminal offences occurring primarily or entirely in Canada. This chapter will analyse this data on a variety of variables aimed at discovering how both courts and Ministers of Justice reach their decisions. This chapter ends with discussion and conclusions regarding the dataset, and particularly how it relates to the doctrine discussed in the previous chapter.

The fifth and concluding chapter proposes both short and long-term solutions to the state of Canadian extradition law and practice, with an emphasis on protecting the rights of the sought individual as a core value moving forward. This chapter is brief as it is intended mostly as a gesture to future research and analysis, whether by myself or by other scholars after reading the present work.

It is hoped that this project will contribute to the ongoing study of extradition in Canada on a few fronts. First, it confronts an original concern not heretofore specifically treated in existing scholarship: that of extradition where the alleged criminal activities occurred primarily or entirely within Canada, the state receiving the extradition request. Second, this project comprises a significant empirical study of a specific subset of extradition cases, allowing for some insight into the on-the-ground practice in this area of law and the implementation (or not) of legal doctrine. Finally, this project introduces proposals, both immediate and longer term, to render extradition a more rights-sensitive field of law. Without further delay, let us now turn to the existing literature on extradition law in Canada and its related subjects.

Chapter 2: Literature Review: A Field of Few Voices

1. Canadian Extradition Legal Scholarship

Canadian extradition is an understudied subject in legal scholarship. As a result, a few scholars have had perhaps outsized effects on the trajectory of the scholarship that have remained largely unchallenged over time. The primary voices in this conversation have been, to date: Justice Gérard V La Forest and later his daughter Anne Warner La Forest; Joanna Harrington; Gary Botting; and Robert J Currie.

1.1 The La Forest Factor[5]

One central voice in this body of work is that of Justice Gérard V La Forest, prior to his appointment as a judge of the New Brunswick Court of Appeal. In 1961, he published *Extradition To and From Canada*; a second edition was published in 1977 and a third by his daughter Anne Warner La Forest in 1991.[6] Both also served as deans of law at some point in their careers, at the University of Alberta (GV La Forest) and the University of New Brunswick (AW La Forest). In the preface to the second edition, GV La Forest states that he wrote the first edition at the behest of the Canadian Department of Justice, who had approached him in 1957 to prepare an outline of Canadian extradition law.[7] This outline was later expanded to book length and published, and revised for 1977.[8] The preface to the second edition acknowledges the assistance and contributions of several collaborators: one law professor from Osgoode Hall Law School, one member of the Canadian Law Information Council, his two secretaries, and six government lawyers working at either the Department of External Affairs or the Department of Justice.[9] A marked absence of voices from the defence bar informed GV La Forest's work.

The second and third editions follow similar outlines. First, they trace the history of extradition, from pre-confederation extradition procedures primarily concerned with Great Britain's

[5] For simplicity, Gérard Vincent La Forest and Anne Warner La Forest will be referred to as GV La Forest and AW La Forest, respectively.
[6] The third edition was written by Anne Warner La Forest, Justice La Forest's daughter. Although the book contained legal updates that arose in the intervening years, no changes to structure or framing occurred.
[7] GV La Forest, *Extradition to and from Canada*, 2nd ed (Toronto: Canada Law Book Limited, 1977) at vii [GV La Forest, *2nd Edition*].
[8] *Ibid*.
[9] *Ibid* at vii-viii.

management of its international relations through to the present. Next, they review the general concepts of extradition law and the definition of an extradition crime, as well as its exemptions. The remainder of these works explains in detail the legal proceedings of extradition law as regards both requests received by Canada and those Canada makes abroad.

The books are very much a product of their originating raison d'être as an outline of extradition for the Justice Department, which is acknowledged by GV La Forest in the first edition.[10] As a document whose origin was use for official government purposes, it retains what Gary Botting has called a "pro-government bias."[11] The central concern of the works is explaining the law and process of extradition as it existed at the time of writing, for the benefit of the Department of Justice, the government department tasked with successfully carrying out extradition requests. As a result, the book's focus is on successfully completing an extradition, that is, ensuring the sought individual is returned to the requesting state. This appears to be based on a recognition of extradition's origins as a treaty-based procedure and the emphasis on fulfilling treaty obligations as a good member of the international community.[12]

In concentrating on and privileging the successful completion of extradition as almost a technical matter, these works lack substantive discussions of the rights or concerns of the sought individual in extradition, the other involved party besides states. This absence includes a lack of consideration for the good-faith fulfillment of treaty obligations arising from international human rights treaties alongside the obligations found in bilateral extradition treaties or the extradition provisions of multilateral treaties. These rights dimensions are usually treated as secondary considerations subordinate to government objectives and interstate reciprocity. However, it must be noted that the first two editions of the book, authored by GV La Forest, were published before the existence of the *Charter*. The legal landscape as it pertains to individuals as rights-holders who can make claims against the state, was different. The third edition, authored by AW La Forest, acknowledges the coming into force and influence of the *Charter* within the book, but notes the cautiousness of the

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[10] GV La Forest, *Extradition to and from Canada*, (New Orleans: Hauser Press, 1961) at vii; cited in Gary Botting, *Extradition Between Canada and the United States*, (Ardsley: Transnational Publishers, Inc,. 2005) at 22 [Botting, *Canada-United States*].
[11] Botting, *Canada-United States*, *supra* note 10.
[12] GV La Forest, *2nd Edition*, *supra* note 7 at 16-17. Anne Warner La Forest, *La Forest's Extradition To and From Canada*, 3rd ed (Aurora: Canada Law Book Inc, 1991) at 15, 22 [AW La Forest, *3rd Edition*].

courts in applying it in extradition.[13] The courts' cautiousness is reflected in the book; while there are revised subsections in the Chapter on "exemptions" to extradition to reflect rights-based claims (for example, the "nationals" exemption is now classified as "nationals and mobility rights"),[14] there is no independent section devoted to exploring the *Charter*'s impact on extradition law or practice, or analysing whether and to what extent it should impact the process. Instead, AW La Forest retains the structure and focus of earlier iterations of the work.

A second limitation of these works is that the legislative landscape of extradition changed significantly with the coming into effect of the *Act*. Prior to this Act, Canada practised extradition according to two statutes: the *Extradition Act*[15] for non-Commonwealth jurisdictions, and the *Fugitive Offenders Act*,[16] 1888, for Commonwealth rendition. In terms of understanding contemporary extradition practices and the legal technicalities, these works are of limited use.

A third limitation on these works is that their purpose is almost entirely descriptive, with little engagement with extradition law and process in a critical way. As mentioned above, this was deliberate; with its origins as a government document, GV La Forest refrained from criticisms of the law and chose to focus on its elucidation and clarification. At the same time, however, as a government document, its purpose in assisting the government's efforts is clear throughout. While GV La Forest, and later AW La Forest, refrain from critiquing or analysing the law and the process, their works implicitly defend the law and process as it existed at the time of writing, with emphasis on achieving the government's objectives.

However, these works are helpful in elucidating the historical origins of extradition in Canada, particularly its relationship to British colonisation of the land upon which Canada is founded and the early confusion and overlap of various Canadian and British statutes prior to and post-Confederation. In 1981, a few years after the second edition was published, GV La Forest became a judge on the New Brunswick Court of Appeal, and in 1985, he became a judge on the Supreme

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[13] AW La Forest, *3rd Edition*, supra note 12 at 23.
[14] *Ibid* at xvi.
[15] *Extradition Act*, RSC 1985, c E-23. This statute dates to much earlier than the consolidated citation suggests. In fact, Part I of this act dates to *Extradition Act*, SC 1877, c 25, with minor amendments, according to AW La Forest, *3rd Edition*, supra note 12 at 6-7.
[16] *Fugitive Offenders Act*, RSC 1985, c F-32.

Court of Canada, where he remained until 1997.[17] As a Supreme Court justice, GV La Forest participated in numerous extradition cases; a search of the Court's online database reveals that GV La Forest participated in seventeen extradition judgments during this time, and wrote a majority, concurring, or unanimous decision in twelve of those cases.[18] This history, combined with the citation of the La Forest's Extradition works in jurisprudence at the Supreme Court, most recently in *MM v United States of America*,[19] and in lower courts as recently as January 2021,[20] suggests that the La Forest approach to extradition may have an dominating impact on extradition law. Botting describes this impact as "The La Forest Factor."[21]

A partial corrective to this narrative occurs in 2002, with the publication of an article by AW La Forest reviewing and critiquing the 1999 *Act*, in particular the lowered standards of evidence at the judicial stage at the expense of the liberty interests of the sought individual.[22] As AW La Forest elucidates, under the former *Act*, early *Charter* jurisprudence confirmed the constitutionality of the extradition hearing in part because of the evidentiary standards present at that stage in the pre-1999 legislation.[23] In particular, AW La Forest challenged the purported explanation of this change being related to addressing considerations from extradition partners with differently-structured criminal law systems, particularly civil law systems. She noted that there has been no discussion of when or whether problems with civil law systems had actually occurred.[24] In a novel turn for the La Forest lineage of scholarship, AW La Forest's article focused on how the balance between the rights of the sought individual and the state throughout the extradition proceedings is upset under the new *Act* as a result of these changes.[25] In reaching this conclusion, AW La Forest engages in a comparison with the extradition practices of England, New Zealand, Australia, and the United States regarding the evidentiary standards evinced by each in determining whether sufficient

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[17] "The Honourable Gérard Vincent La Forest," Supreme Court of Canada (2008), online: <https://www.scc-csc.ca/judges-juges/bio-eng.aspx?id=gerard-vincent-la-forest.>
[18] Author's calculations based on a search of Supreme Court judgments, using the Advanced Search option to return the results of full text search of decisions including the word "extradition" and selecting Gérard V La Forest from the Judges option as a judge who sat on the bench hearing the case.
[19] 2015 SCC 62 at para 70. [*MM v United States*]
[20] *USA v Sari*, 2021 BCSC 286 at para 42 citing *United States v Rogan*, 2014 BCSC 1016 at para 120.
[21] Botting, *Canada-United States*, *supra* note 10 at 22.
[22] Anne Warner La Forest, "The Balance between Liberty and Comity in the Evidentiary Requirements Applicable to Extradition Proceedings" (2002) 28:1 Queen's LJ 95 at 104 [AW La Forest, "Liberty and Comity"].
[23] *Ibid* at 117.
[24] *Ibid* at 98-99, 133.
[25] *Ibid* at 104.

evidence exists to pursue extradition, ultimately concluding that Canada had gone the farthest in lowering these standards.[26]

1.2 Joanna Harrington

Professor Joanna Harrington's extradition work has primarily concerned the relationship between individual human rights, extradition treaty obligations, and international human rights obligations, particularly those contained in the *International Covenant for Civil and Political Rights* (the *Covenant* or *ICCPR*),[27] through focus on specific points within the extradition process. Like the La Forests, Harrington identifies extradition as an act of a "sovereign and willing state," involving the surrender of an individual on request of another state.[28] Yet, she attempts to complicate the legal landscape of extradition by including international human rights obligations as a necessary and equal consideration alongside extradition treaties given that they are equally binding upon the state.[29]

In part, Harrington treats this as a corrective to the limitation of the *Charter*'s reach in extradition as a result of the high degree of deference accorded to the Minister in judicial review decisions, the difficulty in succeeding on a *Charter*-based challenge to a surrender order (it took until 2001 for such a claim to succeed), and the reticence and concern of the courts to apply the *Charter* extraterritorially.[30] In this context, international human rights obligations, considered as binding as extradition treaties, provides an alternative route for rights protections in extradition, rather than the *Charter* or protections offered by existing extradition law.[31] Harrington decries the lack of domestic courts' considerations of international sources of human rights obligations as an "absent dialogue," particularly as regards the jurisprudence of the United Nations Human Rights

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[26] *Ibid* at 140.
[27] 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976, accession by Canada 19 May 1976) [*ICCPR*].
[28] Joanna Harrington, "The Role for Human Rights Obligations in Canadian Extradition Law" (2005) Can YB Intl Law 45 at 45 [Harrington, "Human Rights Obligations"].
[29] *Ibid* at 46.
[30] *Ibid* at 91-92.
[31] "Alternative" meaning as a direct recourse of international mechanisms tied to these treaties, as well as the interpretive incorporation in *Charter* interpretation (per *Slaight Communications Inc v Davidson*, [1989] 1 SCR 1038) and statutory interpretation (*Baker v Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817).

Committee (the HRC).[32] Canada has had multiple extradition cases before the HRC; at the time of publication of this article and as noted by Harrington, the only successful application had been in the Ng case, and only on the point that the form of capital punishment faced by Ng (gas asphyxiation) violated article 7 of the *ICCPR* as this method of execution did not minimise the suffering of the executed individual.[33] Yet, and as Harrington notes, this case had limited domestic impact: Ng's HRC case has not been cited in subsequent jurisprudence and in at least one case, an attempt to bring an appeal based on this ruling was unsuccessful.[34] Although Harrington's arguments on this point are persuasive, particularly regarding the equal status of extradition treaties and human rights treaties in terms of their binding powers on states, in practice Canada's courts have continued to largely ignore the relevance of international sources of human right obligations in its own extradition jurisprudence.

Subsequent work by Harrington has focused more on interstate cooperation via extradition. Harrington has examined the possibilities and limitations of multilateral arrangements to facilitate extradition beyond the traditional bilateral treaty.[35] In addition, Harrington examined judicial responses to assurances and their efficacy in protecting human rights in a comment on the recent *Badesha* decision.[36] Harrington expresses some scepticism about whether the courts will hold the government to account regarding the latter's assessment of the sufficiency of the assurances received from the requesting state in response to specific concerns raised during the extradition process, and the capacity for the requesting state to fulfill the assurances it gives.[37] In the particular context of *Badesha*, Harrington points out the lack of follow-through on the Supreme Court's own reasoning: India is recognised as having submitted to the authority of international rights-monitoring mechanisms, but the court does not include that India, at the time of the article's

[32] Joanna Harrington, "The Absent Dialogue: Extradition and the *International Covenant on Civil and Political Rights*" (2006) 32 Queen's LJ 82 [Harrington, "Absent Dialogue"].
[33] *Ibid* at 105. At the time Harrington's article was published she mentions five different applications against Canada involving extradition, including one "extradition-by-deportation" case in *Judge v Canada* (111). For the case in question, see *Judge*, Communication No 829/1998, UN Doc CCPR/C/78/D/829/1998 (5 August 2003).
[34] Harrington, "Absent Dialogue," supra 32 at 71.
[35] Joanna Harrington, "Extradition of Transnational Criminals" in *Routledge Handbook of Transnational Criminal Law*, ed by Neil Boister & Robert J Currie (London: Taylor & Francis Group, 2014) 153 [Harrington, "Transnational Criminals"].
[36] Joanna Harrington, "Extradition, Assurances and Human Rights: Guidance from the Supreme Court of Canada in India v. Badesha" (2019) 88 SCLR: Osgoode's Annual Constitutional Cases Conference 273 [Harrington, "India v Badesha"].
[37] *Ibid* at 288.

publication, had not fulfilled its reporting obligation to the Human Rights Committee and was not a party state to the Committee Against Torture.[38] Harrington also notes the territorial complication in *Badesha*: the conspiracy charged occurred in Canada, and thus Badesha and his co-accused, Sidhu, could be prosecuted here based on a real and substantial link between the offence and Canadian territory.[39] The notion of "real and substantial link" arises, perhaps ironically, in Canadian criminal law, and is the test for establishing a sufficient territorial connection to Canada to prosecute someone for transnational criminal offences.[40] These factors, in Harrington's view, support the possibility of domestic prosecution or even a more creative option of negotiating a temporary surrender for the purposes of trial, with the return of Badesha and Sidhu to serve any sentences, an option present in some of the multilateral treaties including extradition provisions, to which both Canada and India are parties.[41]

1.3 Gary Botting

Gary Botting's work stands out for his full-throated critiques of the current extradition regime. In contrast to the works of the La Forests and Harrington, Botting's works directly attack the power of the executive in contrast to the judiciary and against the sought individual throughout the process. Beginning with his 2005 work examining Canada-United States extradition, Botting first traces the historical development of Canadian extradition law through its use in British colonisation of the territory now known as Canada to the present.[42] Botting concentrates here on the separation of powers in Canada between the judiciary and the executive over time, emphasising the shift in the balance brought by the 1999 *Act* and moving some tasks from the judge to the executive, such as receiving evidence that the sought individual faced a situation which breached their human rights, subject to judicial review – though highly deferential.[43] Botting also published a case comment expressing optimism about the outcome of the *Ortega* and *Ferras* Supreme Court

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[38] *Ibid* at 288. The Human Rights Committee and the Committee Against Torture will be described in greater detail in Chapter 3. For now, it suffices to say that the Human Rights Committee is the United Nations body responsible for hearing claims of state party violations of the *International Covenant on Civil and Political Rights*, and the Committee Against Torture performs the same function for the *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* (10 December 1984, art 27(1), 1465 UNTS 85 (entered into force 26 June 1987, ratification by Canada 24 June 1987) [*Convention Against Torture*]).
[39] Harrington, "India v Badesha", *supra* note 36 at 289-290.
[40] *Ibid* at 290.
[41] *Ibid* at 290-291.
[42] Botting, *Canada-United States*, *supra* note 10.
[43] *Ibid* at 270.

of Canada decisions as they restored judicial authority to engage in limited weighing of the evidence at the committal stage.[44] Botting's optimism was subsequently dampened by appeal courts' narrow interpretation of these cases.[45] Most of Botting's work since has been publishing and periodically updating his work *Canadian Extradition Law Practice*, which provides detailed commentary and cases for the entire *Act*, and includes several of the most used extradition treaties.[46]

1.4 Robert J Currie

Most recently, Robert J Currie has contributed to scholarship on Canadian extradition; unlike the previous authors, his work focuses primarily on international and transnational legal regimes, particularly international penal law and international human rights law, and Canada's place within these regimes. He co-edited, alongside Neil Boister, the *Routledge Handbook of Transnational Criminal Law*, which includes the aforementioned chapter by Joanna Harrington.[47] It also includes a chapter authored by Currie that reviews the disconnect between the transnational criminal law system (the development of international treaties aimed at suppressing drug trafficking, terrorism, and other criminal activities that may cross borders) and international human rights law.[48] Currie argues that transnational criminal legal instruments, being focused on crime suppression, did not consider human rights implications in any meaningful way, leading the two areas to develop largely in silos with little opportunity for the latter to impact the former.[49] His most recent book, published in 2020 and co-authored with Joseph Rikhof, reviews current Canadian extradition, alongside other state responses to crime that crosses borders, both legitimate (such as mutual legal assistance) and less so (abduction of accused individuals).[50] They also examine the interaction between human rights and extradition, both in Canada and in international jurisprudence.[51] Most

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[44] Gary Botting, "The Supreme Court 'Decodes' the *Extradition Act*: Reading Down the Law in *Ferras* and *Ortega*" (2007) 32:2 Queen's LJ 446.
[45] Gary Botting, *Canadian Extradition Law Practice*, 5th ed (Markham: LexisNexis Canada Inc, 2015) at 5 [Botting, *Extradition Law Practice*].
[46] *Ibid.*
[47] Harrington, "Transnational Criminals" *supra* note 35.
[48] Robert J Currie, "The Protection of Human Rights in the Suppression of Transnational Crime," in *Routledge Handbook of Transnational Criminal Law*, ed by Neil Boister & Robert J Currie (London: Taylor & Francis Group, 2014) 27.
[49] *Ibid* at 28.
[50] Robert J Currie & Joseph Rikhof, *International and Transnational Criminal Law*, 3rd edition, (Toronto: Irwin Law Inc, 2020) at 530.
[51] *Ibid* at Chapter 10.

recently, Currie has turned his attention to the committal phase of Canadian extradition practices, using the failures of the Diab case as a backdrop to argue in favour of reforms of this process to lend greater fairness between the sought individual and the Crown, as well as urging a judicial inquiry and Parliamentary action.[52]

1.5 Extradition Beyond La Forest, Harrington, Botting, and Currie

Beyond these five main authors, Canadian extradition law scholarship has mostly been limited to case commentary[53] and practitioner-focused books,[54] or subsumed within scholarship focusing on other legal or social phenomena.[55] Following the *Burns* decision, in which the Supreme Court mostly prohibited extradition without assurances where there was the possibility of the death penalty,[56] scholarship dissected the potential impacts of this decision. Some scholars contend that the decision serves to expand the Charter's impact extraterritorially.[57] Some, such as Cortland, went as far as suggesting this decision will create a safe haven for individuals accused of capital offences.[58] Bateman, in contrast, focuses on the Supreme Court's references to international norms and rules to suggest a turn towards "globalism" in the court's rights jurisprudence.[59] Still other scholars, like Schabas, have been less critical of the decision, instead examining the decision in the context of the global movement towards the abolition of capital punishment,[60] and as an

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[52] Robert J Currie, "Wrongful Extradition: Reforming the Committal Phase of Canada's Extradition Law" (2021) 44 Man LJ, forthcoming, available at SSRN: <http://dx.doi.org/10.2139/ssrn.3664754> at 43-46.

[53] See for example: Andrea Cortland, "United States v Burns: Canada's Extraterritorial Extension of Canadian Law and Creation of a Canadian 'Safe Haven' in Capital Extradition Cases" (2008) 40:1 U Miami Inter-Amer L Rev 139 [Cortland, "Capital Extradition Cases"]; Nick Kaschuk, "Manifestly Misinterpreted? The Test for Committal in *USA v Shephard* vs The Test for Committal in *USA v Ferras*" (2011) 15:3 Can Crim L Rev 337; David Murray, "Hands Across the Border: The Abortive Extradition of Solomon Moseby" (2000) 30:2 Canadian Review of American Studies 185 [Murray, "Solomon Moseby"]; Thomas Bateman, "The New Globalism in Canadian Charter of Rights Interpretation: Extradition, the Death Penalty, and the Courts;" (2003) 7:3 The Intl JHR 49 [Bateman, "New Globalism"].

[54] See for example: Elaine Krivel et al, *A Practical Guide to Canadian Extradition* (Toronto: Carswell, 2002).

[55] See for example: Kent Roach, "Section 7 of the Charter and National Security: Rights Protection and Proportionality versus Deference and Status" (2011) 42:3 Ottawa L Rev 337; Peter W Hogg, Allison A Bushell Thornton, & Wade K Right, "Charter Dialogue Revisited – or 'Much Ado About Metaphors'" (2007) 45 Osgoode Hall LJ 1.

[56] *United States v Burns*, 2001 SCC 7 at para 8 [*Burns*].

[57] Cortland, "Capital Extradition Cases," *supra* note 53; Bateman, "New Globalism," *supra* note 53.

[58] Cortland, "Extradition Capital Cases," *supra* note 53.

[59] Bateman, "New Globalism," *supra* note 53 at 51.

[60] William A Schabas, "Indirect Abolition: Capital Punishment's Role in Extradition Law and Practice" (2003) 25 Loy LA Int'l & Comp L Rev 581.

example of the ways in which states can structure their international relations in order to advance and protect individual rights in conjunction with state sovereignty considerations.[61]

Interestingly, extradition has also been featured as part of historical work that positions extradition in relation to the regulation of particular human bodies. For example, Hoy examines extradition as a method of control over sexual morality alongside border surveillance and "deprivation tactics" across the Canada-United States border in the nineteenth and twentieth centuries.[62] Border surveillance allowed both jurisdictions to control immigration and exclude individuals considered to be immoral or "deviant," which often had racialized and gendered implications based on the stereotypes commonly applied to certain groups at that time and the discretion afforded to immigration officials at the borders.[63] Deprivation tactics were used primarily against Indigenous populations and involved using mechanisms of social and economic control deployed by federal agents, such as limiting access to economic opportunities and rescinding status.[64] According to Hoy, extradition was more useful for securing the return of Euro-Americans and Euro-Canadians, because their relationship to their respective states kept them beyond the authority of racist and sexist immigration officials and Indian agents, who held no authority over them.[65] Extradition was simply another mechanism of control. Hoy notes the expansion of extraditable charges to include, "crimes against the family," such as abortion, child stealing, and rape in agreements between Canada, Great Britain, and the United States by the early twentieth century.[66] As Hoy notes, the inclusion of these criminal offences indicated their seriousness in the eyes of the respective

[61] Thomas Rose, "A Delicate Balance: Extradition, Sovereignty, and Individual Rights in the United States and Canada" (2002) 27 Yale J Int'l L 193.
[62] Benjamin Hoy, "Policing Morality: Regulating Sexuality across the Canada-United States Border." (2018) 99:1 Can Historical Rev 30 at 33. Sexual morality in the era under consideration encompassed a broad array of "non-conforming" or "deviant" behaviours, to use Hoy's words, and included but was not limited to the following: bigamy, interracial couples, non-marital cohabitation, divorce, child stealing, and abortion (*Ibid* at 33). This concern over sexual morality beginning in the late nineteenth century was a product of the proliferation of laws seeking to narrowly define marriage and family relationships occurring at the same time according to Christian standards (*Ibid* at 35).
[63] *Ibid* at 44-45. An egregious example of the interaction of racial and gender prejudice at the border was the view common to American immigration officials at the time, that Chinese women were likely to be "concubines, second wives, and prostitutes" (*Ibid* at 44).
[64] *Ibid* at 48-49. Per Hoy, these mechanisms of coercion were available to the state governments as a result of the relationship between the Canadian and American states and the Indigenous nations on whose lands they were founded.
[65] *Ibid* at 53.
[66] *Ibid* at 54.

jurisdictions, as it placed them on par with commercial fraud and crimes of violence (murder and arson) as being sufficiently serious to warrant international agreement.[67]

In a related vein, Canada's attempts to extradite several slaves who had escaped from the United States, particularly those who had been charged with criminal offences directly tied to their escape from bondage, have stirred some academic reflection.[68] Although they will be discussed in greater detail in Chapter 3, for present purposes, the extradition proceedings of Solomon Moseby and John Andersen have drawn attention for the legal and ethical issues they raised, and community responses, such as the role the Canadian Black community played in preventing Moseby's extradition.[69]

This approximate grouping of scholarship about extradition as a tool for regulating human bodies, ties extradition as a legal process to its impact socio-politically, both domestically and transnationally, and raises in its own way the concern about Canada's complicity in upholding violent and oppressive structures through law. Additionally, in contrast to most extradition scholarship, these works centre the sought individual and concerns relating to these persons in the study of extradition. This framing is helpful, because it takes extradition beyond the confines of a courtroom or the office of the Minister of Justice, and into the societal realm.

The concerns identified above regarding the relationship between extradition and human rights obligations exist beyond the Canadian context. van der Wilt explores similar tensions to those identified by Harrington regarding the relationship between international human rights and extradition, with a primary focus on the European Court of Human Rights.[70] In the course of this exploration, van der Wilt characterises the international regime as one of conflict avoidance when it comes to the relationship between extradition and human rights and looks at the mechanisms available to states to mediate this interaction.[71] van der Wilt notes that states prioritise harmonious

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[67] *Ibid* at 54.
[68] Donald V Macdougall, "Habeas Corpus, Extradition and a Fugitive Slave in Canada" (1986) 7:2 Slavery & Abolition 118; Murray, "Solomon Moseby," *supra* note 53.
[69] Murray, "Solomon Moseby," *supra* note 53 at 187.
[70] Harmen Van der Wilt, "On the Hierarchy between Extradition and Human Rights," in *Hierarchy in International Law: The Place of Human Rights*, ed by Erika De Wet & Jure Vidmar, (Oxford: Oxford University Press, 2012) at 148 [Van der Wilt, "On Hierarchy"].
[71] *Ibid* at 151, 164-169.

relations amongst each other and where there is the potential for conflict, states choose the option most likely to maintain that harmony, which he suggests subverts the expectation that human rights and extradition must inevitably collide.[72] Key to this framing and to states' reasoning is that human rights violations in extradition are primarily prospective – they have not yet occurred (unless the extradition process itself infringes someone's human rights).[73] van der Wilt then surveys a variety of what he names "avoidance techniques:" options such as assurances, or the existence of domestic remedies for rights breaches in the requesting state, allow states to avoid conflict that may arise from a refusal to extradite, by gesturing or indicating that the human rights of the sought individual will be protected in the requesting state.[74] Ultimately, van der Wilt concludes that, beyond the absolute nature of the right not to be subjected to torture or other inhuman or degrading treatment, no primacy of human rights over extradition exists, and considerable murkiness exists regarding human rights' place in extradition.[75]

1.5 Administrative Law and Extradition

Extradition sits at the crossroads of several distinct fields of law. One field of particular import given the nature of this project is that of administrative law: as will be further explored in Chapter 3 below, surrender orders from the Minister of Justice are reviewable by provincial courts of appeal on a reasonableness standard. Thus, a brief review of Canadian administrative law scholarship is warranted.

Liston contends that administrative law is central to the rule of law because the latter principle requires legal constraints on political power.[76] Liston's framing is particularly useful when considering the relationship between administrative law principles and extradition, given that the surrender decision, taken by the Minister of Justice, is considered a deeply political decision.[77] A

[72] *Ibid* at 150.
[73] *Ibid* at 150, 157.
[74] *Ibid* at 173, 150-151.
[75] *Ibid* at 172-173.
[76] Mary Liston, "Administering the Canadian Rule of Law" in *Administrative Law in Context*, 3rd edition, ed by Colleen M Flood & Lorne Sossin (Toronto: Emond Montgomery Publications Ltd, 2018) at 142 [Liston, "Canadian Rule of Law"].
[77] *Idziak v Canada (Minister of Justice)*, [1992] 3 SCR 631, 1992 CanLII 51 at p 658 Cory J.

tension explored by Liston is the limits of review jurisdiction by the courts and the impact of such review on the separation of powers.[78]

In terms of extradition, however, Liston's framing of administrative law is incomplete. Extradition, in contrast to most administrative decision-making processes, is not just political in the generic sense of the locus of institutional decision-making but deeply political in the sense of allowable and relevant substantive considerations centred on diplomatic relations and comity. Extradition pits political considerations against individual human rights in a heightened way compared to many other areas of standard political decision-making. For this reason, literature focusing on the interaction between international human rights law and administrative law is particularly helpful, because of the interaction between Canada's domestic laws and its international obligations.

Much of the recent literature on this point has been inspired by *Baker v Canada (Minister of Citizenship and Immigration)*.[79] Heckman, for instance, notes that international law is particularly helpful in defining the contours of government discretion, within administrative law and in terms of constitutional law.[80] International human rights law can assist in determining the obligations that states owe non-citizens.[81] Similarly, Scott praised the decision for elaborating on the principle that domestic law should be interpreted with a presumption that the legislature intended legislation to be in conformity with international law.[82] Indeed, this particular understanding of international law's interaction with domestic law would be especially useful for examining the relationship between domestic and legal obligations in extradition contexts, given the interplay between

[78] Liston, "Canadian Rule of Law," *supra* note 76 at 143, 162.
[79] *Baker*, *supra* note 31. Briefly, this decision appealed a refusal of a humanitarian and compassionate application to halt her deportation, a decision delivered without reasons by the Immigration and Refugee Board. Baker had a significant impact on immigration law and administrative law more generally. Amongst its contributions, the Supreme Court of Canada provided for a general duty to provide reasons in administrative decisions, specified requirements for procedural fairness, and directly applied international human rights law it its decision, specifically regarding the requirement to consider the best interests of children pursuant to the *Covenant on the Rights of the Child*, 20 November 1989, Can. T.S. 1992 No. 3, 28 I.L.M. 1448, UN GAOR, 44th Sess., Supp. No. 49, UN Doc. IRES/44/25 (entered into force 2 September 1990, entered into force for Canada 13 December 1991).
[80] Gerald Heckman, "International Human Rights Norms and Administrative Law" in *Administrative Law in Context*, 3rd edition, ed by Colleen M Flood & Lorne Sossin (Toronto: Emond Montgomery Publications Ltd, 2018) at 570.
[81] *Ibid* at 572.
[82] Craig Scott, "Canada's International Human Rights Obligations and Disadvantaged Members of Society: Finally Into the Spotlight?" (1999) 10:4 Const Forum Const 97 at 100.

extradition treaties, the *Charter*, the *Act*, and international human rights instruments, and given the centrality of ministerial discretion at the nexus of these interplaying normative sources.

However, not all scholars took an optimistic approach to the impact of *Baker*, and their concerns may help illuminate the limitations of international human rights law in extradition contexts, in their focus on both *Baker* and post-*Baker* jurisprudence. Shortly after *Baker* was released, Norman reviewed the language used in this decision in the context of the Canadian Department of Foreign Affairs' statement that it would not expect other states to meet rights standards that Canada does not itself apply.[83] Norman compares Canada's reluctant approach to giving effect to international human rights instruments domestically, particularly by the executive, to other common law jurisdictions, such as Australia, New Zealand, and India, in which their ratification of international human rights treaties led to courts using arguments based in these laws to invalidate state acts which breached the rights contained therein.[84]

Ultimately, and although the impact of international human rights law on Canadian extradition practice is debatable, as will be elaborated upon in Chapter 3, Heckman's and Scott's discussion about international law's impact on the interpretation of substantive law remains useful when thinking about extradition, and in particular, the capacity of international human rights law to de-centre citizenship as a precondition to holding certain rights.[85]

1.6 Prosecutorial Discretion

Finally, literature relating to prosecutorial discretion provides some useful parallels with the Minister's discretion regarding surrender in an extradition context. In the criminal law context, prosecutors are engaged to act in the public interest in charging and prosecuting individuals accused of committing criminal infractions.[86] In carrying out this function, prosecutors have traditionally been given a broad area of discretion in all aspects of their role, largely shielded from judicial interference. In Canada, criminal prosecutors report to the Attorney General (of a province

[83] Ken Norman, "Taking Human Rights Lightly: A Canadian Approach" (2001) 1 NJCL 291 at 292, 296-297.
[84] *Ibid* at 298-305.
[85] Heckman, *supra* note 80 at 572.
[86] Philip C Stenning, "Discretion, Politics, and the Public Interest in 'High-Profile' Criminal Investigations and Prosecutions" (2009) 24:3 CJLS 337 at 337.

or of the federal government, as the case may be) who is ultimately answerable to the legislature; according to some, this chain of accountability is sufficient oversight without any oversight by the courts beyond the highly limited cases in which prosecutorial discretion can be challenged.[87] Moreover, Gorman argues that the Charter's implementation serves to constrain further prosecutorial discretion.[88]

There are certain notable parallels between the criminal prosecutor (acting in the name of the Attorney General) and the Minister of Justice (the same person as the Attorney General but wearing a political hat) in extradition matters. First, the actions of both determine a given individual's fate in legal processes that inherently impact on that individual's rights in contexts which, at minimum, evoke the criminal and carceral institutions of the state. Moreover, the Minister of Justice and the Attorney General serve core functions relating to assuring the legality of state actions. But this comparison is not perfect. A notable limitation of equating the Minister of Justice to a criminal prosecutor is that the role of the Minister of Justice is closer to decision-making of a more political sort. More fundamentally, the Minister of Justice does not act in the public interest in the sense of the prosecutor (and Attorney General) but rather is supposed to somehow act both in Canada's public interest and as the "lawyer" for the requesting state. As will be further elaborated in Chapter 3, the International Assistance Group, the division of the Justice Department who receive and respond to extradition requests, effectively acts in a partisan manner (in the sense of party-serving) on behalf of the requesting state. In Canada, the positions of the Attorney General and the Minister of Justice are occupied by the same person. As some measure of the attempt to keep these roles separate, the International Assistance Group in practice deals with the Minister of Justice's obligations under the *Act*, while those attributed to the Attorney General are usually assumed by counsel from the Attorney General's office.[89] As has previously been stated, and as will be expanded upon below, the Minister's decision is primarily political, weighing competing interests in carrying out their functions. These differences serve to guide the scope of the relevance of literature relating to prosecutorial discretion.

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[87] JA Ramsay, "Prosecutorial Discretion: A Reply to David Vanek" (1988) 30:3 Crim LQ 378 at 379.
[88] Wayne Gorman, "Prosecutorial Discretion in a Charter-Dominated Trial Process" (2000) 44:1 Crim LQ 15 at 18.
[89] Segal, *Independent Report*, *supra* note 4 at 19. See also Currie & Rikhof, *supra* note 50 at 547. The exception to the delegation of the Minister of Justice's duties is the decision to surrender, a decision which must personally be taken by the Minister of Justice.

2. Territoriality and Jurisdiction Scholarship

The second major cluster of scholarly work that has relevance to this project is that pertaining to territoriality and jurisdiction and the ways in which these two notions interact (and occasionally conflict). Since extradition serves as a legal meeting ground of sorts for the criminal laws of different jurisdictions, notions of jurisdiction in criminal and public law must be understood. The criminal law in Canada, as in much of the common law world, relies primarily though not exclusively on territorial jurisdiction to undergird courts' authority to adjudicate prosecutions of such offences.[90] This principle states that the territory in which the offence is committed, forms the basis of the competence of a court to entertain a criminal prosecution of the accused person. However, there are important exceptions to this principle in Canadian criminal law. For example, section 7(1) of the *Criminal Code* sets out the scenarios in which alleged offences committed on aircraft count as having been committed in Canada; section 7(2.3) covers criminal offences committed by Canadians aboard the International Space Station or transportation to or from the Station; and sections 476 and 477.1 govern, in part, Canada's jurisdiction over alleged offences committed beyond the jurisdictional limits of any given state.

Lindsay Farmer notes that territorial jurisdiction as the basis of criminal law has been mostly well-settled in common-law criminal law since the late nineteenth century.[91] Although his focus is primarily on the development of jurisdiction for purposes of criminalizing conduct and prosecuting that conduct, his conclusions are applicable to the context of extradition, given that extradition is a facilitative institution for the effective operation of criminal law. Specifically, Farmer contends that jurisdiction issues are directly connected to articulations of the scope of substantive criminal law and its normative power – that is, a court's claim of competence to try someone for a given criminal offence is tied both to how the criminal law itself claims power over the individual and the offence, and whether the standards the law's claims set are accepted as having power.[92] Farmer identifies two elements of jurisdiction: venue and ambit.[93] Venue refers to a court's competence

[90] This principle is enshrined in section 6(2) of the *Criminal Code*, RSC 1985, c. C-46.
[91] Lindsay Farmer, "Territorial Jurisdiction and Criminalization" (2013) 63:2 UTLJ 225 at 232 [Farmer, "Territorial Jurisdiction"].
[92] *Ibid* at 229.
[93] *Ibid* at 230.

to try a particular offender or offence.[94] Ambit references the substance of law: specifically, whether the criminal law applies to particular conduct.[95] Together, these components shape what Farmer terms the "paradigm" of territorial jurisdiction in English criminal law (from which, it should be recalled, Canadian law in this realm is originally derived). This paradigm solidifies the state's authority of conduct occurring within its territorial boundaries and ties the concept of territorial jurisdiction to the earliest days of criminal law and its use of juries pulled from the locality specifically for their local knowledge.[96]

Yet, it was recognised early on that extraterritorial extension of criminal jurisdiction on land may be necessary for national security, particularly for crimes of treason, and by the nineteenth century expanded to include preparing to cause an explosion within Her Majesty's dominions.[97] Additionally, the British Crown asserted jurisdiction on British individuals committing criminal offences abroad on the basis that they were its subjects[98] – that is, the British Crown asserted personal jurisdiction.[99] This was further expanded in the late nineteenth century through formal agreements with other states, those that were non-Christian or Muslim – most importantly, with the Ottoman Empire.[100] These agreements, known as capitulations, permitted British subjects who committed criminal offences in one of these other jurisdictions to be returned to Great Britain to be tried.[101] According to Farmer, this ensured that accused persons faced trials while also shielding them from the alleged "barbarism" of the Ottoman Empire.[102] This expansion of criminal jurisdiction by attaching power over individuals based on their relationship to the jurisdiction seeking to exert that power, provides a useful perspective on assertions of jurisdiction into Canadian territory by other states and on the use of broad extra-territorial assertions of the criminal law power over nationals even in the common law. Finally, Farmer's work also raises questions

[94] *Ibid* at 230.
[95] *Ibid* at 231.
[96] *Ibid* at 233.
[97] *Ibid* at 236.
[98] *Ibid* at 236.
[99] Or in public international law terms, nationality jurisdiction.
[100] Farmer, "Territorial Jurisdiction," *supra* note 91 at 237.
[101] *Ibid* at 237.
[102] *Ibid* at 237. One could argue that the United Kingdom did not have much of a leg to stand on insofar as charges of "barbarism" – given the violence it inflicted around the globe against the original inhabitants of its colonies done for political and economic gain. Additionally, the use of the death penalty was still in effect for many criminal offences.

regarding offences committed beyond the territory of any particular state – most notably criminal offences occurring at sea – which have been resolved by English courts via notions of territorial jurisdiction as applied to ships, and the mechanisms of authority which allow such a claim to be made.[103]

Extradition and criminality have been explored somewhat in the context of jurisdiction and territoriality concerns. A clear voice in this discussion is that of Neil Boister, who has advocated for a notion of universal extradition to facilitate criminal prosecution in an era of increasingly "globalised crime."[104] In order for this to occur, extraterritorial application of criminal jurisdiction would be necessary,[105] as would the recognition of the world as a singular community for this legal purpose, rather than a society of states.[106] It must be noted that in making this argument, Boister clearly assumes that crime suppression is an important goal that all states have in common.

In contrast, Edward Morgan provides a more nuanced examination of extraterritoriality and criminal offences.[107] He notes that while much of international law is effectively disputes over jurisdiction, in practice, international courts frequently rely on domestic courts' interpretations of the rules and observations of domestic practice in resolving these disputes.[108] He argues that the law as it stood at the time of writing provides no clear answers to the question of territorial jurisdiction. At the same time, Morgan notes that individual persons tend to be seen as members of national communities and are responsible primarily to these communities and can only be made to answer to a foreign jurisdiction when they are within the territorial bounds of that nation.[109]

Given the nature of extradition, transnational and international explorations of jurisdiction are also helpful in this project. Although his focus is private international law, Andreas Lowenfeld's work serves well as a starting point for extradition, particularly his 1996 collection of essays originally

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[103] See for example the discussions about the HMS Wasp and the Franconia (*R v Keyn*, [1876] 2 Ex Div 63 (CCR)) cases at Farmer, "Territorial Jurisdiction," *supra* note 91 at 226-228.
[104] Neil Boister, "The Trend to Universal Extradition over Subsidiary Universal Jurisdiction in the Suppression of Transnational Crime." (2003) Crim Justice New Society 287 at 287-288.
[105] *Ibid* at 298.
[106] *Ibid* at 311.
[107] Edward M Morgan, "Criminal Process, International Law, and Extraterritorial Crime" (1988) 38:3 UTLJ 245.
[108] *Ibid at 247-248, 253.*
[109] *Ibid* at 255.

given as lectures at the Hague Academy of International Law. Throughout this work, Lowenfeld examines facets of jurisdiction in its private international law understandings before ultimately advocating for a principle of reasonableness in resolving jurisdictional problems.[110] He grounds this principle in a concern over ensuring the law's responsiveness to practical considerations and a rejection of a rigid private-public international law divide. Instead, as Lowenfeld demonstrates repeatedly throughout these essays, public law, and public international law, encroach regularly in the course of doing private international law.[111] The parallels between private international law and extradition practices are clear: both fields of law deal with law conducted by two (or more parties) across national boundaries, often in the absence of a supranational adjudicative body to deal with matters and disputes that arise.

[110] Andreas F Lowenfeld, *International Litigation and the Quest for Reasonableness: Essays in Private International Law* (Oxford: Oxford University Press/Clarendon Press, 1996) at 228.
[111] See for example: *Ibid* at 3, 119, 220 and 227.

Chapter 3: Extradition Doctrine: What do we Call a Gathering of Red Flags?[112]

1. History of Extradition in Canada

1.1 The Roots of Extradition

A side effect of the limited literature about extradition is that few accounts of its history exist, and the accounts that do exist sometimes disagree regarding the proper understanding of extradition's history in Canadian law and on Canadian territory. The following section will provide a brief overview of this history, indicating where disagreements regarding the proper interpretations exist.

Extradition as practised by the Canadian state finds its origins in European colonisation of North America, and specifically English colonisation. Signed in 1794, the *Treaty of Amity, Commerce and Navigation*[113] (commonly known as the *Jay Treaty*) between Great Britain and the newly formed United States of America governed a series of considerations intended to ease tensions between the two entities following the American War of Independence and included *inter alia* an early provision dealing with what is now known as extradition but was then called "delivery" or "delivering up."

Most of the terms of the *Jay Treaty* are concerned with the access to, management of, and the demarcation of territory.[114] In doing so, the *Treaty* makes frequent reference to the *Definitive Treaty of Peace 1783* (the *Peace Treaty*) which brought an official end to the American War of Independence.[115] It should be noted early that neither the *Peace Treaty* nor the *Jay Treaty* appear to take much note of the Indigenous nations who already inhabited the land contained within the territorial claims the respective colonial powers made. Rather, the two treaties between the United States and Great Britain operate on the assumption that each had legitimate claims to the territories covered by the treaties.

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[112] As an articling student I had the privilege of working on a few of the cases mentioned in this chapter and the next. To safeguard confidentiality these cases will not be pointed out.

[113] *Treaty of Amity, Commerce, and Navigation between the United Kingdom and the United States of America*, United States and United Kingdom, 19 November 1794 (entry into force 28 October 1795, proclaimed 29 February 1796). [*Jay Treaty*]

[114] For examples of discussion about territorial boundaries, see *Ibid* articles 3-5, 9, 14.

[115] *The Definitive Treaty of Peace and Friendship Between His Brittanick Majesty and the United States of America, United States and United Kingdom*, 3 September 1783 (entry into force 12 May 1784).

As mentioned, extradition was also covered by the *Jay Treaty*. Article 27 states:

> It is further agreed that His Majesty and the United States on mutual Requisitions by them respectively or by their respective Ministers or Officers authorized to make the same will deliver up to Justice, all Persons who being charged with Murder or Forgery committed within the Jurisdiction of either, shall seek an Asylum within any of the Countries of the other, Provided that this shall only be done on such Evidence of Criminality as according to the Laws of the Place, where the Fugitive or Person so charged shall be found, would justify his apprehension and commitment for Tryal, if the offence had there been committed. The Expence of such apprehension and Delivery shall be borne and defrayed by those who make the Requisition and receive the Fugitive.[116]

The language of the *Jay Treaty* clearly indicates two elements undergirding the exercise of authority for the purpose of extradition. First, the person must be charged with committing murder or forgery (no other crimes being referenced) within the jurisdiction of the requesting party. Second, the person must be found within "any of the Countries" of the other party to the treaty. Viewed in context, and particularly the shared common law tradition of Great Britain and the United States, the focus on the jurisdiction of the criminal offence in the context of a treaty focused largely on regulating relations and borders between two hostile powers, suggests a focus on territoriality as regards the criminal offence.

The *Jay Treaty* expired in 1807, and a new treaty governing Great Britain and the United States relations containing an extradition provision was not signed until 1842 – the *Webster-Ashburton Treaty*.[117] Interpretations of extradition practice in this period differ. Per AW La Forest, Canada practised extradition from the signing of the *Jay Treaty* and past its expiry, pointing to multiple examples of extraditions apparently sanctioned by the courts in both Upper Canada and the United States during this interlude.[118] However, Botting disagrees, highlighting that "[t]here is no evidence to support this assertion."[119] He notes that American policy as expressed by the federal government largely discouraged extradition of fugitives and there was jurisdictional wrangling between some of the states and the federal government over the authority to extradite, and within

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[116] *Ibid* at article 27.
[117] *Treaty to Settle and Define the Boundaries between the Territories of the United States and the Possessions of Her Britannic Majesty in North America, for the Final Suppression of the African Slave Trade, and for the Giving Up of Criminals Fugitive from Justice in Certain Cases*, United States and United Kingdom, 9 August 1842 (entered into force 10 November 1842). [*Webster-Ashburton Treaty*]
[118] AW La Forest, *3rd edition*, *supra* note 12 at 3.
[119] Botting, *Canada-United States*, *supra* note 10 at 40, footnote 35.

the federal government whether the *Jay Treaty* required legislation for it to take effect.[120] In practice, only one extradition took place from the United States to Canada under the *Jay Treaty*, and there is no evidence of a request made by the United States to Canada during this time frame.[121] During the period between 1807 and 1842, courts on both sides of the border grappled with the legitimacy of extraditing alleged fugitives from justice in the absence of a treaty – and, in the United States, whether states could formulate requests or whether this was the sole prerogative of the federal government. AW La Forest contends that extraditions did occur, pointing to the surrender by Upper Canada of Joseph Fisher in 1827.[122] In this case, the Court of Queen's Bench in Montreal relied not on jurisprudence or existing British law but on legal theorists to support the decision that extradition was a "moral duty" in the interests of comity among nations.[123] However, Botting notes two problems with AW La Forest's assertion: first, Fisher's case, being in Montreal, was actually decided in Lower Canada; second, that the surrender decision would have fallen to the Lieutenant Governor of Lower Canada; by 1829 Fisher remained there, suggesting that despite the court's ruling no surrender had been ordered by the Lieutenant Governor.[124]

In 1833, the *Fugitive Offenders Act* came into effect in Upper Canada, which allowed for extradition of fugitives from Upper Canada to elsewhere; the power was conferred on the Lieutenant Governor, but he was allowed to refuse if extradition would be inexpedient.[125] Most notably, it operated in absence of any treaty. It was the earliest legislation dealing with extradition in British North America and served as enacting legislation for the *Webster-Ashburton Treaty* between the United States and Great Britain, which took effect in 1842.[126]

Both Botting and AW La Forest questioned the validity of this statute, as did Great Britain.[127] Botting notes that in practice, the only fugitives who were pursued under the 1833 *Act* were

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[120] *Ibid* at 40-42.
[121] *Ibid* at 42, 40.
[122] AW La Forest, *3rd Edition*, *supra* note 12 at 3.
[123] Botting, *Canada-United States*, *supra* note 10 at 54.
[124] *Ibid* at 54, footnote 70.
[125] Philip Girard, *A History of Law in Canada Volume 1, Beginnings to 1866* (Toronto: University of Toronto Press, 2018) at 670-671.
[126] AW La Forest, *3rd Edition*, *supra* note 12 at 3.
[127] *Ibid* at 3; Botting, *Canada-United States*, *supra* note 10 at 67. Specifically, it did not seem to be within the legislative competence of Upper Canada to pass legislation concerning extradition, as this was a matter reserved for Great Britain.

runaway slaves escaping the United States; indeed, this may have been at least partly the impetus for the enactment of the legislation in the first place.[128] In 1833, the same year that Great Britain passed the *Slavery Abolition Act*,[129] a slavecatcher from the state of Kentucky entered the Niagara region seeking the returns of Jesse Happy and Solomon Moseby, both of whom were being sought for horse stealing directly connected to their respective escapes from enslavement.[130] Although Moseby's surrender was ordered, significant community organising, especially from the African Canadian community in Upper Canada, prevented his extradition from occurring and allowed Moseby to escape Canadian custody and flee to Britain.[131] In Happy's case, although the court ruled in favour of extradition, the Lieutenant Governor declined to surrender him due to insufficiencies in the evidence.[132] In 1841, Upper Canada surrendered to the United States a formerly enslaved man named Nelson Hackett for having allegedly stolen a horse, a saddle, a watch, and a coat from his master when he escaped.[133] This decision was met with outrage in Canada and Britain and no further extraditions occurred.[134] This case also marked at least the third time an extradition case involving someone who had escaped slavery in the United States made it before Canadian courts.

The 1833 Upper Canada *Act* was superseded in 1843 by the British *Apprehension of Offenders Act*.[135] A back-and-forth of extradition legislation between the places that became Canada, and the

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[128] Botting, *Canada-United States*, *supra* note 10 at 67. Botting highlights that the chief architect of the legislation, John Beverley Robinson, was very keen to keep out of Upper Canada, people he deemed undesirable "aliens," especially fugitives from the United States, and that while a member of the Assembly of Upper Canada, he led the legislature in imposing discriminatory practices on Blacks in the colony (*Ibid* at 66). He became a Chief Justice of Upper Canada, and in a disturbing parallel to the La Forest factor described in Chapter 2, was an interpreter of the very laws he helped craft, including in the extradition case of Jesse Happy in 1833 under the *Fugitive Offenders Act* (*Ibid* at 67-68).

[129] (UK) 3 & 4 Will IV., c 73. This law abolished slavery across the British Empire, including Canada, and took effect on 1 August 1834.

[130] Murray, "Solomon Moseby," *supra* note 53 at 187, 189-190.

[131] *Ibid* at 188.

[132] Botting, *Canada-United States*, *supra* note 10 at 68.

[133] *Ibid* at 68-69. Botting notes that Hackett was never tried in the United States but was instead returned to his master – because for Hackett to be tried, he would have to have been acknowledged as human, not chattel (*Ibid*).

[134] *Ibid* at 70. It should be noted that this pause in the extradition was not indefinite; extradition resumed with the *Webster-Ashburton Treaty*, *supra* note 117, on at least one further occasion did Upper Canada attempt to extradite another escaped slave: John Anderson (Botting, *Canada-United States, supra* note 10 at 83). This was another case on which sat Chief Justice Robinson and ordered extradition (*Ibid* 85). The extradition was eventually overturned due to a clerical error on the warrant (*Ibid* 83).

[135] AW La Forest, *3rd Edition*, *supra* note 12 at 3-4; *An Act for the better apprehension of certain offenders*, 1843 (6 & 7 Vict. C. 34).

United Kingdom, continued until 1882, when Great Britain suspended the application of its *Extradition Act* in Canada.[136] In its place, the earlier Canadian *Extradition Act*, 1877, became the supreme legislative act in Canada.[137] However, Canada as a British possession continued to be subject to the extradition treaties entered into by Great Britain at this time and leading up to the First World War.[138] In fact, Canada as an independent state did not enter into its own extradition treaties until the 1960s, although it continued to be bound by treaties signed by Great Britain, and it amended or entered into new treaties with existing extradition partners.[139] Of these treaties, the most significant for the purposes of this thesis are the *Treaty on Extradition Between the Government of Canada and the Government of the United States of America*[140] and the *Protocol Amending the Treaty on Extradition Between Canada and the United States of America Signed at Washington on December 3, 1971, as Amended by an Exchange of Notes on June 28 and July 9, 1974*,[141] which amended parts of the earlier treaty to render it more efficient. As will be seen in Chapter 4, these treaties have formed the basis of legal arguments against surrender in several cases in the dataset.

2. Contemporary Practice of Extradition

Contemporary extradition practice in Canada is governed by the *Act* of 1999 and the relevant extradition treaties. It is intended to be an "expeditious" process, in keeping with Canada's obligations to its extradition partners to fulfill its obligations promptly.[142]

2.1 Arrest and Judicial Interim Release

Sought individuals' introduction into the extradition system is usually via arrest. They will be arrested for one of two reasons, both emanating from the state seeking that individual's delivery into their jurisdiction. In the first, the requesting state sends a request for a provisional arrest

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[136] AW La Forest, *3rd Edition*, *supra* note 12 at 7.
[137] *Ibid* at 5-6. See also: *Extradition Act*, SC 1877, c 25.
[138] AW La Forest, *3rd Edition*, *supra* note 12 at 7.
[139] *Ibid* at 9.
[140] *Treaty on Extradition Between the Government of Canada and the Government of the United States of America*, United States and Canada, 3 December 1971, CTS 1976 No 3 (entered into force 22 March 1976) [*Canada-US Treaty*].
[141] *Protocol Amending the Treaty on Extradition Between Canada and the United States of America Signed at Washington on December 3, 1971, as Amended by an Exchange of Notes on June 28 and July 9, 1974*, United States and Canada, 11 January 1988, CTS 1991/37 (entered into force 26 November 1991) [*1988 Protocol*].
[142] *MM v United States*, *supra* note 19 at para 64.

warrant to Canada's Minister of Justice. If the Minister is satisfied that the offence for which the person is sought can be punished for a maximum of two years (or more) by the requesting state or is otherwise extraditable pursuant to the relevant treaty, and that the requesting state will make an extradition request, they can authorise the Attorney General to apply for the arrest warrant in a superior court.[143] If the court grants the warrant, it can be executed anywhere in Canada.[144]

A provisional arrest warrant, being provisional, implies a forthcoming extradition request and the continuing of the extradition procedures. Its use indicates a level of urgency in ensuring the sought individual is brought under the authority of the court – for example, if there was a risk the sought person would leave Canada before the formal extradition request can be prepared and sent by the requesting state. If a request is received from a state with whom Canada has an extradition agreement including a time limit, the request and supporting documents must be received by Canada within the time limit and the Minister must issue the Authority to Proceed (ATP) within 30 days of the time limit contained therein (the Authority to Proceed will be discussed further in the following section).[145] In all other situations, the requesting state must formally request and provide supporting documents within 60 days, and the Minister has a further 30 days to issue the ATP.[146] If these deadlines are not respected and no extension is accorded by the court, the court must discharge the sought individual.[147] The person will also be discharged if the Minister informs the court that they will not issue an authority to proceed.[148]

If no provisional arrest warrant is issued, a person only enters the extradition process following the issuance of an ATP by the Minister. As will be discussed further below, the ATP's issuance is the first official step of extradition – the provisional arrest only indicating that proceedings are forthcoming – and can result in either a summons or arrest.[149] A summons must specify an

[143] *Act*, *supra* note 3 at ss 11-12. In the Canadian system, the same person occupies both the Minister of Justice and Attorney General roles, and thus in effect these provisions lead to the same person authorizing themselves to pursue a course of action.
[144] *Ibid* at s 13(3).
[145] *Ibid* at s 14(b).
[146] *Ibid* at s 14(c).
[147] *Ibid* at s 14.
[148] *Ibid* at s 14(1)(a).
[149] *Ibid* at s 15, s 3(3)(1)(a), s 3(3), s 16(1). The *Act* does not specify when one or the other method may or ought to be used. In Botting, *Canadian Extradition Law Practice*, the author suggests that summons may be used where the individual has ties to the community; however, given that the nature of extradition understands the sought individual

appearance date before the court within 15 days of its issuance.[150] Whether arrested pursuant to a provisional arrest warrant or an arrest warrant following the issuance of the ATP, the sought individual must be brought before a court within twenty-four hours or, if no judge is available, as soon as possible.[151] At this stage, judicial interim release or detention is governed by sections 18 and 19 of the *Act*, and the onus will be on the detained individual to demonstrate why they should be released.[152]

2.2 The ATP and Committal Hearing

The ATP is the first document a sought individual receives from the state and sets out why this person is sought by the foreign state. It lists the Canadian offence(s) corresponding to the conduct underlying the charges in the requesting state.[153] It does not list the offences as they are named in the requesting jurisdiction, nor does the sought individual have access to the charging document from the requesting jurisdiction at this stage.[154] The Minister of Justice issues the ATP if they are satisfied that section 3(1)(a) and section 3(3) are satisfied.[155] In effect, this means that the following conditions must be satisfied, in absence of an extradition agreement's alternative arrangements:

1) When an individual is sought for criminal prosecution, or for sentence imposition or enforcement, for offences for which the maximum punishment is at least two years in prison or otherwise deprived of liberty, or by a more severe punishment.[156]

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as one who has absconded from justice, it may tip the balance in favour of issuing warrants (*supra*, note 45 at 90-91).

[150] *Act*, *supra* note 3 at s 16(5)(a).

[151] *Ibid* at s 17.

[152] These provisions set out the options available to courts presiding over bail hearings and import the implementation of s 522(2) and Part XVI of the *Criminal Code*, supra note 90 respectively, to inform the bail process.

[153] *Ibid* at s 15(3). The purpose of this process is to establish double criminality, that is, the crime for which an individual is sought by a requesting state is also a criminal offence in the jurisdiction of the state receiving the extradition request. Double criminality is required for extradition. Under the new *Extradition Act*, Canada relies on conduct-based criminality – that is, the conduct underlying the criminal offence must be a criminal offence in both jurisdictions, regardless of the name of the offence.

[154] Charging documents is a general term used to refer to the documentation laying out criminal charges against accused individuals. In Canada, for example, this is normally called an information; in the United States, it may be called an indictment.

[155] *Act*, *supra* note 3 at s 15.

[156] *Ibid* at s 3(1)(a). The notion of "more severe punishment" is not elaborated in the *Act*, and jurisprudence has not directly elaborated upon this phrase. Botting, *Canadian Extradition Law Practice*, *supra* note 45 at 54, references to jurisprudence that examines whether a punishment would "shock the conscience of Canadians" under section 7 of the *Charter*, a consideration normally reserved for the Minister of Justice in their surrender decision.

2) Furthermore, if a person being sentenced to imprisonment or other deprivation of liberty is being sought for extradition, at least six months imprisonment must remain to be served on the sentence or more severe penalty.[157]

The sought individual will also receive the Record of the Case (ROC). The contents of the record of the case vary depending on whether the person is sought for prosecution or for sentencing. For the former, the record of the case must summarise the evidence available for use in prosecution in the requesting state; it may also include identification evidence.[158] The ROC must be certified, but its authentication is not required unless the relevant extradition agreement provides otherwise.[159] The ROC is presumed reliable unless the particular format or organisation of the ROC is not specified in the *Act* or jurisprudence. According to the *Diab Report* completed by Murray Segal, a ROC for prosecution would contain summaries of relevant witness testimonies, reports, and so forth, on which the requesting state intends to rely.[160] Where extradition is sought for sentencing, the record of the case must include a copy of the record of conviction and a document describing the conduct for which the requested individual was convicted.[161] The record of the case may also include documents regarding the identification of the sought individual.[162]

After the sought person is arrested and receives the ATP, the next significant step in extradition is the committal hearing. Section 21 of the *Act* confirms the need to hold this hearing at an "early date." This requirement is in keeping with the intention that extradition be an expedited process. However, as Dennison and Weinstein note, there is disagreement across provincial jurisdictions regarding what, specifically, constitutes an extradition hearing, particularly where there are disclosure or other preliminary matters falling within the purview of the judicial phase.[163] Generally speaking, a committal hearing can be understood as beginning once a "live issue" has

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[157] *Ibid* at s 3(3).
[158] *Ibid* at s 33(1)(a), s 33(2).
[159] *Ibid* at s 33(3) and (4). Per *United States of America v Ferras; United States of America v Latty*, 2006 SCC 33 at para 69, certification renders the ROC presumptively reliable.
[160] Segal, *Independent Report, supra* note 4 at 23.
[161] *Act, supra* note 3 at s 33(1)(b). There is no requirement for the ROC to explain how the individual evaded sentencing, nor is there a prohibition at the committal stage against extradition to serve a sentence following a trial in absentia that results in conviction. However, section 47(b) of the *Act* permits but does not require the Minister to refuse extradition where the sought person was convicted in absentia and could not have their case reviewed.
[162] *Ibid* at s 33(2).
[163] Nancy L Dennison & Seth Weinstein, *Prosecuting and Defending Extradition Cases: A Practitioner's Handbook* (Toronto: Emond Publishing, 2017) at 216 [Dennison & Weinstein, *Practitioner's Handbook*].

been raised that is relevant to the committal test.[164] At the hearing, the ATP and ROC are filed with the court by the Attorney General.[165] At the conclusion of the extradition hearing the judge must either discharge the sought individual or commit them into custody.[166] If the sought individual had previously been released, they will be rearrested at the conclusion of the hearing. Release may be sought anew pending either an appeal of the committal decision and/or while awaiting the Minister's surrender decision.[167]

The test for committal is fairly straightforward and, beyond confirming that the identity of the individual in the record of the case is the person before the court, the judge's role is limited.[168] Where a person is sought for imposition or enforcement of a sentence, the judge must be satisfied that the conviction for which the individual is sought corresponds to the offence named in the ATP.[169] Where the person is sought for prosecution, the court will order committal where the admissible evidence demonstrates that the alleged conduct, had it occurred in Canada, "would justify committal for trial in Canada on the offence set out in the authority to proceed."[170] Courts have interpreted this to mean that the evidence "must be demonstrably able to be used by a reasonable, properly instructed jury to reach a verdict of guilty."[171] Jurisprudence clarifies that the extradition judge is not entitled to consider foreign law or the foreign charges in carrying out their functions.[172] The *Act* provides no clear recourse for challenging the ATP itself, but the Federal Court of Appeal in *Froom v Canada (Minister of Justice)* appears to support the extradition judge's authority to grant an appropriate remedy where they have been presented with evidence that the decision to issue an ATP was made arbitrarily, in bad faith, or motivated by improper motives or irrelevant considerations, drawing such authority from the *Charter* and from the inherent jurisdiction of the court to control its process.[173]

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[164] *Ibid* at 216.
[165] *Act*, *supra* note 3 at s 24, s 31. See also Dennison & Weinstein, *Practitioner's Handbook, supra* note 163 at 212.
[166] *Act*, *supra* note 3 at s 29(1) and (3).
[167] *Ibid* at s 20.
[168] *Ibid* at s 29(1)(a) and (b).
[169] *Ibid* at s 29(1)(b).
[170] *Ibid* at s 29(1)(a).
[171] *Ferras*, *supra* note 159 at para 46.
[172] *United States of America v Kavaratzis*, [2004] OJ No 173, 2004 CanLII 18251 (ON CA), leave to appeal refused [2004] SCCA No 107 (SCC) at para 17; *United States of America v Yang*, [2001] OJ No 3577, 2001 CanLII 20937 (ON CA) at para 5; *United States of America v Cail*, [2009] AJ No 1152 at para 15.
[173] *Froom v Canada (Minister of Justice)*, 2004 FCA 352 at para 19.

Section 32 of the *Act* determines evidence admissibility at the extradition hearing. Evidence not gathered in Canada is admissible at a committal hearing if it is contained in the record of the case, if it is submitted pursuant to an extradition agreement, and if it is adduced by the sought individual and determined by the court to be relevant to the test for committal – in all cases whether or not such evidence would be admissible according to Canadian rules of evidence.[174] Where the evidence has been gathered in Canada, it must additionally be done in accordance with Canadian evidentiary rules in order to be admissible.[175] Courts of Appeal in Canada have interpreted this provision to mean that the evidence presented by the Attorney General must contain sufficient material on the manner of the gathering of evidence in Canada to determine whether this is the case.[176] Generally speaking, evidence obtained in a jurisdiction other than Canada need not satisfy any particular evidentiary threshold, beyond its relevance to the issues at an extradition hearing; no material is required on the manner in which the requesting state gathered evidence outside of Canada.

2.2.1 Charter Arguments at the Committal Hearing

Section 25 of the *Act* confirms the extradition judge's competence in constitutional, and thus *Charter*, matters. Challenges to the constitutionality of provisions of the *Act* and applications for a remedy under section 24 of the *Charter* are thus properly before the extradition judge.[177] In practice, the Supreme Court of Canada has limited this competence to grant remedies for *Charter* infringements that occur at the committal stage and sought individuals must establish an air of reality to the alleged *Charter* breach in order to obtain relevant disclosure.[178]

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[174] *Act*, *supra* note 3 at s 32(1).
[175] *Ibid* at s 32(2).
[176] See notably: *United States of America v Fraser*, 2017 BCCA 136 [*Fraser*]; *Belapatino Savaresse c Procureure Générale (États-Unis d'Amérique)*, 2019 QCCA 123 [*Belapatino Savaresse*]; *Deland c Procureur Général (États-Unis d'Amérique)*, 2020 QCCA 655 [*Deland*].
[177] Section 24 of the *Charter* authorizes courts of competent jurisdiction to provide remedies for *Charter* breaches. Subsection 24(1) is worded generally – the court may provide a remedy as it sees fit (such as a stay of proceedings). Subsection 24(2) provides for the exclusion of evidence before a court where it has been obtained in breach of *Charter* rights (*Charter*, *supra* note 2).
[178] See *Lake v Canada (Minister of Justice)*, 2008 SCC 23 at para 21 [*Lake*]*; United States of America v Kwok*, 2001 SCC 18 at para 57, 100 [*Kwok*].

Given the evidentiary focus of the committal hearing, most *Charter* jurisprudence at the committal stage deals with evidentiary matters. Most notably, since subsection 32(2) of the *Act* mandates that Canadian-gathered evidence must satisfy the Canadian rules of evidence as a precondition to being admitted, the extradition judge is empowered to order certain disclosure, hold a *voir dire*, and exclude evidence gathered in Canada if its inclusion would breach the *Charter* (this will be explored in greater detail in section 4 below).

Non-evidentiary *Charter* claims receive varying treatment. The majority judgements in *Schmidt v The Queen* (*Schmidt*) and in *Argentina v Mellino*, both authored by Justice La Forest, exclude extradition from the ambit of section 11 of the *Charter*, because it pertains only to the criminal trial, and technically Canada is not the state prosecuting the sought individuals.[179] Yet, since extradition proceedings often involve arrest and detention, the sought individual retains their section 10(b) rights to counsel, although courts have previously ruled that a Miranda warning given by American law enforcement officials in Canada meets these requirements for the purpose of extradition.[180] Misconduct by the requesting state against the sought individual may result in a stay of proceedings for abuse of process under the residual category, to protect the court's own integrity.[181] This was the case in *United States of America v Khadr*. Very briefly, Abdullah Khadr was abducted in Pakistan by the Inter-Services Intelligence Directorate (ISI) which was paid by the United States of America to do so.[182] Khadr was held for 14 months by the ISI, was beaten regularly, and they initially denied Khadr Canadian consular access on the advice of the United States while the latter conducted a criminal investigation to support eventual rendition from

[179] *Schmidt v The Queen*, [1987] 1 SCR 500 at 518 [*Schmidt*]; *Argentina v Mellino*, [1987] 1 SCR 536 at 547. Per Justice La Forest in *Schmidt*, to apply section 11 to extradition matters would amount to extraterritorial application of the *Charter* (*supra* at 518). Section 11 of the *Charter* covers several legal rights covering primarily the rights of a person charged with criminal offences pertaining to post-arrest matters, in Schmidt's case, the right not to be tried or punished again once being finally convicted or acquitted of the offence (*Charter, supra* note 2 at s 11(h)).
[180] See *United States of America v Yousef*, [2003] OJ No 3118. In this case, two police officers and a prosecutor from Illinois visited Yousef while he was in custody pending resolution of unrelated Canadian criminal charges (para 1). They were accompanied by a Canadian police officer who did not participate in questioning (para 24). In American constitutional law, this warning must be provided to someone in custody prior to seeking a statement from this person (para 2). The Miranda warning informs the accused person of the following: they have a right to remain silent and that anything they say or do could be used against them in a court of law, that they have a right to a lawyer and to have them present during questioning, that if they cannot afford a lawyer one will be appointed by the court to represent the person during questioning (para 26; see also *Miranda v Arizona*, 384 US 436 (1966)).
[181] *United States of America v Khadr*, 2011 ONCA 358 at para 4 leave to appeal refused [2011] SCCA No 316 (SCC) [*Khadr*].
[182] *Ibid* at para 1.

Pakistan to the United States.[183] Khadr was never brought before a Pakistani court and after almost two years being held at the request of the United States, he was repatriated to Canada, where he then faced an extradition request from the United States for prosecution on terrorism charges.[184] A majority of the Ontario Court of Appeal held that it was within an extradition judge's jurisdiction to make a stay of proceedings order.[185] Moreover, based on the judge's findings, the case fell within the clearest of cases in which a stay for abuse of process is warranted.[186]

2.3 Surrender Orders and Appeals/Judicial Review

Once a person has been committed for extradition, or they consent to their committal,[187] the Minister of Justice must decide whether to surrender the individual to the requesting state.[188] Per the Act, this decision is taken by the Minister personally – it cannot be delegated.[189] The sought individual may make submissions to the Minister explaining why they should not be surrendered.[190] Where the committal is being appealed, the Minister may postpone making a surrender order.[191]

In coming to a decision on surrender, the Minister must consider "all the relevant circumstances."[192] There is a duty to refuse surrender in certain circumstances, although the condition precedent for triggering this duty is highly subjective and discretionary. Most reasons for refusal fall under section 44, the first part of which reads as follows:

> 44 (1) The Minister shall refuse to make a surrender order if the Minister is satisfied that
> (a) the surrender would be unjust or oppressive having regard to all the relevant circumstances; or
> (b) the request for extradition is made for the purpose of prosecuting or punishing the person by reason of their race, religion, nationality, ethnic origin, language, colour,

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[183] *Ibid*.
[184] *Ibid*.
[185] *Ibid* at paras 44-45, 50.
[186] *Ibid* at para 57.
[187] *Act*, *supra* note 3 at s 70(1).
[188] *Ibid* at s 40, s 44.
[189] *Ibid* at s 40. In practice, the Minister likely receives substantial assistance from the International Assistance Group and other governmental departments, including from the Minister responsible for immigration and refugees (s 40(2)).
[190] *Ibid* at s 43.
[191] *Ibid* at s 41(1).
[192] *Ibid* at s 44(1)(a).

> political opinion, sex, sexual orientation, age, mental or physical disability or status or that the person's position may be prejudiced for any of those reasons.[193]

In practice, the courts have dealt with arguments regarding what would be "unjust or oppressive" alongside arguments concerning a breach of section 7 of the *Charter*, particularly because of the "shocks the conscience" test applied under this Charter provision within the extradition context.[194] In fact, in *United States of America v Reumayr*,[195] in a context in which the Minister had decided that surrender would not be unjust or oppressive and thereby infringe section 7 of the *Charter*, the British Columbia Court of Appeal stated: "However, the s. 44(1)(a) standard is essentially the same as that applied under s. 7 of the *Charter*."[196]

Additionally, section 44(2) of the *Act* permits but does not require the Minister to refuse extradition where the conduct underlying the extradition request can be punished by death in the requesting state. *Charter* case law has been layered on top of this provision, most importantly the *Burns* decision, which prohibits, except in exceptional circumstances, extradition to a death penalty regime without assurances that this punishment will not be sought or imposed.[197] Thus, in effect, section 44(2) operates much closer to a mandatory provision, at least for the purposes of seeking assurances.

Additional grounds for refusal, although not mandatory, follow in sections 45 to 47, although they are subordinate to the terms of bilateral extradition treaties.[198] Also, in practice sections 46 and 47 do not apply except for cases in the absence of an extradition treaty or where the extradition treaty is multilateral.[199] Section 46 requires refusal to surrender if prosecution is barred due to prescribed time limits, if conduct relates to a military offence that is not also a regular criminal offence, or if the offence is political in character (excluding, per section 46(2), certain offences that are also

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[193] *Ibid* at s 44(1)(a).
[194] For examples see the following: *Lake*, *supra* note 178 at para 18; *Hanson v Canada (Minister of Justice)*, 2005 BCCA 77 at para 22.
[195] 2003 BCCA 375.
[196] *Ibid* at para 19.
[197] *Burns*, *supra* note 56.
[198] *Act*, *supra* note 3 at s 45. Of note, per s 47.1 of the *Act*, requests for surrender to the International Criminal Court are exempt from the grounds of refusal in sections 44, 46, 47.
[199] *Ibid* at s 45.

regular criminal offences, such as murder or kidnapping).[200] Per section 47, the Minister may refuse, but is not required to refuse, to surrender an individual where the alleged criminal conduct is subject to Canadian criminal proceedings, or where none of the conduct occurred in the requesting state's territory, among other circumstances.[201]

The last-mentioned two provisions are particularly relevant to the issue of extraditing a sought individual for criminal offences that are alleged to have occurred within Canada's territorial jurisdiction, because the situations they cover are analogous to the issue under study here. Conduct not occurring in the territory of the extradition partner is not the same as conduct occurring within Canada's territorial jurisdiction, and ongoing criminal proceedings are not the same as having the option of instituting such proceedings. However, these provisions do get at a similar underlying issue, which is the validity or strength of the extradition partner's claim to authority over the sought individual – and more specifically, the weakness of such a claim. These grounds do not apply to requests originating from the International Criminal Court,[202] nor, as mentioned previously, do they apply where there is a bilateral extradition treaty in effect.[203] This latter exclusion rather significantly restricts the application of these provisions since, in practice, most of Canada's extradition occurs pursuant to bilateral extradition treaties and indeed, a bilateral treaty exists between Canada and the United States, its largest extradition partner, and as will be seen in Chapter 4, the state most commonly requesting extradition for acts committed wholly beyond its territory.

If the Minister orders the individual's surrender, that person can apply to the relevant provincial court of appeal for judicial review of the decision.[204] Although the authority and remedies available on judicial review are contained within the *Act*, the grounds for review are contained in section 18.1(4) of the *Federal Courts Act*.[205] The court may combine a committal appeal and a judicial

[200] *Ibid* at s 46.
[201] *Ibid* at s 47.
[202] *Ibid* at s 47.1.
[203] *Ibid* at s 45.
[204] *Ibid* at s 57(1). While it is unclear in the legislation, given the structure of the Ministerial phase, it does not seem open to the possibility that the requesting state can request the judicial review of a Ministerial decision not to surrender a sought individual but to instead order their discharge. This unavailability is currently of limited practical relevance precisely because the Minister rarely, if ever, refuses surrender.
[205] *Ibid* at s 57(7); see also *Federal Courts Act*, RSC 1985, c F-7 at s 18.1(4). Briefly, these grounds permit intervention where a decision-maker incorrectly exercised its jurisdiction, committed legal errors, factual findings that cannot stand, or otherwise acting contrary to law.

review application into the same hearing.[206] In the interim, the sought individual, if on release, will likely need to surrender themself into custody and undergo another judicial release hearing awaiting the outcome of the judicial review application and/or the appeal.[207] Both judicial review and the committal appeal can be further appealed to the Supreme Court of Canada by either party, by leave of the Court, with the same provisions with respect to interim release pending court decisions on these matters applying.

2.4 The *Charter* and Surrender

Since the introduction of the *Charter*, its interaction with the law and practice of extradition has been subject to considerable judicial debate. The first significant case at this intersection is *Schmidt*.[208] In this decision, which predates the current *Act*, a majority of the Supreme Court of Canada narrowed the applicability of the *Charter* to section 7 to the exclusion of almost all other rights.[209] As a result, much of extradition jurisprudence, particularly at the Supreme Court of Canada, seeks to determine whether extradition in various circumstances violates the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.

Subsequent jurisprudence has confirmed the reliance on section 7 and has set a high standard for accepting a *Charter* violation in surrender contexts. In fact, the first successful challenge on this point only occurred in 2001 in the case *Burns*.[210] In this case, a unanimous court held that extradition to face the death penalty without assurances the death penalty will not be sought will violate section 7 in all but the most exceptional cases.[211] Interestingly in this case, the court held that this constitutional requirement did not violate but rather was in harmony with international extradition law because Canada's treaty right to refuse surrender in these circumstances had been

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[206] *Act*, *supra* note 3 at s 57(9).
[207] *Ibid* at s 20, s 38(2).
[208] *Schmidt*, *supra* note 179.
[209] *Ibid* at 520. Section 7 of the *Charter* reads as follows: "Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice" (*supra* note 2). The primary exception to this rule is section 6(1) of the *Charter*, which will be discussed below.
[210] *Burns*, *supra* note 56.
[211] *Ibid* at para 8. A For the treaty provision in question, see: *Canada-US Treaty*, *supra* note 140 at art 6, which permits either treaty partner to refuse to extradite someone to face the death penalty in the absence of assurances said penalty would not be imposed.

explicitly agreed to by the United States.[212] In addition to effectively overturning the precedent set in the *Kindler* and *Ng* decisions, this holding manages to strike a balance – at least rhetorically – between comity and human rights, by using the provisions of the extradition treaty itself to justify the court's ruling accepting a claim that extradition in the case at bar would violate human rights unless Canada received assurances to prevent the rights violation from occurring. This decision demonstrated a possible path forward in rights claims in extradition cases, by using the permissive terms of extradition treaties to bolster a *Charter* claim.

An additional example of section 7 jurisprudence, the Supreme Court in *United States of America v Ferras; United States of America v Latty*[213] and *United Mexican States v Ortega; United States of America v Fiessel*,[214] confirmed the constitutionality of the evidentiary provisions of the 1999 *Act* by construing these provisions to be interpreted as complying with existing rules of evidentiary admissibility, double criminality, basic fairness, constitutional guarantees, and in the context of a hearing before a judge who possesses the discretion to refuse to commit an individual for extradition for insufficient evidence.[215]

Section 7 also provided the constitutional grounding to examine the use of assurances in the extradition context – the mechanism whereby the surrendering state first receives confirmation from the requesting state that the latter will guarantee certain matters if the sought individual is surrendered into their custody. Following the inaugural *Burns* decision discussed above, the leading case on this issue is *India v Badesha*, in which two co-sought individuals were wanted in India to stand trial for their participation in a murder plot.[216] The impugned assurances were sought and received pursuant to concerns related to the health and safety of the co-accused in Indian jails should they be returned.[217] The case dealt with both the notion of substantial risk of torture, and the sufficiency of assurances received from India.[218] A unanimous court ruled that the assurances were sufficient and the Minister's decision, in considering the case as a whole, was reasonable.

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[212] *Burns*, *supra* note 56 at para 8.
[213] *Ferras*, *supra* note 159.
[214] 2006 SCC 34. [*Ortega*]
[215] *Ferras*, *supra* note 159 at paras 43-44.
[216] 2017 SCC 44 at paras 1-2 [*Badesha*].
[217] *Ibid* at para 5.
[218] *Ibid* at para 5.

Per the court, diplomatic assurances need not eliminate the risk of torture or mistreatment; they only need to be sufficient to form a reasonable basis for the Minister of Justice to conclude that there was no substantial risk of torture or mistreatment.[219] The reliability of assurances is assessed on a case-by-case basis, and the court stressed a contextual approach to the evaluation of assurances.[220] Moreover, the court emphasised that the presence of assurances do not in themselves indicate the presence of a risk and may be sought as a precautionary measure.[221] In reaching this decision, the court relied heavily in all but the actual rule, on a European Court of Human Rights decision, *Othman (Abu Qatada) v The United Kingdom*, which stated that the proper test for assessing assurances was whether they "eliminated an real risk of ill-treatment."[222]

3. *Cotroni, Kwok, Lake, Sriskandarajah*, and Section 6: Focus on Nationality, Sidestep Territoriality

Another rights consideration that revealed itself following the coming into effect of the *Charter* is the interplay between extradition practice and the right of Canadian citizens to remain in Canada, protected by s 6(1) of the *Charter*.[223] The Supreme Court of Canada first examined this consideration in *United States of America v Cotroni*.[224] In this case, two individuals, Cotroni and El Zain, were sought by the United States for prosecution of drug trafficking charges. Both individuals were Canadian citizens, and the alleged criminal conduct underlying the charges had been committed entirely in Canada. Before the Supreme Court of Canada, counsel for both individuals based their arguments exclusively on section 6(1) Charter considerations.[225]

The majority decision, authored by La Forest J, concluded that extradition constitutes a prima facie infringement of the right to remain in Canada.[226] Affirming first that the rights contained in the *Charter* were broadly worded, the Supreme Court confirmed a generous interpretation of the scope of protected rights, section 6(1) rights not less than the others.[227] Section 6(1) recognises the tie

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[219] *Ibid* at para 46.
[220] *Ibid* at para 48.
[221] *Ibid* at para 52.
[222] No. 8139/09, ECHR 2012-I at para 186, cited with approval at *Badesha*, *supra* note 216 at para 47.
[223] *Charter*, *supra* note 2. Section 6(1) reads as follows: "Every citizen of Canada has the right to enter, remain in and leave Canada."
[224] [1989] 1 SCR 1469 [*Cotroni*].
[225] *Ibid* at 1476.
[226] *Ibid* at 1481.
[227] *Ibid* at 1480.

between citizen and country is an intimate one, and thus any interference with that right must be demonstrated to be justifiable under section 1.[228] This approach to section 6(1) is further textually supported by its broad wording, with no internal limitations in the language of the right.[229] As a result, extradition of a citizen of Canada, being the removal of a person from Canada, is an infringement of section 6(1) and thus a prima facie violation of the *Charter*.[230]

However, the majority of the Court also indicated that the infringement caused by extradition was, "at the outer edge of the core values sought to be protected by the provision."[231] Per the majority, the main purpose of section 6(1) was protection against exile and banishment; extradition does not threaten these purposes.[232] Since the citizen may return to Canada after an acquittal at trial or after serving a sentence if convicted, the infringement on section 6(1) is, from a purposive perspective, "of secondary importance."[233] Moreover, the majority states that extradition promotes a number of values that are central to a free and democratic society.[234]

Turning to its justification under section 1 of the *Charter* and the application of the test set out in *R v Oakes*,[235] it was not contested that extradition legislation serves a pressing and substantial objective insofar as it is an important tool for the purposes of crime suppression.[236] The majority went so far as to state: "The importance of extradition for the protection of the Canadian public against crime can scarcely be exaggerated."[237] The majority additionally ties extradition's importance to Canada's membership in the international community, apparently a worthier notion of community than a "parochial and nationalistic" one.[238] Though the majority appears to soften its instrumental emphasis on extradition's role in crime suppression by noting that it also serves to bring fugitives to justice to determine their guilt or innocence,[239] this statement suggests a

[228] *Ibid* at 1480.
[229] *Ibid* at 1481.
[230] *Ibid* at 1481.
[231] *Ibid* at 1481.
[232] *Ibid* at 1482.
[233] *Ibid* at 1482.
[234] *Ibid* at 1482.
[235] [1989] 1 SCR 103 [*Oakes*].
[236] *Cotroni*, *supra* note 224 at 1485.
[237] *Ibid* at 1486.
[238] *Ibid* at 1486.
[239] *Ibid* at 1487.

mischaracterisation of the history of extradition in Canada and the notion of crime suppression. Since the *Jay Treaty*, extradition has been used for the purpose of returning an individual to face trial (to determine their guilt or innocence).[240] Moreover, separating the criminal trial from the notion of "crime suppression" seems somewhat far-fetched, given that the criminal trial is the sole legitimate state mechanism for suppressing criminal activity. That said, in context of the majority's argument, this rhetoric is effective in emphasising the importance of a legal institution (criminal prosecution) ahead of a political and societal goal (crime suppression).

The majority of the court also held that extradition met the threshold for proportionality, the second component of the *Oakes* test: it was not irrational in surrendering an individual to face prosecution where their actions have done the most harm;[241] extradition impaired section 6(1) as little as possible or as "reasonably possible;"[242] and the urgency of prosecution of such crimes overrode the impairment of section 6(1) right to remain in Canada.[243]

The *Cotroni* case also marks the first case post-*Charter* in which the Supreme Court of Canada dealt with the circumstances of an extradition request where the individual is sought for alleged offences committed in Canada. Recall that criminal jurisdiction in Canada is largely defined territorially; thus, in a case like *Cotroni*, Canada could conceivably prosecute the sought individual rather than extraditing them. All judges were in agreement that the extradition of a Canadian citizen violates their rights under section 6(1). The main points of contention between the majority and dissenting opinions were twofold: whether the infringement was peripheral to the right; and the application of the test set out in *R v Oakes*[244] to determine whether extradition could be justified under section 1 of the *Charter* in the particular circumstances of the case.

According to the majority opinion, authored by Justice La Forest, extradition is a "peripheral" infringement of section 6(1)'s right to remain in Canada.[245] In arriving at this decision, the majority adopted what had been a dissenting opinion (also authored by Justice La Forest) in the earlier case

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[240] *Jay Treaty, supra* note 113 at article 27.
[241] *Cotroni, supra* note 224 at 1488.
[242] *Ibid* at 1490.
[243] *Ibid* at 1499.
[244] *Oakes, supra* note 235.
[245] *Cotroni, supra* note 224 at 1492.

R v Jones,[246] in which the dissent held that the accused's rights were infringed but it was of a peripheral or minimal nature and therefore the infringement was reasonably justified.[247] Justice La Forest also imports the dissent's more flexible interpretation of the *Oakes* test as a reflection of the phrase "reasonable limits" found in section 1 of the *Charter*.[248]

In terms of the *Oakes* test and whether extradition could be justified under section 1, Justice La Forest sees the arguments raised by the sought individuals as being primarily tied to the second part of the test – the proportionality test.[249] For the majority, the first prong of the proportionality test is clearly satisfied, with Justice La Forest writing that he saw "nothing irrational in surrendering criminals to another country, even when they could be prosecuted here."[250] However, the reasons become less clear after that in terms of completing the *Oakes* test. Instead, the majority turns to the earlier case *United States of America v Swystun*, a case involving the extradition of a member of a Canadian conspiracy to distribute drugs in the United States, [251] for setting out the factors to consider in determining whether a prosecution in Canada would be preferable to extradition. The factors are as follows:

> -where the impact of the offence was felt or likely to have been felt,
> -which jurisdiction has the greater interest in prosecuting the offence,
> -which police force played the major role in the development of the case,
> -which jurisdiction has laid charges,
> -which jurisdiction has the most comprehensive case,
> -which jurisdiction is ready to proceed to trial,
> -where the evidence is located,
> -whether the evidence is mobile,
> -the number of accused involved and whether they can be gathered together in one place for trial,
> -in what jurisdiction most of the acts in furtherance of the crime were committed,

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[246] [1986] 2 SCR 284 [*Jones*].
[247] *Cotroni, supra* note 224 at 1492; see also *Jones, supra* note 246.
[248] *Cotroni, supra* note 224 at 1489*; Jones, supra* note 246 at 300.
[249] *Cotroni, supra* note 224 at 1488.
[250] *Ibid*.
[251] (1987), 50 Man. R. (2d) 129 [*Swystun*].

-the nationality and residence of the accused,
-the severity of the sentence the accused is likely to receive in each jurisdiction.[252]

These factors become known as the "*Cotroni* factors" and are used up to the present day in extradition cases where a sought individual's rights under section 6(1) are put in issue.

Most of these factors concern, in one way or another, questions of jurisdiction, specifically territorial jurisdiction, as expressed through the enumeration of a variety of elements that go to the best locus of prosecution. Ultimately, territorial considerations focus on how easy each jurisdiction (here, each state) will be able to prosecute the sought individual for the alleged criminal activity: where is the evidence, whose police force is involved, who is ready to prosecute, the ease of transferring evidence and accused individuals. In effect, which state will find it easier to run a trial? No consideration is given to the impact on the sought individual beyond the single factor of sentencing considerations; the only obvious rights consideration on the list is only indirectly expressed, namely, the concern for the most affected victim community. In addition, no consideration is paid to the possibility that the requested state has previously declined to prosecute the sought individual, which could be an indication of the merits of the case against the sought individual.

There were also two dissents in *Cotroni*. The first, authored by Wilson J, agreed that extradition was an infringement of section 6(1) of the *Charter*, but also went on to find that this infringement could not be justified under section 1. Wilson J's dissent is centrally concerned with the problem of territorial jurisdiction present in this case.[253] Justice Wilson construes section 6(1) broadly to mean that a citizen has the right to come and go from Canada according to his own choice,[254] and emphasises the foundational nature of all rights contained by the *Charter,* no less section 6 than others, to the political structure of Canada.[255] Justice Wilson notes that the constitutionality of the extradition of a Canadian citizen for acts committed in Canada and for which the accused could be prosecuted criminally in Canada was before the Supreme Court for the first time, which limited

[252] *Cotroni, supra* note 224 at 1498, citing *Swystun, supra* note 251 at 133-134.
[253] *Cotroni, supra* note 224 at 1509.
[254] *Ibid* at 1504.
[255] *Ibid* at 1506.

the relevance of earlier decisions relied on by the majority.[256] Per Justice Wilson, "the locus of the wrongdoing is very relevant when extradition to a foreign country is sought to be justified as a reasonable limit on a Canadian citizen's right to remain in Canada. Indeed, the locus of the wrongdoing is frequently the key factor connecting the accused to the requesting state."[257] Justice Wilson states that bringing an accused who is a Canadian citizen to justice where the alleged wrongdoing occurs in Canada does not necessitate their extradition: they can be prosecuted in Canada.[258] The availability of this alternative renders the infringement of section 6(1) caused by extradition unjustifiable in such contexts. Justice Wilson clearly uses a stricter approach to the *Oakes* test, stating that rights limitations can only be legitimized in the clearest of cases and applying a necessity standard in the minimal impairment prong of the test.[259] Justice Wilson emphasises the location of the alleged criminal acts: "In these appeals we must taken into account the fact that the accused are Canadian citizens, that their alleged wrongful conduct took place entirely within Canada, and that such conduct gives rise to offences for which the accused can be charged and prosecuted in Canada."[260] Thus, per Justice Wilson, the cases before the court in *Cotroni* were clearly distinguishable from its closest equivalents in pre-existing jurisprudence in which Canadians are wanted abroad for prosecution of alleged offences committed within the territorial jurisdiction of the requesting state.[261]

Unsurprisingly, Justice Wilson also vigorously disagrees with Justice La Forest's characterisation of the infringement of section 6(1) as "peripheral" because it amounts to a total denial of the right.[262] This violation is central to the right to remain in Canada, not on the edges of that right. In reaching this conclusion, Justice Wilson also implicitly rejects what appears to be the underlying assumption to La Forest's characterisation, namely, that the reason for the infringement impacts on the degree of infringement. Put otherwise, Justice La Forest's reasoning implies that because of the importance of extradition in the international context, the infringement is "peripheral" to the right. Justice Wilson rejects this collapsing of categories: she does not contest the importance of

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[256] *Ibid* at 1509.
[257] *Ibid* at 1510.
[258] *Ibid*.
[259] *Ibid* at 1506.
[260] *Ibid* at 1509.
[261] *Ibid*.
[262] *Ibid* at 1510-1511.

extradition or its role, but she does distinguish that from how much it prevents the exercise of the right to remain in Canada. In extradition, this prevention is total: the person is removed from Canada and surrendered into the custody of law enforcement and the criminal law system of a foreign jurisdiction, with the ability to return very much dependent on the laws of that same jurisdiction.

Moreover, Justice Wilson rejects the logic that international cooperation necessitates extradition, by indicating that the international community would also expect Canada to deal with its own citizens and with crime within its borders as a matter of maintaining public order.[263] Justice Wilson agrees that a general principle exists allowing for more than one state to have jurisdiction to prosecute.[264] Yet, Justice Wilson emphasises the mutuality of extradition treaties: not just that Canada respects the other state's criminal law system, but that other state also respects the system in Canada.[265] In fact, this respect, and the confidence that each will be able to deal with alleged offenders within their respective criminal law systems, is an assumed precondition to the existence of those treaties in the first place. It would be reasonable to assume that both or all parties to an extradition treaty would be able to operate their criminal law systems effectively, which under this logic includes prosecution of accused individuals within their bounds.

Although Justice Wilson does not discuss this in her decision, it is also the case that even if it were the case that the crime is first detected abroad – for example, a phone number attached to a fraud scheme can be traced from an alleged victim in Milwaukee to a phone line in Toronto – there are alternative forms of cooperation that are less disruptive of the rights under section 6(1) than extradition, such as mutual legal assistance.[266] And, as has been made all the more evident since COVID-19 made congregating in courthouses a dangerous activity, advancements in videoconferencing technology makes it possible to conduct trials partially or entirely remotely, removing barriers related to the location of potential victims or witnesses – as with the hypothetical

[263] *Ibid* at 1512.
[264] *Ibid* at 1513.
[265] *Ibid* at 1512.
[266] Briefly, mutual legal assistance in criminal matters is a treaty-built practice like extradition, through which states can request that other states gather and transmit evidence on their behalf.

fraud victim in Milwaukee.[267] All of these would be possible alternatives that do not infringe the right of Canadian citizens to remain in Canada. Ultimately, Justice Wilson relies on an examination of the particular facts of the case to reach her decision that extradition in the circumstances of Cotroni and El Zein cannot pass the minimal impairment portion of the Oakes test, here departing from the majority in her analysis under section 1.[268]

Justice Sopinka also dissented, adopting primarily Justice Wilson's reasoning. He also disagrees vigorously with the characterisation of the section 6(1) infringement as peripheral: while acknowledging that in this particular case, the extraditions were to a country with a similar justice system to Canada's and with similar protections, extradition may also be sought where many of the protections in the Canadian system do not exist and in circumstances that effectively amount to banishment – thus being a much more than peripheral infringement.[269] Justice Sopinka also disagrees with the use of the list of factors from *Swystun*, above, that the majority adopts as a legal test in clarifying whether to prosecute in Canada, as these factors seem to have been findings of fact by the court about consultations which occur between Canadian and American prosecutorial authorities regarding which state would pursue prosecution and the factors considered therein, and not a general statement of law as characterised by the majority.[270] Put otherwise, Justice Sopinka's interpretation of *Swystun* is that the list of factors did not describe how the judge in *Swystun* reached their decision. They describe the considerations that the prosecutorial authorities of Canada and the United States assess to determine where a prosecution can or should occur. Even if that were not the case, Justice Sopinka contends that the factors describe a practice developed by the prosecutorial authorities in the respective jurisdictions pursuant to the consultations, but this practice was not a law and not based on a law. Since the decision to prosecute or not prosecute is a discretionary decision taken by a criminal prosecutor (either federally or provincially), it cannot be reviewed unless it was exercised for arbitrary or improper motives,[271] which constitutes an abuse of process argument. Justice Sopinka therefore contends that an exercise in discretion

[267] Admittedly, this technology was not likely to have been so widespread or ubiquitous in courtrooms in 1989. A similar option for witness testimony already exists at ss 22.1 and 22.2 of the *Mutual Legal Assistance in Criminal Matters Act*, RSC 1985, c 30 (4th Supp).
[268] *Cotroni*, *supra* note 224 at 1514.
[269] *Ibid* at 1518.
[270] *Ibid*.
[271] *Ibid* at 1519.

cannot be considered a limit prescribed by law sufficient to override a *Charter* infringement.[272] Essentially, Justice Sopinka's argument is that avoidance of a *Charter* violation "cannot be delegated to a prosecutor whose conduct is not circumscribed by guidelines which are enforceable in a court of law."[273] Justice Sopinka additionally attacks the notion that the fact of having signed an extradition treaty means that Canada had previously considered the political and legal systems of their extradition partners by pointing to the age of many of the treaties: dating to the 1920s or even pre-1900 and were negotiated by Great Britain.[274] The passage of time certainly leaves open the possibility that circumstances may have changed for some extradition partners.[275]

Just over a decade later, the tensions surrounding jurisdiction and the exercise of prosecutorial discretion in cases where extradition pursued was at the heart of *United States of America v Kwok*,[276] in which Kwok was charged in the United States for heroin trafficking.[277] Unlike in *Cotroni*, Kwok had been targeted in a parallel Canadian surveillance investigation by the Royal Canadian Mounted Police (RCMP, the federal police agency) at the same time as being targeted by the American Federal Bureau of Investigation (FBI) on the same matters as those that eventually formed the substance of the charges in the United States.[278] In the course of these investigations and prior to any extradition request or laying of charges in either jurisdiction, the RCMP also volunteered information to the FBI about their ongoing surveillance.[279]

Justice Arbour, writing for a unanimous court, rejected the submission that extradition would violate Kwok's section 6 rights, particularly regarding the possibility of domestic prosecution.[280] It should be stated that there is no suggestion in the *Kwok* decision that a prosecution was in the works in Canada at the time of extradition, although the fact that the RCMP was investigating and conducting surveillance prior to an extradition request and prior to communication with the

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[272] *Ibid*.
[273] *Ibid* at 1519. Although Justice Sopinka does not specify who the "prosecutor" is in this instance, it seems reasonable to assume he is referring to Canadian provincial or federal prosecutors responsible for instituting criminal proceedings domestically.
[274] *Ibid* at 1520.
[275] *Ibid*.
[276] *Kwok, supra* note 178.
[277] *Ibid* at para 8.
[278] *Ibid* at para 9.
[279] *Ibid* at para 9.
[280] *Ibid* at paras 89-90.

American investigation suggests that there was at least a possibility of one.[281] In reaching this decision, Justice Arbour stated that the possibility of domestic prosecution was but one factor among many in determining whether the breach of Kwok's section 6(1) rights was justifiable per the *Cotroni* factors, and the decision on whether to prosecute involved more factors than simply the prospect of conviction.[282] Determining whether or not to prosecute is a decision taken in the public interest, and includes the costs of prosecution, and potential concerns such as delay, inconvenience to witnesses, and "applicable rules."[283]

From this discussion follows the court's contention that in extradition cases, the efficacy of a Canadian prosecution includes consideration of Canada's international obligations.[284] The court also appeared to hold that the fulfillment of Canada's international obligations includes extradition where the requesting state had a "superior interest" in prosecution.[285] The notion of superior interest is not defined here, but seems to imply that the requesting state has more of an interest in prosecuting than Canada, in the present case, based on a variety of factors.

The court also affirmed the high degree of deference to be accorded to the Minister's decision regarding the appropriateness of domestic prosecution.[286] The Minister considered Kwok's mobility rights but concluded that a Canadian prosecution would be less effective because the United States had a greater interest since "most of the alleged activities were committed there"[287] – a confusing decision to reach, given the court earlier stated that Kwok supplied heroin, brought together customers and suppliers, received profits, and was under surveillance, all while he was in Canada.[288] There is in fact, no suggestion that Kwok himself was ever present in the United States

[281] Interestingly, when Kwok requested disclosure of the RCMP investigation including authorisations for surveillance, the American prosecutors refused to comply and stated they were not using the fruits of the RCMP investigation and did not intend to rely on it in the future (*Ibid* at para 10). What this response leaves unclear is whether the fruits of the RCMP investigation informed any investigations or lines of inquiry in the United States. This is not an insignificant consideration, particularly when one considers that in Canada, if there was a defect in any authorisations, any evidence collected pursuant to that investigation would be jeopardized and at risk of exclusion pursuant to section 8 of the *Charter*.
[282] *Ibid* at para 90.
[283] *Ibid*. Justice Arbour does not specify to which rules the court refers, but based on context, it is possible that they are rules of evidence, court procedure, and the like, that apply to criminal proceedings.
[284] *Ibid* at para 91.
[285] *Ibid*.
[286] *Ibid* at para 93.
[287] *Ibid*.
[288] *Ibid* at para 9.

for any of the allegations levelled against him. While the drugs may have crossed the border in the United States, by the court's own account, Kwok did not. It is worrying that the court would reach this conclusion so inconsistent with its own decision and does nothing to help clarify the application of *Cotroni* factors.

The Supreme Court in *Lake v Canada (Minister of Justice)*,[289] again took up the majority's decision in *Cotroni*, focusing on weighing the "*Cotroni* factors" outlined above. Lake, a dual American-Canadian citizen, was charged in Canada with conspiracy to traffic narcotics following an undercover operation that saw Lake engage in drug trafficking transactions on both sides of Canadian-American border.[290] He pled guilty to all charges in Canada.[291] At the sentencing hearing it was known that Lake would be sought for extradition by the United States on some trafficking offences relating to allegations for conduct that occurred there.[292] Indeed, after Lake served his Canadian sentence, extradition proceedings were commenced against him.[293]

The significant contribution of this unanimous decision is that it holds that not all *Cotroni* factors need be considered equally, or even that all must be considered.[294] Rather, the list merely enumerated "some" of the factors relevant to the consideration of whether to prosecute domestically or whether to extradite and attempting to instruct prosecutorial discretion would deprive the concept of its meaning.[295] Interference in prosecutorial discretion – in this case, the decision not to prosecute in Canada for the offences covered by the American extradition request – is only warranted in "the clearest of cases" such as where evidence exists of bad faith or improper

[289] *Lake*, *supra* note 178.
[290] *Ibid* at paras 4, 8.
[291] *Ibid* at para 8.
[292] *Ibid* at para 9.
[293] *Ibid* at para 11. Although the Canadian and American charges concerned related events as part of a series of drug transactions, they applied to different particular events; at the sentencing hearing for the Canadian offences, the Canadian Crown prosecutors indicated they agreed to a lower sentence on joint recommendation because there was a likelihood of conviction on the American charges and Lake was likely to spend more time in jail (para 9)
[294] *Ibid* at para 30.
[295] *Ibid* at para 30. In this case, the Minister of Justice requested an assessment from the Canadian prosecutorial authorities regarding the possibility of Canadian prosecution, based on documentation received from the American authorities and the factors in *Cotroni*; the Canadian prosecutors decided Canadian prosecution was not warranted (para 12). The Minister did not disturb this decision of the Canadian prosecutors but did conduct his own analysis of Lake's section 6(1) rights.

motives on the part of the criminal prosecutors.[296] Apparently, the Supreme Court makes no distinction between the actual decisions taken in the course of a criminal prosecution, and the opinion of criminal prosecutors that Canada would not be the most efficacious place to prosecute or that there are no plans to prosecute. Per the court, the mere decision to not prosecute domestically is not sufficient to demonstrate that extradition is an unjustified infringement of section 6(1) of the *Charter*.[297] For the Minister, the location of the infraction appeared to have been determinative: that the acts occurred in the United States outweighed other considerations.[298] The court does not disturb this reasoning, and affirms the through-line in jurisprudence that the Minister is entitled to considerable deference as the decision to extradite is political, not legal.[299] Rather, it recognises that the weighing of various factors will vary from case to case and seems to suggest that it would be inappropriate to assign weight since some of these factors relate to prosecutorial discretion.[300] The court also affirmed that the reasonableness standard applied to judicial review of ministerial decision-making even when *Charter* infringements are being alleged, and that, pursuant to the Supreme Court's ruling in *Schmidt,*[301] the breadth of discretion accorded to the Minister indicates that judicial interference should be limited to cases of "real substance."[302] Reasonableness is not itself defined in this case; the Supreme Court refers to *Dunsmuir* for its discussion on this standard of review.[303] Per *Dunsmuir*, a reasonableness standard reflects that a question may have more than one possible reasonable conclusion: a range of possibilities exists based on the facts and the law.[304] It is worth noting here that *Schmidt* was decided more than a decade before the notion of reasonableness as applied in *Lake* existed, and the result is that the Supreme Court here seems to be superimposing an administrative law standard in name, to a

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[296] *Ibid* at para 30. This threshold for interference in prosecutorial discretion arises out of the criminal law context; in Canadian criminal law, decisions falling under prosecutorial discretion are only reviewable for abuses of process. For a recent decision reviewing the law on abuse of process in the exercise of prosecutorial discretion, see *R v Nixon*, 2011 SCC 34.
[297] *Ibid* at para 30.
[298] *Ibid* at paras 47-48.
[299] *Ibid* at para 37.
[300] *Ibid* at para 30.
[301] *Schmidt, supra* note 179. The majority opinion on *Charter* issues and extradition was authored by Justice La Forest and held that "judicial intervention must be limited to cases of real substance" (at 523). The phrase is not defined by Justice La Forest, but it is preceded by the assertion that courts should be extremely circumspect to interfere in matters involving the good faith and honour of Canada in its relations with other states.
[302] *Lake, supra* note 178 at para 34.
[303] *Ibid* at para 34. See *Dunsmuir v New Brunswick*, 2008 SCC 9 [*Dunsmuir*]. The specific discussion to which the Supreme Court refers is at paras 47-50 in *Dunsmuir*.
[304] *Dunsmuir, supra* note 303 at para 47.

standard of review that in practice is rather high, in the sense that it is difficult to meet by the person seeking judicial review.

The implications of the court's reasoning in *Lake* are fairly serious when one takes the perspective of the sought individual asserting their *Charter*-protected rights. In allowing for this degree of latitude in the consideration of the *Cotroni* factors and not providing some common standards that can be applied across cases, the Supreme Court of Canada is effectively allowing a free-for-all of reasons to justify infringing section 6(1) of the *Charter*. At the same time, upholding the criminal law standard for not interfering in prosecutorial decisions of the clearest of cases shields an important part of the analysis of the justification of this infringement of rights by extradition from both the sought individual asserting their right, and from the court tasked with reviewing the decision of a political actor – the Minister of Justice, who is not a criminal prosecutor (even they are the same person as Attorney General is at the top of the prosecution hierarchy, although by convention not supposed to interfere in decisions by the Director of Public Prosecutions) – who has determined that the rights infringement is justified. Moreover, this decision is reviewable on a "reasonableness" standard, which allows for a range of responses with which the decision under review, must fall, but in practice is accorded significant deference by the courts. The practical result, for the sought individual, is at once a lack of certainty in how their *Charter* right to remain in Canada will be dealt with and a judicial laissez-faire approach to reviewing that decision, however it is reached by the Minister. One would be hard-pressed to provide an example of another instance of *Charter* adjudication that allows an interested actor to determine whether their own infringement of a *Charter* is justified, and where the judiciary defers to that decision. In many respects, the Supreme Court of Canada has obliterated serious *Charter* review by treating extradition decisions as thought they were prosecutorial ones deserving the same exceptionally high deference.

More recently, the Supreme Court in *Sriskandarajah v United States of America*,[305] outlined some interpretive principles regarding section 6(1) of the *Charter*, particularly in the context of extradition. Chief Justice McLachlin, writing for a unanimous court, affirmed the following: that extradition was a marginal limitation on section 6(1); that generally it will be accepted under

[305] 2012 SCC 70 [*Sriskandarajah*].

section 1; that the decision by the Minister of Justice to prosecute or extradite is necessary for the effective exercise of the criminal law; that the Minister can only order extradition if the Minister is "satisfied" that it is more appropriate than domestic prosecution; that no single *Cotroni* factor is dispositive but nor do the different factors need to be weighed equally; and that whether a Canadian prosecution is realistic is only one factor, and is not determinative.[306] The court rejected submissions by counsel for Sriskandarajah and his co-accused Nadarajah that the evolution of legal and political circumstances have changed the calculus under section 6(1). Counsel proposed a new analysis for determining whether section 6(1) was infringed by extradition that would have effectively overruled *Cotroni*, *Kwok*, and *Lake*.[307] However, the Supreme Court held that no compelling reasons were demonstrated that would permit such overruling.[308] Per the court, weak jurisdictional connection to the requesting state can be adequately subsumed in the context of the reasonableness of the Minister's decision.[309] In the specific circumstances of this case, the Minister's reasons established a link to the United States (the requesting state) on the basis that the United States had led the investigation, had charged the sought individuals, had charged their co-accused, the witnesses were located there, and the United States was ready to proceed to trial.[310] In other words: because the United States had already acted, it had established its jurisdiction. Furthermore, because the United States had already acted, Canada was now justified in infringing section 6(1) of the *Charter*. The outcome in *Sriskandarajah*, on this consideration of jurisdiction, is arguably an inevitable by-product of the discussion of the infringement of section 6(1) of the *Charter* largely revolving around the best locus for prosecution. Rather than giving separate consideration to jurisdictional issues relating to the requesting state, these become subsumed under an analysis of a *Charter*-protected right of the sought individual. This compounds a concern identified relating to equivalencies made between section 7 of the *Charter* and section 44 of the Act discussed above: it makes it difficult to discuss anything related to the Minister's decision and its reasonableness, in relation to anything other than *Charter* rights. No space is left for challenging the actions taken by the requesting state and whether there is a way to understand them as being unjust or oppressive, per section 44(1), in any non-*Charter*-rights way.

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[306] *Ibid* at paras 9-16.
[307] *Ibid* at paras 16-17.
[308] *Ibid* at para 20.
[309] *Ibid* at para 23.
[310] *Ibid* at para 35.

Through these cases, the focus on the right of a citizen to remain in Canada serves to collapse the rights considerations that are linked with the location of the wrongdoing with the citizenship of the sought individual. This collapsing of concepts is particularly evident in the dichotomy adopted by the courts starting in *Cotroni* of either extradition or prosecution domestically as the options available on the basis of citizenship. There is no space left for the possibility of doing neither. It is as though once an extradition request has been received by Canada and an ATP has been issued, the sought individual must be subjected to the coercive powers of some state and have their liberty jeopardised and their life interfered with. As will be seen later in this chapter when reviewing comparator jurisdictions, the ignorance of this third option is neither a universal feature nor a requirement for an extradition process. Moreover, tying this discussion of the locus of prosecution to citizenship is not particularly coherent: why would it be any less unjust or oppressive for a permanent resident rightfully in Canada (and per our criminal law system, presumed innocent) sought for extradition for alleged acts committed entirely in Canada, than it would be for a Canadian citizen, if in practice the analysis turns largely on the issue of the location of a criminal prosecution? Overall, the courts' analysis of section 6(1) in the context of extradition leaves unresolved some fairly substantial issues that are not easily resolvable in the current state of the law and jurisprudence.

4. *Fraser, Savaresse, Deland*: Canadian-Gathered Evidence

One area in which Canadian appellate courts have been increasingly willing to hold the state to account concerns the information that must be disclosed to the sought individual regarding evidence gathered in Canada that forms part of the ROC. Although not directly related to the situation of extradition when the alleged conduct is committed primarily or entirely within Canada's territorial jurisdiction, this related body of jurisprudence provides additional information and perspective on the issue. First, many of the cases in fact involved alleged criminal activity occurring in Canada being subject to an extradition request. Second, this jurisprudence, although it primarily deals with committal appeals rather than judicial review applications, provides further indicators of the feasibility of prosecution in Canada, which is a *Cotroni* factor, as well as an additional glimpse into the realities of the extradition situations serving as the focus of this thesis.

United States of America v Fraser,[311] *Belapatino Savaresse c Procureure Générale du Canada (États-Unis d'Amérique)*,[312] and *Deland c Procureur général du Canada (États-Unis d'Amérique)*,[313] all appeals from committal decisions, confirm that evidence gathered in Canada must conform in substance to Canadian rules of evidence, as is stated in the *Act* at section 32(2). In all three of these cases the sought individuals were seeking disclosure of additional evidence with the goal of establishing breaches of their section 8 *Charter* rights protecting against unreasonable searches that were potentially part of the various forms of investigative techniques that occurred on Canadian soil.[314] In all three cases, Courts of Appeal in British Columbia and Quebec unanimously held that sufficient information must be available that establishes that Canadian-gathered evidence was admissible according to Canadian rules of evidence.[315] These rulings confirm and expand upon the decision in *Anekwu*, which held that Canadian rules of evidence referred to in section 32(2) of the *Act*[316] include the *Charter* and specifically section 24(2) of the *Charter*,[317] which allows for the exclusion of evidence obtained in breach of *Charter* rights.[318]

Although not strictly concerned with the exercise of ministerial power, these decisions nevertheless assist in understanding how the role, writ large, of the Minister of Justice in extradition proceedings can be circumscribed by imposing a specific obligation on them. In so doing, they also provide an entry point for *Charter* claims by the sought individual appropriate at the committal stage, particularly for possible breaches of sections 8 and 9 of the *Charter*.[319] Therefore, where Canadian-gathered evidence is ruled inadmissible and this results in a failure by

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[311] *Fraser, supra* note 176.
[312] *Belapatino Savaresse, supra* note 176.
[313] *Deland, supra* note 176.
[314] *Fraser, supra* note 176 at paras 1-2; *Belapatino Savaresse, supra* note 176 at para 9; *Deland, supra* note 176 at para 38.
[315] *Fraser, supra* note 176 at paras 54, 68; *Belapatino Savaresse, supra* note 176 at paras 33-36; *Deland, supra* note 176 at paras 64-65.
[316] Section 32(2) reads: "Evidence gathered in Canada must satisfy the rules of evidence under Canadian law in order to be admitted." *Act, supra* note 3.
[317] Section 24(2) reads: "Where, in proceedings under subsection (1), a court concludes that evidence was obtained in a manner that infringed or denied any rights or freedoms guaranteed by this Charter, the evidence shall be excluded if it is established that, having regard to all the circumstances, the admission of it in the proceedings would bring the administration of justice into disrepute." *Charter, supra* note 2.
[318] *United States of America v Anekwu*, 2009 SCC 41 at para 21 [*Anekwu*].
[319] Section 8 protects against unreasonable search and seizure, and section 9 protects against arbitrary detention (*Charter, supra* note 2).

the requesting state to meet the test for committal, the door is opened to a discharge of the sought individual at an earlier stage in extradition proceedings.

5. Contemporary Rights Considerations in Extradition

The following section now turns to some recent developments in jurisprudence that illuminate some of the problems and possible paths forward based on the state of extradition law in Canada. First, I discuss the extradition of Dr Hassan Diab to France, and the public outrage it inspired, as an example of one of the worst possible outcomes of the extradition process, especially the lack of court interference in holding to account the Canadian government – whether the Minister of Justice or the Attorney General. Second, I discuss the 2019 *Vavilov* decision that updates administrative standards of review, and its early application to extradition matters.

5.1 Diab Extradition

Hassan Diab, a Canadian citizen of Lebanese origin, was extradited to France in 2014 on terrorism charges for his alleged participation in the 1980 bombing of a synagogue in France. The evidence against him was circumstantial and the extradition judge acknowledged that the evidence linking Diab to the bombing was weak.[320] However, due to the extremely low standard of proof required under the Act and associated case law reviewed above, the judge ruled that it was sufficient to commit him for extradition, a decision the court of appeal did not disturb.[321] In reviewing the Minister's decision to surrender, the court again declined to disturb the outcome. The primary issues regarded whether the Minister had jurisdiction to surrender given that Diab was not wanted for trial[322] and whether surrender would shock the conscience of Canadians given the reliance on unsourced intelligence reports as a source of evidence.[323]

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[320] *France v Diab*, 2014 ONCA 374 at para 2 [*Diab*].
[321] *Ibid* at paras 77-78; para 141.
[322] The French criminal process follows an inquisitorial model in which judges take central investigative roles (known as juges d'instruction), which begin before an accused person is charged. The severity of the criminal offence determines the court and composition of the bench leading the investigation: in Diab's case, there were two investigating judges. France made the extradition request for Diab while his case was still at the pre-charge investigative stage, and the judges had not determined whether to send the case to trial. The decision to send or not send an individual to trial is appealable to the Chambre de l'instruction, a specialised appeal court, whose decision is then appealable to the Cour de cassation, the highest court in France for criminal matters. If a matter is sent to trial that started before investigating judges, it will be sent to the cour d'assises for a trial.
[323] *Diab*, *supra* note 320 at para 142.

Diab was surrendered to France in November 2014. Shortly afterwards, CBC News reported that France had been in possession of exculpatory evidence that was never disclosed to Diab or his lawyers.[324] A subsequent independent review of the Diab extradition noted that at least one member of the International Assistance Group at the Department of Justice was aware of this exculpatory evidence by approximately 2010, although it is unclear if it was shared with the rest of counsel working on the case.[325]

Diab spent close to three years in detention in France without being formally charged, before the two investigating judges in charge of anti-terrorism prosecutions released him and dismissed the case[326] due to lack of evidence.[327] He returned to Canada in January 2018.[328] His release, which had the effect of ending Diab's detention and terminating the criminal proceedings against him, was appealed to the Chambre de l'instruction, tasked with hearing criminal appeals arising from investigating judges; this court quashed the investigating judges' dismissal order and returned the case before the Cour d'assises for Diab to stand trial in January of 2021.[329] In May 2021 the Cour de cassation dismissed Diab's appeal and confirmed sending the case before the cour d'assises for trial.[330] Although there appears to have been no new evidence presented, the issue turned on whether the evidence gathered by the investigating judges was sufficient to send the case to trial. Evidently, the courts of appeal disagreed with the assessment of the investigating judges.

The Diab extradition attracted considerable public controversy, particularly concerning the low evidentiary standards at the committal stage, and further concerns when the CBC News report was first published regarding the exculpatory evidence. At a minimum, the sequence of events within

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[324] David Cochrane, Lisa Laventure, "France Told Canada Key Evidence Did Not Exist in Hassan Diab Extradition Case," *CBC News* (20 June 2018), available online: < https://www.cbc.ca/news/politics/hassan-diab-france-evidence-1.4714307.>

[325] Segal, *Independent Report*, *supra* note 4 at 54-55.

[326] Cass crim, Arrêt n°711 du 19 mai 2021 [2021] (21-80.849) - ECLI:FR:CCAS:2021:CR00711 at para 14 ["Arrêt n°711 du 19 mai 2021"].

[327] David Cochrane, "French Court Orders Hassan Diab to Stand Trial in Terrorism Case, 3 Years After He Was Set Free," *CBC News* (27 January 2021), available online: < https://www.cbc.ca/news/politics/hassan-diab-france-1.5888310.>

[328] *Ibid*.

[329] *Ibid*. See also Communiqué (arrêt n°711 du 19 mai 2021, chambre criminelle), available online: < https://www.courdecassation.fr/jurisprudence_2/communiques_lies_activite_juridictionnelle_8004/attentat_rue_copernic_10121/n_711_47076.html> ["Communiqué de l'arrêt"].

[330] *Ibid*, see also "Arrêt n°711 du 19 mai 2021," *supra* note 326. See explanatory note, *supra* 322 for more information on the French criminal law system.

the Department of Justice and especially within the International Assistance Group should attract greater attention to the degree of control and the breadth of discretion that the Minister of Justice has throughout the extradition process.[331] In particular, and unlike in most extradition cases, counsel from the International Assistance Group acted in court when normally it would be litigators from the Attorney General's office acting, a very obvious melding of the two distinct roles the Minister of Justice and the Attorney General ostensibly play.[332] The independent review of the case did not see this as inherently problematic, even though it did note that allowing IAG lawyers to represent the Attorney General and the requesting state in court could give rise to "awkward" situations.[333] I would suggest that it is more than "awkward" when the counsel in question is fully aware of the existence of exculpatory evidence that impacted the one piece of evidence tilting and nevertheless pursues extradition with all the restrictions on liberty it entails, and when such counsel repeatedly adjourns proceedings to gather additional evidence while omitting this detail from the court. It arguably borders on misleading the court. While it cannot be known if the outcome in Diab would have been the same had Justice Maranger of the Ontario Superior Court of Justice been aware of either or both of these issues, they each individually and cumulatively raise that possibility.

5.2 The Effect of *Vavilov*

In December 2019, the Supreme Court of Canada released its decision in *Canada (Minister of Citizenship and Immigration) v Vavilov*,[334] which substantially reformed the standards of review of administrative action and provided greater clarity regarding the reasonableness standard. Rather than retaining two distinct tests for judicial review – reasonableness and correctness – and the incoherence over when one or the other applies, the Supreme Court set one presumptive standard for all judicial review: reasonableness.[335]

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[331] Particularly since, in practice, the IAG assists the Minister in exercising that discretion at key points in the process.
[332] Segal, *Independent Report, supra* note 4 at 40.
[333] *Ibid* at 84.
[334] 2019 SCC 65 [*Vavilov*].
[335] *Ibid* at para 10. Courts may derogate from this standard only when needed by clear legislative intent (where the statute declares otherwise) or by the rule of law (para 10).

The Supreme Court also provided updated guidance for applying the reasonableness standard. The court confirms that reasonableness is a robust standard of review, not a rubber-stamp.[336] It is intended to take the administrative decision as a whole and determine whether it is intelligible, transparent, and justified, based on the underlying rationale of the decision itself.[337] Connected to this standard and this review, the court states that administrative bodies should develop "culture[s] of justification" and be in a position to demonstrate to the public that their decisions are rational and fair.[338] Amongst the robust and thorough explanation of how reasonableness is meant to operate in judicial review, a particularly noteworthy point was made by the court, which is that administrative decisions should reflect an understanding of the stakes involved and the consequences of the decision.[339] This is a potentially helpful tool for extradition purposes because it may be able to shift some of the focus more clearly onto the person being impacted by the result: the individual being sought by a foreign state to face criminal prosecution or sentencing.

A recent application of *Vavilov* to the judicial review of surrender orders is in *Romania v Boros*.[340] Here, the Minister's decision was ruled unreasonable because of the lack of transparency vis-à-vis the sought individual regarding the material on which the Minister based his decision.[341] A significant contribution by *Vavilov* to the reasonableness analysis is its emphasis on transparency in decision-making.[342] This emphasis on transparency is significant in the extradition context since, as seen in previous sections, surrender orders have been accorded a high degree of deference by the courts, who have been reticent to interfere with a process considered essentially political. As a result, the courts have been less inclined to deeply engage with Ministerial decision-making leading to the surrender order. This emphasis on transparency not only provides greater potential assistance to the sought individual in understanding and challenging a surrender decision. It also provides an opening to the courts reviewing surrender order reasons, to more closely examine these decisions and the evidence on which Ministers rely to reach them. This represents a potentially important advancement over past jurisprudence that has tended to favour non-interference by

[336] *Ibid* at paras 12-13.
[337] *Ibid* at para 15.
[338] *Ibid* at para 14.
[339] *Ibid* at paras 133-135.
[340] 2020 ONCA 216 [*Boros*].
[341] *Ibid* at paras 26-29.
[342] *Vavilov, supra* note 334 at para 15.

courts judicially reviewing surrender orders, even in contexts where *Charter* rights are involved. Emphasising the need for transparency may also be helpful going forward, particularly when considering engagements with analyses of section 6(1) rights infringement and justifications thereof.

6. International Jurisprudence and International Human Rights Law

International jurisprudence and international human rights law have had limited application in Canadian extradition practice.[343] However, Canada is a party to several international human rights treaties, and these treaties are as equally binding as extradition treaties on Canada. In addition, Canada has on multiple occasions been the country mentioned in a complaint to the United Nations Human Rights Committee (HRC) and the Committee Against Torture, including in extradition matters. The following section will review both the treaties and the relevant jurisprudence involving Canada that relate to Canadian extradition law.

6.1 International Human Rights Law

There are two primary international human rights legal instruments that impact extradition in Canadian law: the *International Covenant on Civil and Political Rights* (*ICCPR* or *Covenant*) and the *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* (*CAT* or *Convention*).

The *ICCPR* was opened for signature, ratification, and accession by the United Nations General Assembly on 16 December 1966 and came into force on 23 March 1976, once thirty-five states had either ratified or acceded to the Covenant.[344] Canada acceded to it on 19 May 1976. The Covenant sets out a series of rights generally governing the relationship between the individual and the state in terms of treatment by the state of the individual, the individual's rights of participation in public life, and the freedom of the individual from state interference on several aspects of public and private life. Individuals and groups can make complaints alleging violations by state parties of the *ICCPR* to the HRC, which has the power to adjudicate these claims and

[343] Harrington, "Human Rights Obligations," *supra* note 28 at 47.
[344] According to the terms of the *ICCPR*, *supra* note 27 at art 49.

interpret the *Covenant* via the procedure set out in *the (First) Optional Protocol*, separately ratified.[345]

The *CAT* was opened for signature, ratification, and accession by the United Nations General Assembly on 10 December 1984 and came into force on 26 June 1987, once twenty states had either ratified or acceded to it.[346] As the title implies, the Convention takes aim specifically at prohibiting state conduct that intentionally inflicts or acquiesces in severe pain or suffering whether physical or mental, for a variety of purposes.[347] The *CAT* also provides for the creation of the Committee Against Torture; like the HRC, if its authority is acceded to by the state party, claims may be lodged against it for alleged violations of the *CAT*.[348]

6.2 International Jurisprudence

There have been few extradition-based complaints against Canada before international human rights adjudicatory bodies, and fewer still have been successful. Canada has had five complaints submitted against it: four at the HRC under the *ICCPR*[349] and one at the Committee Against Torture under the *CAT*.[350]

Three of the cases filed under the *ICCPR* – *Ng*, *Kindler*, and *Cox* – based their complaints on Canada's refusal to seek assurances that no death penalty would be imposed. The sought individuals in each of these cases were requested for return by the United States to face murder charges and risked imposition of the death penalty if they were convicted. Canada had declined in each case to seek such assurances, and the Supreme Court of Canada declined to require such

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[345] *Optional Protocol of the International Covenant on Civil and Political Rights*, 16 December 1966, 999 UNTS 171, no 14668 (entered into force 23 March 1976, acceded by Canada 19 May 1976).
[346] *CAT*, *supra* note 38 at art 27(1).
[347] *Ibid* at art 1.
[348] *Ibid* art 21. Canada made the required declaration to accede to the Committee's authority on 13 November 1989; see: Canada, "Reports on Human Rights Treaties," (23 December 2020), online: <https://www.canada.ca/en/canadian-heritage/services/canada-united-nations-system/reports-united-nations-treaties.html.>
[349] To wit: *Saxena*, (3 November 2016) Communication No 2118/2011, CCPR/C/118/D/2118/2011 [*Saxena*]; *Chitat Ng*, (5 November 1993) Communication No 469/1991, CCPR/C/49/D/469/1991 (1994) [*Ng*]; *Kindler*, (30 July 1993) Communication No 470/1991, CCPR/C/48/D/470/1991 [*Kindler*]; and *Cox*, (31 October 1994) Communication No 539/1993, CCPR/C/52/D/539/1993 [*Cox*]. *Judge*, supra note 33 indirectly deals with extradition, however, the main substantive arguments did not pertain to Canada's extradition process and so this case was excluded for present purposes.
[350] *Boily*, (14 November 2011) Communication No 327/2007, CAT/C/47/D/327/2007 [*Boily*].

assurances as conditions for their surrenders.[351] These cases each alleged several violations of the *ICCPR*, including articles 6, 7, and 14, which cover: the right to life and not to be arbitrarily deprived thereof, including rules relating to the death penalty (article 6); protection against torture and cruel, inhuman, or degrading treatment or punishment (article 7); and a variety of legal rights protection in criminal trials, including equal standing before the court, the presumption of innocence, and the rights to know the charges, to be tried without delay, to meet with counsel and prepare a defense, to be tried in person, to examine witnesses and call witnesses, to have an interpreter, to not be compelled to testify against oneself, to have conviction and sentence reviewable, to not be tried or punished again for offences for which one has been finally acquitted or convicted, and if a conviction is reversed, to be compensated according to law (article 14). In these cases, the allegations concerning the death penalty were primarily dealt with under articles 6 and 7. In each case, the HRC was divided on the question of surrendering without assurances in contexts where the death penalty would be sought or imposed.

Ultimately, the only case in which the HRC held that extradition in these circumstances constituted a violation of the *ICCPR* was in the case of *Ng* because of the method of execution he faced: asphyxiation by cyanide gas. The majority of the HRC held that such method of execution violated article 7 of the Covenant as it constituted cruel and inhuman punishment, as this method did not limit the physical and mental suffering of the person executed.[352] It was held across all three decisions that the death penalty did not per se violate the right to life per article 6 of the *ICCPR*. As the HRC elucidated in *Ng* that article 6 expressed a preference for limiting the death penalty but does not require its abolition.[353] The impact of this decision for Canada is limited, as by 2001 Supreme Court of Canada's decision in *Burns* effectively prohibited extradition without assurances that the death penalty would be imposed where such punishment is an option, less than ten years after the *Kindler*, *Ng*, and *Cox* decisions were released.[354]

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[351] See *Reference Re Ng Extradition (Can)*, [1991] 2 SCR 858; *Kindler v Canada (Minister of Justice)*, [1991] 2 SCR 779. In Cox's HRC decision it was indicated that in light of the Supreme Court of Canada's decision in *Ng* and *Kindler* it would be futile to exhaust all domestic remedies (*Cox, supra* note 349 at para 8.1).
[352] *Ng, supra* note 349 at para 16.4.
[353] *Ibid* at paras 15.2-15.3. It is worth recalling that *Ng*, *Kindler*, and *Cox* were all decided between 1993-1994; as such, the statements of the law and interpretation of the Covenant contained therein may be out of date.
[354] *Burns, supra* note 56.

The fourth case, *Saxena,* concerned an allegation that Canada had waived the rule of specialty after surrendering the sought individual.[355] After Canada extradited Saxena, Thailand requested a waiver of the rule of specialty, which prevents the requesting state from prosecuting the sought individual for offences other than those for which the sought person has been surrendered.[356] In this case, the offences for which they requested the waiver were allegedly time-barred, that is, time had lapsed for prosecution according to Thailand's laws.[357] While the waiver request could be made pursuant to the 1911 extradition treaty between Canada and Thailand, the HRC noted that Canada had repeatedly assured Saxena that there would be no waiver of the rule of specialty, and moreover that Saxena was not given the opportunity to provide input on the waiver.[358] The HRC held that Canada's agreement to waive the rule of specialty without providing Saxena an opportunity to reply violated article 13 of the *ICCPR,* which protects against expelling a non-citizen from a state's territory who is lawfully there except in accordance with the law.[359] The Committee directed Canada to make reparations to the affected individual without specifying the form of the reparations, and to amend its laws to bring them into conformity with the *ICCPR*.[360]

Canada's materials submitted in compliance with reporting requirements to the HRC subsequent to these decisions hint that these decisions and the recommendations contained therein will have or have had a limited impact on Canada's laws and practices. As mentioned above, concerns

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[355] In extradition, "the rule of specialty" constrains prosecution of the surrendered individual to only those crimes for which they are extradited. For example, if someone is surrendered to face trial on a charge of assault, they may only be tried for assault – even if the person in question also had a drug possession charge. It has been an important part of common law extradition since at least the nineteenth century, with an explicit protection in the *Extradition Act* 1870 (UK), 33 & 34 Vic, c 52, s 3(2). Even as early as the *Jay Treaty*, the constraints for which extradition could be requested could imply a form of specialty: were someone surrendered under that treaty to face a charge of murder, and then, once returned to the United States (for example), instead face a charge of theft, the United States at minimum risked giving the Great Britain the impression that it could not be trusted to fulfill treaty obligations with integrity. In this way, extradition effectively involves an act of faith on the part of states that each will do what they say they will do, and not act in ways that risks jeopardizing the relationship as a whole.

[356] *Saxena, supra* note 349 at para 11.2, 11.5.

[357] *Ibid* at para 11.3.

[358] *Ibid* at para 11.8.

[359] *Ibid* at para 12. See also *ICCPR, supra* note 27 at art 13. Regarding the matter of giving Saxena an opportunity to provide input on the waiver request, it could easily be noted in the domestic jurisprudence of the case, and alluded to by the HRC, that Saxena was alive to the risk of a request to waiver and specifically sought assurances that it would not be imposed. Thus, Canada's accession to the waiver request after the fact may suggest a level of bad faith on the Canadian government's part in their communications with Saxena and before domestic courts in Canada, which is a troubling concern from the perspective of rights protection (see *Saxena, supra* note 349 at para 11.8; *Thailand v Saxena*, 2006 BCCA 98 at para 3).

[360] *Saxena, supra* note 349 at para 12.

relating to extradition where the death penalty may be imposed were mostly rendered moot by the *Burns* decision in 2001.[361] Intriguingly though, the *Kindler*, *Ng*, and *Cox* decisions are the only extradition decisions dealt with in available documents relating to country reports and the follow-ups, in both the parts of Canada's reports and responses, and in the HRC's concluding observations.[362] However, the adoption of views in *Saxena* only occurred in 2016, after Canada's most recent report was submitted, and searches of the CanLII, Lexis Advance Quicklaw, and WestlawNext databases reveal no Canadian cases citing this decision.

One case filed against Canada alleged violations of the *CAT* in extraditing the sought individual, Boily, to Mexico on insufficient assurances in the face of allegations of torture by police and other state officials and a fear that he would be returned to the same facility from which he had escaped (during which a prison guard was killed) before then escaping back to Canada. Boily, charged with marijuana trafficking in Mexico, claimed that he refused to cooperate with police and provide information, and that in retaliation, the police smothered him with a plastic bag, had substances inserted into his nose, beat him, and forced him to sign a confession written in Spanish that he did not understand.[363] After receiving limited medical attention and being held for 72 hours in a lightless cell, the same police officers threatened to kill him and warned him not to report the treatment he had received.[364] After being found guilty on the trafficking charges, during which the

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[361] Though these cases were not cited in *Burns*, the Supreme Court did cite the *Second Optional Protocol*'s policy on death penalty abolition at para 87 and the *ICCPR*'s prohibition on execution of individuals for offences committed before they were 18 years old at para 93 (*ICCPR*, *supra* note 27 at art 6(5)). For the *Second Optional Protocol*, see: *Second Optional Protocol to the International Covenant on Civil and Political Rights, Aiming at the Abolition of the Death Penalty*, G.A. Res. 44/128 (December 15, 1989) (in force in 1991).

[362] *Kindler*, *Cox*, *Ng* were discussed in: Canada, *Consideration of Reports Submitted by States Parties Under Article 40 of the Covenant*, Fourth Periodic Reports of States Parties Due in 1995, Addendum, CCPR/C/103/Add.5 (15 October 1997) at 11, 12, 14, 26. Affirmation of the Burns decision and the seriousness with which the Supreme Court views extradition where torture or the death penalty may result, briefly mentioned here: Canada, *Consideration of Reports Submitted by States Parties Under Article 40 of the Covenant*, Fifth Periodic Report, CCPR/C/CAN/2004/5 (18 November 2004) at 9, 15. The most recent available report does not mention extradition at all: Canada, *Consideration of Reports Submitted by States Parties Under Article 40 of the Covenant*, Sixth Periodic Reports of States Parties Due in 2010, CCPR/C/CAN/6 (9 April 2013), nor do the List of Issues, Canada's Reply, or the Concluding Observations. See: Human Rights Committee, *List of Issues in Relation to the Sixth Periodic Report of Canada*, CCPR/C/CAN/Q/6 (21 November 2014); Canada, *List of Issues in Relation to the Sixth Periodic Report of Canada: Addendum 1: Replies of Canada to the List of Issues*, CCPR/C/CAN/Q/6/Add.1 (19 June 2015); Human Rights Committee, *Concluding Observations on the Sixth Periodic Report of Canada*, CCPR/C/CAN/CO/6 (13 August 2015).

[363] *Boily*, *supra* note 350 at para 2.1.

[364] *Ibid*.

coerced statement above was introduced, Boily organised an escape from prison one year later.[365] On extradition, Boily was returned to the same facility and was tortured again.[366] The Committee Against Torture, finding in favour of Boily, held that Canada did not consider all the circumstances relating to the "foreseeable, real and personal risk of torture" Boily faced if returned to Mexico.[367] Although it was uncontested before the Committee that Boily had previously been tortured,[368] Canada's decision to extradite did not consider the fact that Boily would be returned to the same prison from which he had escaped and at which a guard had been killed during said escape, which was a significant absence since charges arising from the guard's death were a subject of the extradition request.[369] Second, the Canada-Mexico diplomatic assurances system was not properly designed so as to prevent the risk of torture.[370] In particular, Canadian consular officials were not informed of the extradition or of the need to maintain close, continuous contact with Boily from the moment he was handed over.[371] The Committee noted that the highest risk of torture was during the initial days of detention, which Boily alleged occurred; however, Canadian consular officials did not check on Boily until he had been in detention for five days, after the torture had occurred.[372] The Committee held that as a result of these actions, Canada violated articles 3 and 22 of the *CAT* and ordered Canada to provide compensation, to provide full rehabilitative services to Boily, and to review its system of diplomatic assurances.[373] It should be noted that this case hinges on facts known at the time of extradition as well as facts that occurred afterwards. The failure of consular officials to check on Boily's welfare could only occur after Canada extradited him, as could the torture, factual findings made for the first time by the Committee. However, the uncontested prior allegations of torture had been before Canada's courts, as was the regime of assurances. Domestic courts' findings of fact do not bind the Committee; it is permitted to examine the facts and reach its own factual conclusions. The Committee ordered Canada to compensate Boily for violating his rights without specifying the form of the compensation, to provide him with "as full a rehabilitation as possible" including but not limited to medical and psychological care, social services, and

[365] *Ibid* para 2.2-2.3.
[366] *Ibid* at para 2.4.
[367] *Ibid* at para 14.5
[368] *Ibid* at 14.4.
[369] *Ibid* at para 14.5.
[370] *Ibid.*
[371] *Ibid.*
[372] *Ibid.*
[373] *Ibid* at para 15.

reimbursements for legal costs, and to review its system of diplomatic assurances to avoid a recurrence of this type of situation.

As of 2021, it appears that Canada has not acted in accordance with the Committee's order. In 2010, Régent Boily had filed suit at the Federal Court of Canada claiming compensation.[374] This lawsuit is ongoing and court records indicate that the parties have been unable to reach a settlement.[375]

6.2 International Comparator Jurisdictions

The following section provides a brief review of extradition proceedings in two comparator jurisdictions: The United Kingdom of Great Britain and Northern Ireland (the United Kingdom), and the Republic of Ireland (Ireland). A broader comparison is beyond the scope of this thesis. The comparator jurisdictions were selected as both are common law jurisdictions and both are part of the former British Empire (with the United Kingdom being at the centre), and thus their laws share a related history with each other and in relation to British imperial history. They provide alternative understandings of extradition, notably by changing the balance of power between the executive and the judiciary. In particular, Ireland conceptualises extradition as a penal process rather than a political one, effectively being Canada's opposite. The insights gleaned from this section will also support the analysis in the following chapter of empirical data gleaned from Canadian extradition practices.

6.2.1 The United Kingdom of Great Britain and Northern Ireland

Although their legislation and potentially their procedure will undergo some changes as a result of the United Kingdom's exit from the European Union, and thus from the European Union-wide extradition scheme, the procedure set out for extradition proceedings with non-European Union jurisdictions remains consistent and provides a useful comparison to Canada's law and practice.

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[374] Brigitte Bureau, "Affaire Régent Boily: Le Comité de l'ONU demande à Canada de s'expliquer" (6 September 2018, updated 18 June 2019), *Ici-Radio Canada*, available online: <https://ici.radio-canada.ca/nouvelle/1121933/explications-torture-mexique-canada.>

[375] "Recorded entry information for file T-541-10," online, *Federal Court of Canada*: <https://www.fct-cf.gc.ca/en/court-files-and-decisions/court-files#cont.>

There are several significant differences between the British practice and the Canadian practice. First, although the British process mirrors Canada's in that an extradition hearing is held before a judge prior to a member of the political executive determining whether the person may be surrendered to the requesting state, the political executive making the surrender decision is the Secretary of State for the Home Department (the Home Secretary).[376] The Home Secretary is a Member of Parliament and a cabinet minister, whose portfolio includes immigration and refugee matters, security, and law and order (but not criminal prosecutions); the approximate Canadian equivalent ministers would be the combined portfolios of the Minister for Public Safety and the Minister for Immigration, Refugees, and Citizenship. The Home Secretary works with other Ministers of State who have more specific portfolios that fall under the Home Office's purview. The Home Secretary's decision to extradite is judicially reviewable. Thus, the British system avoids the tensions inherent to Canada's "two-hatted" Attorney General and Minister of Justice, as well as the complicated logistics in which lawyers advise the "two" ministers at different points in the extradition process.

Second, the extradition judge or magistrate decides on a broader range of issues than merely the sufficiency of evidence and the confirmation of identity; courts are also tasked with considering the rule against double jeopardy, "extraneous considerations," the passage of time, the person's age, and forum, the latter of which legislation defines to mean that it would not be in the interests of justice to extradite.[377] The interests of justice, for the purposes of the legislation, include whether "a substantial measure of" the offence was committed in the United Kingdom,[378] and a consideration of a specific set of matters, including whether a decision to prosecute has been taken in the United Kingdom (even a refusal), whether evidence would be available to the United Kingdom should prosecution proceed there, and issues of delay in both the United Kingdom and the requesting jurisdiction, among other matters.[379] Per the government, the provisions on forum

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[376] That it is the Home Secretary is a function of practice (United Kingdom, Home Office, *A Review of the United Kingdom's Extradition Arrangements,* (review) by Sir Scott Baker, (30 September 2011) at 40 [Baker, *Review of Extradition*). The legislation only specifies the Secretary of State, which according to the *Interpretation Act 1978*, s 5, sched 1, can be any of Her Majesty's Principal Secretary of State.
[377] *Extradition Act 2003* (UK), c 41 at s 79(1), s 83A(1) [*2003 Act*]. Although s 83A was drafted as part of the *2003 Act*, it required the passage of separate legislation, which was done via the *Crime and Courts Act 2013*, s 50; the language from the latter statute is what now exists at s 83A of the *2003 Act*.
[378] *Act 2003* at s 83A(2).
[379] *Ibid* at ss 83A(3), 83B, 83C.

were necessary to render the extradition process more transparent, as they would enable the public to understand how decisions were being taken in cases where there were overlapping jurisdictions for prosecution.[380] A 2015 House of Lords report also considered forum as it appears in the law alongside the Director of Public Prosecutions' guidelines on issues of forum for prosecutorial purposes, ultimately deciding that the guidelines provided sufficient guidance to the Crown Prosecutorial Service to enable them to reach, "sensible conclusions," while acknowledging decisions on this subject will likely continue to be unpredictable.[381]

Like Canada's Minister of Justice, if the court determines that an extradition can proceed, the Home Secretary must decide whether or not a person should be surrendered. Although the United Kingdom's legislation is considerably more detailed than Canadian legislation regarding the matters that they must contemplate in their decision, ultimately their discretion is much narrower than that afforded to Canada's Minister of Justice performing the same task. In fact, in a 2011 report commissioned by the Home Secretary, the Right Honourable Sir Scott Baker, a former Lord Justice of Appeal, recommended that the Secretary of State's powers remain restricted, and specifically argued against leaving matters that would require an exercise in discretion under the Secretary's authority.[382] It requires a near-total refusal where the death penalty may be applied,[383] if the rule of specialty is not protected in either the treaty with the requesting state or that state's domestic laws,[384] or if there was a prior extradition or transfer to the United Kingdom.[385] It also permits but does not require refusal in a further series of circumstances which broadly speaking touch on the person's right to remain in the United Kingdom in the absence of citizenship,[386] and outlines when the Secretary must defer making any decision versus when deferral is optional.[387]

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[380] UK, House of Lords, Select Committee on Extradition Law, *Extradition: UK Law and Practice*, (HL Paper 126, 2014-2015) (London: The Stationery Office, Ltd, 2015) at paras 145-146 [HL Select Committee, *Extradition*].
[381] *Ibid* at para 138.
[382] Baker, *Review of Extradition*, *supra* note 376 at 16.
[383] *Act 2003*, *supra* note 377 at s 94.
[384] *Ibid* at s 95.
[385] *Ibid* at ss 96-96A. The general provision for bars to extradition at this phase is at s 93(2). The language of the statute is strict for all three of these issues, with section 93(2) stating that the Secretary must decide if they are "prohibited" from ordering extradition based on any of these grounds. Each ground contains exceptions, though these exceptions do not provide much space for executive discretion. For example, the death penalty ceases to be a bar on extradition if written assurances which he considers adequate that the sentence will not be imposed or carried out (s 94(2)).
[386] *Ibid* at s 93.
[387] *Ibid* at ss 97-98. Generally speaking, deferral is required where charges are still proceeding before the courts, but not so where the sought individual is serving a sentence.

There is no bar on extraditing those with British citizenship.[388] Finally, unlike Canadian law's preclusion of delegated responsibility beyond the Minister of Justice, the Home Secretary is not required to make the order under their own hand: in addition to the Secretary, it may also be a Minister of State, a Parliamentary Under-Secretary of State, or a senior official (member of the Senior Civil Service or of the Senior Management Structure of Her Majesty's Diplomatic Service).[389]

6.2.2 The Republic of Ireland

The Republic of Ireland maintains a two-tier extradition system because of its membership in the European Union, which has devised its own intra-Union procedure to which its members adhere. For the purposes of this thesis, only the proceedings focusing on non-European Union extradition will be reviewed. These proceedings are encapsulated in the *Extradition Act 1965*.[390] Additionally, Ireland has made public its guide for extradition in these contexts that confirms that the penal nature of extradition proceedings requires strict compliance and an interpretation that favours the individual.[391] This foundational conception sharply contrasts with how Canadian courts have construed extradition as primarily an administrative extension of criminal law enforcement in which the primary considerations are political, and in which little attention is paid to how rights protections of accused individuals interact with penal law.

The privileging of rights considerations in extradition matters exists alongside Ireland's procedures for receiving and reviewing extradition requests. First, requests are normally communicated to the Department of Foreign Affairs and Trade, which forwards the request to both the Attorney General of Ireland and the Minister of Justice and Equality (for the purposes of this section only, "Minister of Justice").[392] The latter communicates with the Garda Siochána (the national police force in Ireland) to determine the sought individual's whereabouts.[393] Meanwhile, the Attorney General reviews the request to determine whether it complies with both the applicable extradition treaty

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[388] For a review of the interplay between citizenship, asylum, and extradition, see Baker, *Review of Extradition, supra note* 376 at 297-301.
[389] *Act 2003*, *supra* note 377 at s 101.
[390] (Republic of Ireland) No 17 [*Act 1965*].
[391] Republic of Ireland, Department of Justice and Equality, *Extradition: A Guide to Procedures in Ireland* (Sept 2019) at 5 [Department of Justice, *Guide to Procedures*].
[392] *Act 1965*, *supra* note 390 at s 23(2).
[393] Department of Justice, *Guide to Procedures*, *supra* note 391 at 5.

and Irish law.[394] The Minister of Justice is then advised of any deficiencies, and the Minister is responsible for advising the Department of Foreign Affairs, which communicates with the requesting state through diplomatic channels to remedy any defects in the request.[395] These defects must be remedied before the Minister of Justice may certify the request under section 26 of the 1965 Act.[396] This certificate is presented to a justice of the High Court, who can then issue a warrant for the sought individual.[397]

The Attorney General's status is markedly different in Ireland compared to Canada, or even the United Kingdom, and bears a brief additional remark. The President of Ireland appoints the Attorney General pursuant to article 30, paragraph 2 of the *Constitution of the Republic of Ireland*.[398] Though they may sit in on cabinet meetings, they are not members of either the political executive or the legislature. Their role is strictly that of the government's lawyer, and the offices the Attorney General oversees all perform legal services falling under their respective portfolios of responsibilities. Thus, unlike in Canada, the government's lawyer is clearly separated from political offices. Unlike in the United Kingdom, the Attorney General does not report to the Minister of Justice (or other cabinet member) and plays no role in criminal prosecutions (under the purview of the Director of Public Prosecutions). These distinctions preserve the Attorney General as a legal officer, rather than a political one.

Returning to the extradition process: as with Canada, the substantive matters pertaining to an extradition request are dealt with in two phases. First, there is a judicial phase which in Ireland occurs before the High Court, and secondly a Ministerial phase, which only occurs if the sought individual is committed for extradition. At the judicial phase, the extradition judge is tasked with examining a broad range of factors beyond the request itself, the supporting evidence, and matters of identification.[399] Most notably for the subject matter of this thesis, Ireland's *Extradition Act* includes the following provisions: a limitation on the extradition of Irish citizens unless either another provision of the Act permits it or the requesting state would extradite its citizens to

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[394] *Ibid* at 5.
[395] *Ibid* at 5-6; *1965 Act*, *supra* note 390 at s 26(3).
[396] *1965 Act*, *supra* note 390 at s 26(1)(a).
[397] *Ibid* at s 26(1)(b).
[398] *Bunreacht na hÉireann*, ratified 1 July 1937, in force 29 December 1937 at art 30(2).
[399] *Act 1965*, *supra* note 390 at s 29.

Ireland;[400] a bar on extradition where the Director of Public Prosecutions or the Attorney General are considering whether, but have not decided, to prosecute domestically for the same offence, or there are pending proceedings in Ireland for the same offence;[401] if final judgement has passed on the sought individual for the alleged offences whether in Ireland or a third country;[402] or if the sought individual has become immune from prosecution or punishment due to lapse of time.[403]

If the High Court commits the individual for extradition, the case proceeds to the Minister for Justice and Equality, who is responsible for issuing a surrender order, the discretion for which appears to be strictly limited.[404] This discretion includes the option to refuse to extradite an individual if the Director of Public Prosecutions or the Attorney General have considered and decided not to prosecute or have terminated criminal proceedings against them for the alleged offence forming the subject of the request.[405] Additionally, the Minister retains a general power of release at any point during extradition proceedings if they are of the opinion that extradition is prohibited by provisions of the Act or where it seems that extradition proceedings are not being pursued.

7. Preliminary Conclusions

A few trends emerge in these doctrinal sources. The first and most obvious is that Canadian extradition law prioritises the state and its political considerations surrounding extradition, even where rights claims have been made. The importance of respecting Canada's international extradition treaty obligations is emphasised repeatedly throughout the jurisprudence, and the concurrent importance of maintaining international comity both outweigh, or serve to limit the intrusion of, *Charter*-protected rights or international human rights treaty obligations into the extradition process. These considerations shape almost every decision taken at every stage of extradition proceedings.

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[400] *Ibid* at s 14.
[401] *Ibid* at s 15(1).
[402] *Ibid* at s 17.
[403] *Ibid* at s 18.
[404] *Ibid* at s 33.
[405] *Ibid* at s 15(2).

Some of this systemic privileging of the state's concerns is attributable to the current structure of the *Act*, particularly the division of decision-making labour and competencies between the extradition judge and the Minister of Justice. In practice, absent serious rights violations, such as the documented practice of torture by the requesting state against the sought individual,[406] extradition judges are primarily confined to an evidentiary-vetting role and, at that, mostly evidence favouring prosecution and thus committal. Although the extradition judge retains competence in *Charter* matters, jurisprudence confines this competence to matters directly pertinent to the committal hearing, with the *Khadr* decision above an outlier born of particularly horrific circumstances.

A more fulsome contemplation of the circumstances surrounding any given extradition proceeding, including the more complex legal questions, is instead left to the Minister of Justice. This legislative decision carries significant risks in terms of the risk of fairness to the sought individual, because, as can be seen in the roles attributed to the Minister of Justice and associated subordinate offices, the Minister of Justice is not an independent or an impartial decision-maker. They are a member of the political executive of the country and oversee an office that maintains direct contact with and occasionally advises the requesting state while also advising the Minister of Justice on surrender matters. Beyond that, they are also invested in a structural reciprocity relationship according to which the more facilitative the Minister is in surrendering the more facilitative Canada might expect the extradition-partner country to be when Canada makes its own requests. This is not a recipe for a full and impartial consideration of circumstances relating to the sought individual, but a recipe for an instrumental orientation to giving up requested persons. At the same time, the Minister of Justice holds the office of Attorney General, who represents the Canadian state and the requesting state in court. This scheme, combined with the *Act*'s complete silence on the matter of judicial reviews initiated by the requesting state, seems to lend a near-inevitability to surrender, regardless of the circumstances.

Furthermore, significant disparity exists between Canada and key comparator jurisdictions in the United Kingdom and the Republic of Ireland. In both of these jurisdictions, the applicable statutes attribute most legal questions, including those relating to the rights of the sought individual, to the

[406] *Khadr*, *supra* note 181.

courts for determination. This distinction is key: the court is an independent and impartial institution in both of these countries, as it is in Canada. Flowing from this status is the court's ability to make decisions where a multiplicity of legal interests compete without the influence of political considerations, and without being beholden to the interests of any party to an extradition case. While both Ireland and the United Kingdom leave the decision on surrender to a member of cabinet, they are not a conflicted minister, their competence is limited, and it also excludes most questions that involve weighing the competing interests and legal claims of the sought individual and the requesting state.

This imbalance between an impartial and independent decision-maker, the judge, and a partisan decision-maker, the Minister of Justice, is exacerbated by the standards of review imposed by courts of appeal to the latter's decisions. The courts simultaneously have placed an onerous burden on the sought individual in presenting rights-based claims, while relying on a highly lenient application of the reasonableness standard of review drawn from administrative law. These standards were not inherent to the legislation but resulted from the judiciary's acquiescence to a framing of extradition as being primarily an exercise in politics. Which begs the question: if the courts can acknowledge that extradition is inherently politicised, why should that mean less scrutiny of those decisions, and not more? This outcome is particularly concerning because the nature of the "political" exercise is not to formulate or develop policy or even foreign policy; it is an exercise in removal of a person found on Canadian territory, to a foreign state, to be subject to that state's criminal process. It is a decision the Minister takes that impacts one individual and their liberty and rights claims.

Relatedly, the commitment in Canadian extradition law to international obligations and the international community is noticeably lopsided in domestic practice. A common refrain in extradition decisions is that Canada must respect its obligations pursuant to its extradition treaties as a member of the international community, and that comity amongst nations must be maintained. Yet, this discussion entirely excludes, as Harrington pointed out some time ago, Canada's obligations under international human rights law, especially the *ICCPR* and the *CAT*. This is an even more glaring absence considering Canada has now been brought before the international bodies on grounds of having violated its treaty obligations towards individuals put through the

extradition process. Canada is a voluntary member of these treaties and has voluntarily submitted itself to the competence of the bodies charged with administering the treaties. Yet, this part of the discussion is all but absent from Canada's extradition law.

These trends are not new in Canada; they have been visible even in pre-Confederation extradition practices. One such example is the outsized influence single actors in the system have on the entire field of extradition law. Pre-Confederation, this was Robinson, in his capacity as a member of the legislature and then later as a judge. Similarly, Justice La Forest's writing and judicial opinions have shaped extradition law and practice since 1961 and especially post-*Charter*.

In pointing this out, I do not mean to suggest that the two men are equivalent. Robinson was a known racist and xenophobe whose extradition judgements demonstrated a jarring lack of recognition of the inherent humanity of Black people, particularly Black men, escaping slavery during the period between the abolition of the institution of slavery in the British Empire (including Canada) and the end of slavery brought about by the American Civil War. In multiple cases decided by Robinson, concerted community action was required to prevent the carrying out of judgments recognised by society at the time to be unjust and contrary to societal values. Justice La Forest carries no such prejudicial history into his legacy. His early written works were products of his employment as counsel at the Department of Justice prior to his becoming a judge, and his time on the Supreme Court of Canada coincided with the coming into effect of the *Charter*. During his tenure, he heard seventeen extradition decisions, authoring the majority or unanimous opinions in nine cases and concurring opinions in a further three cases. In the remaining five, he did not author any opinions, but he was never in dissent.

Yet, the legacies of both Robinson and Justice La Forest involve a focus on the smooth fulfillment of extradition requests, with less consideration for the claims or interests of the individuals sought by the process. Their respective positions at different points in history allowed for their respective views on an entire field of law to shape that field's practice. Particularly for Justice La Forest, this legacy has been to privilege one particular set of obligations – fulfilling extradition requests – at the expense of most other obligations, by a political actor who is largely unconstrained by any

judicial checks on their power. The overall legal landscape, as explored in this chapter, is dotted with red flags when it comes to considering individual rights in this field of law.

Chapter 4: "No Basis to Interfere": Appellate Jurisprudence, Ministerial Decisions, and Rights[407] (Non-)Protection in Extradition

1. Research Method and Building the Dataset[408]

The following section approaches this situation – the extradition of individuals from Canada for alleged criminal offences committed entirely or mostly within the territorial jurisdiction of Canada – through an empirical lens. To do so, I will be using research methods arising from the social sciences.[409] In this chapter, judicial decisions will be examined not as sources of doctrine but as sources of data of committal and surrender decision-making, drawing on descriptive statistics and document analysis research techniques.[410] To do so, a dataset was compiled comprising all published committal appeals and judicial review applications of surrender orders wherein the alleged criminal activity occurred mostly or entirely within Canada's territory,[411] since the coming into effect of the 1999 *Act*, on 17 June 1999, until 31 December 2020, a time span of 21 years, six months, and 14 days. Because of the manageable number of these decisions, all decisions (rather than a sample) will be included in the study.[412] As discussed in Chapter 2, publicly available figures indicate that the vast majority of extradition cases result in a surrender. The objective of the empirical component is to partially shed light on how this occurs, by examining the situations in which such a result could potentially be avoided.

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[407] The calculations throughout this chapter, unless otherwise specified, were completed by the author.

[408] The author wishes to note that during their articling placement, there are a few cases with which they are familiar which make up part of this dataset. In the interests of maintaining confidentiality, these cases will not be pointed out.

[409] For more information on these methods, please see the following texts: Craig Leonard Brians et al, *Empirical Political Analysis: Quantitative and Qualitative Research Methods*, 8th ed (London, New York: Pearson Education, Inc., 2011); and Peter Cane & Herbert M Kritzer, eds, *The Oxford Handbook of Empirical Legal Research* (Oxford: Oxford University Press, 2010).

[410] See: Glenn A Bowen, "Document Analysis as a Qualitative Research Method" (2009) 9:2 Qualitative Research Method 27. A similar method can be found in Jess De Santi & Marie Manikis, "Punishment and Retribution Within the Bail Process: An Analysis of the Public Confidence in the Administration of Justice Ground for Pre-Trial Detention" (2020) 35:3 CJLS 413. Two academic works on the study of judicial decision-making that have been helpful in guiding my thinking are: Lee Epstein & Tonja Jacob, "The Strategic Analysis of Judicial Decisions" (2010) 6 Annual Rev L & Soc Science 341; and Keith J. Bybee, "Paying Attention to What Judges Say: New Directions in the Study of Judicial Decision Making" (2012) 8 Annual Rev L & Soc Science 69.

[411] I use the language "mostly or entirely" to acknowledge that it is possible for some criminal acts to be performed at or across borders, such that the accused individual could be understood as acting in multiple jurisdictions for the commission of a single crime.

[412] An anticipated limitation arising from data collection is the problem of decisions where the basic facts of the case, including the jurisdiction in which the allegations occurred, are not included. Thus, where this occurs, for the sole purpose of obtaining this information, where available a lower court or other previous decision will be examined. I will clearly indicate where data collection by this method has occurred.

Searching for extradition cases poses a particular challenge as there is no consistent titling of the cases. This may be due to the combination of parties: although the Attorney General is the government's "lawyer," both the Minister of Justice and the requesting state are represented at the proceedings. For example, a judicial review decision may be named, "Smith v Canada (Minister of Justice)" in one case, "Smith v United States" in another, and "Smith v Attorney General of Canada" in a third. These variations in case names do not signify anything about the type of decision or its contents; they are simply a procedural quirk. To account for this variation, initial database searches were construed broadly.

In total, three case databases were searched: CanLII, Westlaw Next Canada, and Lexis Advance Quicklaw. In CanLII, a search was conducted using the following parameters: appellate cases citing *Extradition Act*, 1999 c-18, between 17 June 1999 (the coming into effect of the Act) and 31 December 2020, which returned 443 cases. In Westlaw and Quicklaw, the same parameters regarding appellate courts and dates were used, but a broader search using the term "extradition" was employed. In Westlaw, this search returned 1234 cases and in Quicklaw, the search returned 1137 cases.

From these initial results, the dataset was further narrowed to only committal appeals, judicial review applications of surrender orders, and decisions combining both types of decisions, in respect of all three categories of which I was seeking extradition requests for the prosecution of offences allegedly committed within the territorial jurisdiction of Canada. These parameters exclude extradition requests for the sole purpose of the imposition of a sentence and other types of applications except to the extent they informed the reasoning of either the judicial review application or committal appeal. Cases dismissed because the sought individual failed to surrender themself into custody were also excluded because they do not deal with the substance of the appeal or application. Subsequent decisions following reconsiderations by the Minister of Justice or pursuant to new committal hearings were included as these decisions present an opportunity to learn new information about how the Minister of Justice and the courts make decisions. Decisions that dealt with the old *Extradition Act* at the appellate level were also excluded. Finally, where the decision is unclear on the place in which the alleged offences were committed, other related

decisions were consulted purely to determine whether the appeal court decision merited inclusion in the dataset. Where the location could not be determined, the case was excluded.

Having accounted for all of these parameters, the eventual dataset comprises 166 court cases, which include 197 distinct decisions.[413] These disparate numbers account for the variability in extradition proceedings – committal appeals and judicial review applications are distinct procedures, but subsection 57(9) of the *Act* permits them to be joined at the hearing, which frequently occurred – as well as for subsequent committal appeals (where the court of appeal ordered a new hearing or discharge) and subsequent judicial review applications (where the court of appeal ordered a reconsideration or discharge). Put otherwise, some individuals were involved in multiple committal appeals or judicial review applications of the surrender order, and this is reflected in the data. Additionally, there are multiple instances of multiple co-sought individuals being joined in one hearing, or separate cases being joined for the purposes of the appeal due to the similarity of their issues, further lending confusion across different methods of counting. For the analysis which follows, unless it is specified otherwise, the focus will be on the 197 decisions.

2. Defining the Dataset

2.1 Who is the requesting state?

In 191 out of 197 decisions (96.95%) the extradition requests Canada received wherein the alleged criminal offence to be prosecuted occurring entirely or mostly in Canada came from the United States. An additional four requests came from India, all of which were part of the *Badesha* history of cases discussed in Chapter 3. The final two requests came from France.

It is unsurprising that most of these requests emanate from the United States. It is the closest country to Canada, and the two states share a large and relatively open land border, overlapping official languages, and close trade relationships and geopolitical ties. As will be discussed in greater detail below, many cases involved criminal activity that occurred at or across the border.

2.2 Where are extradition proceedings commenced?

[413] In this chapter, the word "case" refers to a court case, regardless of the number of sought individuals attached, whereas the word "decision" refers to the decision taken by an appeal court regarding a specific individual.

There are two dimensions to this question: the first being where in Canada extradition cases arose and the second being where the alleged criminal offences occurred. These dimensions will be observed in order.

Most of the dataset's decisions originated in three provinces: British Columbia (55 decisions), Ontario (47 decisions), and Quebec (87 decisions). These provinces together account for 189 decisions, or 95.94% of the dataset. The remaining eight cases are divided between Alberta (four decisions), New Brunswick (two decisions), and Saskatchewan and Manitoba (one decision each). No cases originated in any other province or territory. There are multiple possible explanations for these numbers which are not mutually exclusive, a few of which are outlined here. First, there is no clear standard for publishing decisions; while advances have been made in recent years regarding the accessibility of court decisions both by centralised databases and by individual courts, there is no single standard for all provinces regarding which cases are published and which are not. Second, there is no set rule on how these cases are heard at a court of appeal; recall from Chapter 3 that courts of appeal may join the hearing of committal appeals and surrender judicial review applications, but they are not obliged. If a court hears them separately, this results in two separate decisions that both deal with only one sought individual (or set of co-sought individuals). Third, and as will be explored further below, many alleged offences involved the transportation of narcotics, other goods, or people across the border into the United States. As a result, it would not be surprising for certain provinces which house cities with connections to international trade routes, such as Quebec (at Montreal), Ontario (at Toronto), or British Columbia (at Vancouver), to also serve as the origins for most of these cases since large volumes of goods and people already flow through these cities. Fourth, these provinces also contain most of Canada's population; assuming that the fact of being in one province or another bears no impact on one's proclivity to become involved in alleged criminal activities, places with larger populations could expect to deal with more extradition cases.

The data regarding the location of the alleged criminal offences can be split into two categories: cases in which the alleged criminal activities occurred within Canada (172 decisions), and cases where the alleged offences occurred at or across the Canada-United States border (25 decisions).

The first category of cases includes cases where the criminal activity occurred in conjunction with efforts abroad, such as participation in a fraud scheme that included corporate entities in multiple countries, or a multi-national drug trafficking scheme, or arranging a murder abroad. This category also includes cases wherein, for example, a fraud scheme was perpetrated against American citizens from Montreal, or where someone acted as a courier in an international drug trafficking scheme, but where, in such situations, all of the sought person's actions occurred entirely within Canada.

In contrast, the second category of offences in which the alleged criminal activity occurred at Canada's border with the United States almost always involved sought individuals who were caught at the border, but also included certain drug trafficking offences wherein the sought individual is alleged to have personally transported drugs across the border. There will be greater exploration of the alleged criminal offences in this dataset, in later sections of this chapter.

3. The Dataset

3.1 Types of Decisions

The 197 decisions comprising this dataset cover the three aforementioned types of appellate court decisions: committal appeals, judicial reviews, and joint committal appeals and judicial reviews. Many of the cases studied also had additional appeals or applications; however, data was only recorded for the three types of decisions comprising this dataset.

Table 1: Number of Decisions by Type

Party	**Decision Type**	**Number of decisions**
Crown	Committal appeals	3
Sought Individual	Committal appeals	42
	Judicial review applications	74
	Joint committal appeals and judicial review applications	78
TOTAL		**197**

The first point to note is that 194 proceedings, counted in the final three rows of Table 1 above, constituting 98.48% of the dataset, were brought by the sought individual and not the Crown on behalf of the requesting state. There are several possible explanations for this outcome. First, as

canvassed in Chapter 3, the threshold at the committal stage is quite low, requiring merely some evidence for each essential element of the equivalent Canadian offence, sufficient that a properly instructed jury could reasonably convict. Additionally, the ROC, the main form of Crown evidence envisioned by the *Act*, benefits from a presumption of reliability. As long as the correct legal tests are applied to the issues before the extradition judge, great deference is owed to the lower courts' decisions. It is likely that these factors go along way to explaining the Crown's overwhelming success rate at the committal stage.

Second, it is not clear from the *Act* that the Crown, on behalf of a foreign state, could even apply for a judicial review of a Ministerial decision not to surrender a sought individual. There are no provisions in the *Extradition Act* that permit such a procedure. Moreover, although the position of Minister of Justice is not the representative of the requesting state, a division within the Justice Department – the International Assistance Group – is tasked with doing so,[414] and in court proceedings, the requesting state and the Minister of Justice are both represented by the Attorney General of Canada, who would not be able to do so if these two entities held divergent opinions – especially in this instance, as it would effectively mean the Attorney General would need to argue both sides of a case. The requesting state does not have representation before the courts except through the Attorney General of Canada.[415] Thus, the total absence of Crown judicial review applications is an outcome apparently envisaged by the legislation itself.

The following set of tables – Tables 2A, 2B, and 2C – explore the decisions rendered in proceedings instituted by the sought individual in more depth, by focusing on the outcomes of each type of decision.

[414] Segal, *Independent Report*, *supra* note 4.
[415] To an extent, these circumstances are reflected in case names of decisions: in Quebec, for example, the requesting state is labelled an "impleaded party" separate from the appellant or respondent. In other provinces, case names sometimes refer to "the Attorney General of Canada on behalf of the United States of America" (for example).

Table 2A: Committal Appeal Outcomes	
Outcome	**Number**
Dismissed	35
Allowed, new hearing ordered	5
Allowed, individual discharged	1
Allowed, order modified	0
Adjourned	1
Conceded by Crown	0
TOTAL	**42**

This first of the trio of tables demonstrates a common theme across all the data: in the overwhelming majority of cases (83.33%), a sought individual seeking an appeal of their committal will have their case dismissed. In contrast, in only 14.29% of cases did the court interfere with the committal decision at all – mostly to order a new hearing, but in one case the individual was discharged. Both outcomes result in cancelling the original committal order emitted from the extradition judge. There were also three Crown appeals, which enjoyed a 100% success rate; these cases will be returned to below.

Table 2B: Surrender Judicial Review Outcomes	
Outcome	**Number**
Dismissed	60
Abandoned - dismissed	0
Allowed, remit to Minister for reconsideration or further submissions	10
Allowed, individual discharged	3
Allowed, order modified	1
Adjourned	0
TOTAL	**74**

Similar results emanate from the judicial review of surrender cases. In 81.08% of cases, the court dismissed the sought individual's application. In one additional case, or 1.35% of cases, the court of appeal allowed the application for judicial review to modify the order, allowing the surrender to nevertheless proceed. Thus, at the end of 82.43% of cases, the sought individual nevertheless is surrendered. The remaining 17.57% of cases (13 cases) result in cancellation of the surrender order, although in most cases, as with committal appeals, the decision-maker gets another opportunity to consider the case. Of these, in 76.92% (10 out of 13 cases), the court of appeal

remitted the decision to the Minister for reconsideration or to permit the sought individual to make further submissions on a matter. Although this was not specifically tracked for the purposes of this study, in at least some of the cases the Minister issued a new surrender order confirming surrender, which can be determined because these new orders were once again subjected to judicial review. However, unlike with committal appeals, the decision-maker in question, the Minister of Justice, remains the same, not just in terms of title but usually (barring an election or cabinet shuffle), the exact same person. In practice, the decision is drafted with significant input by counsel from the International Assistance Group, the same department tasked with dealing with extradition requests and drafting the Authority to Proceed, and derives information from a variety of sources, including information provided by the requesting state, the sought individual's submissions, and other information the IAG deems relevant.[416]

Table 2C: Joint Appeal/ Judicial Review Application Outcomes			
Committal Appeals		**Surrender Judicial Review Applications**	
Outcome	**Number**	**Outcome**	**Number**
Dismissed	67	Dismissed	58
Allowed, new hearing ordered	6	Abandoned - dismissed	1
Allowed, individual discharged	2	Allowed, remit to Minister for reconsideration or further submissions	5
Allowed, order modified	2	Allowed, individual discharged	1
Adjourned	0	Allowed, order modified	2
Conceded by Crown, new hearing ordered	1	Adjourned	2
		Set aside because new hearing ordered or individual discharged at committal	9[417]
TOTAL	**78**	**TOTAL**	**78**

[416] Segal, *Independent Report*, *supra* note 4 at 21.

[417] This number is arrived at by adding together the cases conceded by the Crown, those resulting in a discharge, and those in which a new hearing was ordered: 1+2+6 = 9. Committal appeals that were allowed for the purpose of modifying the order resulted in allowing the surrender judicial review application for the purpose of modifying the surrender order – in these cases, as is clear from the table, the surrender order was not set aside.

Table 2C reviews the outcomes of combined committal appeal/surrender judicial review applications – which is, overall, the most common type of decision. Considering this category of decision separately is due to the unique outcomes that arise in these decision types with respect to the judicial review decisions. Notably, since allowing a committal appeal may generate an order for a new hearing or the discharge of an individual, the judicial review application is set aside because the Minister has lost jurisdiction to order surrender. In fact, this occurred in 11.54% of cases (9) in total. Of those nine cases, in seven of them (77.78%) the court of appeal had ordered a new extradition hearing, including the sole case in which the Crown conceded the appeal; in the remaining two cases (22.22%), the sought individual was discharged from the extradition proceedings and the proceedings were effectively terminated (pending an appeal to the Supreme Court of Canada).

Beyond this particularity, the same trends seen by case type in isolation reappeared in the joint appeal-judicial review cases. Sixty-seven of 78 committal appeals (85.90%) were dismissed. In a further two (2.56%) cases the court of appeal allowed the appeal but modified the committal order. In total, 88.46% of committal appeals in jointly heard cases upheld the committal of the individual.

Similarly, 59 judicial review applications were dismissed (75.64%). A further two (2.56%) cases allowed the application for the purposes of modifying the order, permitting the surrender of the individual to nevertheless occur; in total, 61 cases, representing 78.21% of the judicial review applications, resulted in the surrender of the sought individual. In only six cases (7.69%) in which the surrender order was considered and decided was the surrender prevented from going through. However, if one considers those nine cases in which the surrender order was set aside as a result of the committal appeal decision, that percentage jumps to 19.23% of cases in which, at the end of the hearing, the surrender of the sought individual did not go through.

These numbers change if one excludes the nine judicial review applications that were not considered. Fifty-nine dismissed judicial review applications out of 69 is 85.51% of cases. Accounting for the two applications allowed in which the order was modified but otherwise stood, in 88.41% of judicial review applications, the outcome allows the state to surrender the sought

individual. In only 8.70% of judicial review applications (six out of 69), is the sought individual not surrendered.

Combining the judicial review decisions from Table 2B and Table 2C, while excluding the judicial review applications set aside as a result of a committal appeal decided in the same decision (143 decisions total), in 85.31% of decisions (122 decisions), the result allows for the surrender of the sought individual, either because of a dismissal, because of an abandonment, or because the application for judicial review was only allowed for the purposes of modifying the surrender order. Out of the remaining 21 cases, 15 were returned to the Minister for reconsideration or to receive additional submissions – 10.49% of all judicial reviews, and 71.43% of the decisions that do not result in the extradition occurring. Only four applications of judicial review in the entire dataset, 2.30% of all judicial review decisions, resulted in a discharge of the individual. Yet, when one considers these four against only the 21 decisions that did not result in allowing for the surrender of the sought individual, they represent 19.05% of non-surrender outcomes.

Taking the data as a whole, it is clear that sought individuals' appeals and applications are largely dismissed by courts of appeal, allowing the extradition process to continue to play out. In fact, out of the 197 cases spanning 20 years, six months, and 14 days, only seven sought individuals were discharged, an average success rate of less than one case every two years. In contrast, the three Crown appeals of committal orders enjoyed a 100% success rate: two cases resulted in the appeal court issuing a committal order pursuant to subsection 54(b) of the *Act*, and a new extradition hearing was ordered in the third case. The disparity in success rates will be further explored below, including comment on whether they can be compared given how few Crown appeals there were. For the moment, it suffices to note that the jurisprudence is dominated by legal claims from individuals subjected to the state's coercive carceral and removal powers,[418] and by the courts largely dismissing these claims. This dynamic hints at a lopsided process in which there are few avenues to success in challenging the exercise of state power even, as will be seen, when it directly implications core legal rights designed to protect the individual from such state powers.

[418] Recall, as outlined in Chapter 3, that at each stage of decision-making in the extradition process, the individual is resubjected to arrest and detention, and that the burden of proof in all release hearings rests with the sought individual.

3.2 Characteristics of the Dataset

The following section begins the turn to studying the reasoning of courts and Ministers of Justice, first by examining their inclusion or exclusion of certain basic information about the sought individual and then the criminal allegations they face. To recall, the reasoning of the courts and the Minister are being examined as sources of data, not for developing an understanding of legal doctrine.

3.2.1 Gender

The first criteria examined was whether the gender of the sought individual was mentioned or could be ascertained. The way in which this information was gathered varied considerably within the dataset, based on language of the decision (English or French), length, and whether there were multiple co-sought individuals within the same decision. Sources of this data include pronouns, honorifics, and in French decisions, the gender accord between the sought individual and their party designation, as long as the parties are considered individually in the title of the case, or gender accord within the text of the decision as long as it is done on an individual basis.[419] First names were not used as indicators of gender as these may not consistently reflect gender. In several cases multiple individuals were joined in the same decision. Since both English and French group plurals in a way that neutralises gender (English via the use of "they," French by reverting to the masculine plural for gender and number accords), only where the individual person's gender could be ascertained was their gender noted in the data. In the dataset, only binary male and female identities were reflected, as is demonstrated in Table 3 below.

[419] For the reader unfamiliar with French grammar, all nouns are gendered and the language structures around respecting the gender and number (singular/plural) accords between and across nouns and their descriptions. Some forms of verb conjugation may also provide clues related to gender. If a party is a man for example, in the title of the case he would be identified as "Luc Tremblay APPELANT" whereas a woman would be identified as "Marie Tremblay APPELANTE;" if one wanted to write "Luc came over to ours" in French, it would translate to "Luc est venu chez nous"; if Marie came over, it would be "Marie est venue." Non-binary identities are not easily to reflect in French, although academic work focusing on Quebec and recently the Office québécois de la langue française (OQLF) provide limited guidance; see for example: Florence Ashley, "Les personnes non-binaires en français : une perspective concernée et militante" (2019) 11:14 H-France Salon #5. For the OLFQ's guidelines, which employ a limited acceptance of non-binary identities via linguistic reformulation, see: "Désigner les personnes non-binaires," Office québécois de la langue français, available online: <http://bdl.oqlf.gouv.qc.ca/bdl/gabarit_bdl.asp?T1=non%20binaire&T3.x=0&T3.y=0&id=5370&fbclid=IwAR3OXBbe4UbIJfigfx5xYILwBAj4pJT3HfpxQL5KLghdaHCHCfoZp4Spyyo> (accessed 1 June 2021).

Table 3: Gender	
Gender	**Number**
Man	170
Woman	9
Not mentioned	18
Total	**197**

There is a clear majority of persons identified as men in the dataset, at 86.29%. However, what is striking is that gender is not mentioned for 18 individuals in the dataset. This is surprising, because, in both English and French, gender is very easily signalled in written language. That in 9.14% of decisions the sought individuals' genders could not be determined provides a preliminary hint about the ways in which sought individuals are and are not considered within the context of extradition caselaw, at least in this dataset. More concretely, that in more than nine percent of cases, something as easy to indicate as gender could not be confirmed renders the individual invisible in the context of the decision – and arguably, of the law. This invisibility is concerning, because, as seen above, individuals are overwhelmingly rights claimants in extradition cases before appeals courts.

3.2.2 Citizenship

A more directly relevant datapoint is whether the decision mentions the citizenship of the sought individual. As reviewed in Chapter 3, much of the jurisprudential conversation regarding whether a sought individual should be surrendered in situations where the alleged criminal activity occurred primarily or entirely in Canada has emanated from elaborating the right of citizens to remain in Canada per section 6(1) of the *Charter*. Thus, it is worth noting whether the citizenship of a sought individual is considered worthy of mention in the decisions within the dataset. In addition to explicit citizenship mentions, an explicit mention of arguments dealing with section 6(1) of the *Charter* (or, and notably, the *Cotroni* factors), were counted as indicators of citizenship for the purposes of Table 4 below.

Table 4: Citizenship	
Citizenship	**Number**
Canadian citizenship	92
Indigenous nation member and Canadian citizenship	4
Canadian and other citizenships	4
Other citizenship	6
Not mentioned	91
Total	**197**

Given the aforementioned jurisprudential history, it is perhaps unsurprising that in the majority of the cases, 50.76%, the sought individual is a Canadian citizen, including in combination with other citizenships or immigration identities. Individuals identified within the decision as being Indigenous were all nation members: of the Métis Nation of British Columbia (the only federally recognised representation of Métis people in British Columbia), the Bonaparte Indian Band (the Bonaparte First Nation, of the Secwepemc people), of the Rainy River First Nation (of the Anishinaabe people), and of the Ginogaming First Nation (of the Anishinaabe people, with the decision in question using the term Ojibwe). Of the four cases in which this other membership or status was not Indigenous, those identities were as follows: two individuals with Canadian and Indian citizenship, one person who had Canadian, American, and Lebanese citizenship, and one person who obtained Canadian citizenship after initially having refugee status.

What is noteworthy is that in 46.19% of the cases, citizenship is not mentioned at all, including a lack of mention relating to section 6(1) *Charter* rights or *Cotroni* factors. Given the jurisprudential linking of the location of the alleged offence and specifically Canadian citizenship, it is unexpected that, in so many cases in which the alleged offences occurred in Canada, no mention of any citizenship is made. The cases in this category vary from drug trafficking to money laundering to fraud to child luring, making it difficult to determine whether there is any pattern. It is possible that all these individuals were not Canadian citizens, and for that reason their citizenship was not mentioned by the courts. It is also possible that citizenship is not mentioned in these cases, even though the individual is Canadian, because there was no argument made at the judicial review stage regarding the Minister's application of the *Cotroni* factors or their decision regarding section 6(1) of the *Charter*, or because the case law regarding section 6(1) is so deeply entrenched that

such arguments almost never succeed. There were many cases in which only the court's decision to dismiss an application for judicial review is mentioned, with no discussion of or engagements with any arguments presented in oral or written pleadings; as a result, exceptionally few details of any aspect of the case are present, let alone biographical information. Thus, it is possible, as with any argument, that section 6(1) of the *Charter* was raised both before the Minister of Justice and in arguments but the decision given by the court is so perfunctory as to preclude dealing with them.

For similar reasons, the 3.05% of decisions in which a citizenship is other than Canadian should be noted. Much more clearly than the decisions in which no mention of citizenship is made, these cases recognise that the sought individual is excluded from the normal analysis applied to these situations, as they are not beneficiaries of the right to remain in Canada. The existence of these cases poses a direct challenge to the legal framing of extradition of individuals who are alleged to have committed a criminal offence within Canada as being invariably also a legal question linked to citizenship and raises a more general question about extradition in cases in which Canada could carry a criminal prosecution.

3.2.3 Is the Location of the Offence Mentioned?

A related question – indeed, central for this thesis – is whether the location of the alleged criminal offence was mentioned in the decision which forms part of the dataset. This is the only category of information that, if not mentioned in the decision itself, was sought elsewhere in jurisprudence. The reason for this exception was that the location of the alleged criminal offence was one of the core parameters for defining the dataset, and its mention or not within the decision is itself a threshold variable. Table 5 demonstrates the result.

Table 5: Location of offence mentioned within the decision	
Mentioned	**Number**
Yes	133
No	64
Total	**197**

Of the dataset, the location of the crime was mentioned in 67.51% of decisions; for the remaining 32.49% of decisions, a second decision was consulted solely to determine whether the decision could be included. The second decision consulted varied, as demonstrated in Table 6 below.

Table 6: Oher Decision Consulted	
Decision Type	**Number**
Committal decision	26
Committal appeal	12
Co-accused decision	10
Judicial review decision	8
Bail decision	3
Other	4
Total	**64**

In 40.63% of decisions, the sought individual's committal decision provided the answer, and in total, in 84.38% of the cases the sought individual was a party to the case in which this information was found. In only 15.63% of cases was a decision from a co-accused needed to determine whether the alleged offences occurred within Canada and by extension, whether the particular appellate court case could be included in the dataset.

3.2.4 Alleged Offences

The final category in this section is the data on the alleged criminal offences faced by a sought individual. Data collection on this variable is complicated by the fact that the offences can be defined or named in multiple different ways: the offences outlined on the Authority to Proceed (the ATP), the offences for which they are committed, the offences for which they are surrendered, and the offences as described on the charging document in the requesting state. As explained in Chapter 3, Canada relies on a conduct-based definition of double criminality, which means that the Canadian offences identified in Canadian proceedings may vary considerably from the offences as they are understood in the requesting state. Additionally, different judges relate the charges in different ways, from citing the exact charges under the relevant statute, to quoting the charging document or the ATP, to simply paraphrasing or summarising the charges. For ease of collection, offence categories are construed generally, to include conspiracy and inchoate offences in addition to the offence itself, as can be seen in Table 7 below. Although it was very common that a sought individual was facing multiple (related) charges in the requesting state, there were no

cases in which the charges were so disparate as to render it impossible to categorise within the major categories identified in the table. Had there been a decision, for example, where a person was sought for drug trafficking charges and unrelated murder charges, this decision would be categorised as a distinct category of offence type on its own – i.e. "unrelated drug and murder offences."

Table 7: Offences	
Offence Type	**Number**
Drug Offences	61
Economic Crimes	70
Child Exploitation Offences	6
Human Trafficking	4
Terrorism	4
Bombing	2
Murder	4
Weapons Trafficking	2
Other Property Offences	2
Drugs and Weapons Charges	1
Conspiracy – unspecified	3
Discrepancy	7
Not Mentioned	31
Total	**197**

Before delving into these numbers there are a few points of clarification about these categories. First, the drug offences category includes any form of drug offence and includes the few cases in which laundering the proceeds of crime was charged alongside the drug offences. The reason for including these laundering offences within the larger category of drug offences is because the laundering charge was directly tied to the drug offence: for example, the individual was sought for drug trafficking, possession for the purpose of trafficking, and laundering the proceeds of this crime. The essential character of the criminalised acts is drug-related, not money-related. Second, the economic crimes category includes fraud, telemarketing, and money laundering offences that are unrelated to other types of criminal charges. The unspecified conspiracy charges refer to cases where the nature of the criminal conspiracy is unspecified and could not be determined in the decision; the act of conspiracy is not itself the (or a) criminal offence.

Finally, the discrepancy category refers to decisions in which the Canadian-identified offences differed from the offences as identified by the requesting state. One example of this is a case in which the ATP listed money laundering as the offences whereas the requesting state had charged the sought individual with drug-related offences. Although the actual criminal offences vary, it is the fact that this discrepancy is included in the decision that is of note. This category of offence type is the equivalent of the survey response "I don't know" where the question asks: do you agree?[420] The reason these decisions are kept separate from the categories in which they might otherwise go where one characterisation of the offence type be privileged is twofold. In terms of committal appeals, the lack of equivalency between the offence on the ATP and the offence as charged in the requesting state can result in the evidence being evaluated in a way that does not reflect the spirit of the committal hearing being a test of the sufficiency of the evidence for prosecution. Moreover, in terms of surrender, these decisions where the offences do not match up pose problems for the surrender order – on which offences can the individual be surrendered? How will this decision impact the operation of the rule of specialty?

Delving into the actual numbers, the most obvious point to note is that most offences fall into one of two categories – drugs or economic crimes, which combined account for the offences in 66.50% of decisions. That said, there remain "economic crime" dimensions to drug offences: being in possession of the proceeds of trafficking, for example, would technically be an economic crime, but in the facts the proceeds are clearly the product of a transaction involving a controlled substance; indeed, the offence of possession of proceeds and the offence of trafficking in a controlled substance are often charged alongside each other. In contrast, most of the decisions involving economic crime charges involve some form of fraud scheme (telemarketing, mail fraud, etc.), or money laundering where there is no reason to connect to other types of criminal offences. In fact, in the translation from the requesting state's documents to the ATP, it sometimes happened that one would state money laundering and the other would state fraud.

[420] To continue this analogy, not mentioned would be the survey-response equivalent of "n/a" or an unanswered question. While these types of responses can be excluded from the analysis, their existence may point to specific phenomena or patterns within a given dataset that may turn up new lines of inquiry. Thus, their inclusion as distinct categories even where the "response" does not appear to match the survey question, or the "type of offence" is not a type of offence per se, but a recognition that there are multiple irreconcilable interpretations of what the offences are, has value in being recognised alongside the other types of offences precisely because it shows a breakdown in understanding the raison d'être of an extradition proceeding: that an alleged criminal offence has occurred.

The third largest category, comprising 15.74% of decisions, are those which do not mention the offence(s) for which the individual is sought. If the unspecified conspiracy charges are added to this total (since conspiracy itself is not a criminal offence), the percentage of decisions in which it was not possible to determine the offence with which the sought individual was charged or for which they were sought increases to 18.78%.

Since the point of extradition law is to facilitate criminal prosecutions across national borders, excluding information as to the nature of the offence is potentially very concerning. But for the existence of criminal charges, there would be no case; the sought individual would not be subject to the state's authority, judicial or executive; and there would be no opportunity for the Minister of Justice to exercise executive power in a way that can impede the individual's rights. Especially in a legal field where very little of the executive's exercise of power is visible to the public, this absence of information in a public forum serves to further cast shadows over the extradition process.

A final point of note is the existence of multiple types of offences against individuals. Combined, the decisions in which the sought individual was charged with murder, human trafficking, or child exploitation account for the offences in 14 decisions, or 7.11% of the dataset. While surprising on its face that a foreign state would take an interest in them, given that these forms of offences typically involve the accused being physically present at the moment the offence is committed, and the effects of that offence begin to be felt at that same place and that same moment, they can be explained by the unique circumstances of the cases in which they arose. For example, the murder charges arise from the *Badesha* decisions discussed in Chapters 2 and 3, wherein a murder in India was allegedly arranged by the sought individuals from Canada. The child exploitation decisions varied but were either relating to internet luring or to child pornography. The human trafficking decisions all arose from a group of co-sought individuals allegedly acting in a conspiracy to traffic humans from abroad into the United States over the shared border with Canada. Although a small part of the dataset, they illustrate the diversity of offences for which extradition may be sought, further underscoring why it would be helpful to have this information regularly included in the jurisprudence. Further to that point, it would be especially worrying if

any of the 31 decisions with no mention of the offence turned out to be such personal violence crimes as human trafficking, child exploitation and murder – to return to the early point made on missing information, it is therefore of great concern that we cannot rule out that those do not involve such crimes.

3.3 Court and Ministers' Decisions

In this section, the chapter turns directly to an examination of the decision-making of Ministers of Justice and appeal courts, first through an examination of the grounds of appeal and judicial review advanced by the parties, and then through the extent to which the Minister of Justice's reasons for decision on a surrender order are engaged with by the appellate courts in judicial review contexts.

3.3.1 Grounds of Appeal

This section examines the grounds advanced on committal appeals, including both Crown and individual appeals, and including committal appeals that form part of joint committal appeal and judicial review applications. The focus here shifts from outcomes to the grounds with which the courts deal. Data was collected by both ground type and the number of grounds; hence the total number of grounds exceeds the number of cases from which these grounds have been drawn. In total, there are 123 committal appeal decisions in the dataset, dealing with 242 grounds of appeal as set out in Table 8 below.

Table 8: Committal Appeal Grounds

Ground Type	**Number**
Evidentiary issues - based on record at committal	122
Disclosure order + warrant issues	30
Constitutional challenges to statutes	16
Lack of adherence to Act requirements	24
Stay of proceedings + abuse of process	20
Other Charter and other rights arguments	11
Other	11
Not specified	8
Total	**242**

First, the category "not specified" is an outlier in this dataset, both because it indicates that court did not deal with the appeal in any depth, and because this category is the only category for which the number of times this result occurs in the dataset equals the number of cases in which it occurs. As a result, it can be confirmed that in eight decisions in this dataset, the court provided insufficient information to explain what the issue was on which they had reached a final decision dismissing the appeal. In total, these cases represent 6.50% of the 123 committal decisions. Including these decisions, the mean number of grounds per committal appeal decision is 1.97. However, given the nature of the category "not specified," it would be more appropriate to exclude this category when considering the other categories for the remainder of this section. Removing this category from the dataset leaves 115 committal appeals and 234 grounds of appeal, with a mean of 2.03 grounds of appeal per committal appeal decision.

Unsurprisingly, evidentiary issues clearly dominate, forming 52.14% of grounds raised on appeal. This category is broadly worded, but encompasses several similar and overlapping types of arguments, including whether the evidence was sufficient to commit, whether the extradition hearing judge properly appreciated the evidence, issues relating directly to the ROC, and the influence of the Supreme Court judgements in *Anekwu* and *Ferras* on the appreciation of the evidence at the hearing.[421] All of these types of appeals essentially ask the court to re-examine the evidence presented at the hearing, a decision which, as long as the correct legal test has been applied by the committal judge, is entitled to substantial deference on standard principles related to appellate courts' treatment of lower courts' findings of fact.

The second-most populous category of appeal grounds, those raising appeals relating to disclosure orders and search warrants, also deals with evidentiary issues. However, the distinct focus here is on the interplay between evidence at the hearing and procedural matters in circumstances where additional disclosure has been requested, or where concerns arising from search warrants (particularly those carried out in Canada) makes it worth separating these types of grounds from grounds focusing on the evidence itself. Combining evidentiary issues with disclosure and warrant issues, 64.96% of the grounds of appeal raised on committal involve questions of evidence.

[421] *Anekwu*, *supra* note 318 and *Ferras*, *supra* note 159.

Similarly, some of the datapoints grouped under the fourth category, grounds alleging the lack of adherence to the requirements of the *Act*, involve evidence-adjacent arguments relating to matters such as the test for committal. Although these grounds could impact the evidence presented or its appreciation, the grounds in question are formulated by reference to the Act, and do not directly confront the evidentiary record so much as the legal parameters surrounding the evidence. They encompass 10.23% of grounds of appeal in committal appeals.

This result is unsurprising: as canvassed in Chapter 3, the two questions facing the extradition hearing judge are evidentiary in nature – whether the person before the court is the same as the individual sought by the requesting state, and whether the evidence presented at the hearing is sufficient to justify committal.[422] Furthermore, as reviewed in the previous chapter, the extradition hearing judge has limited jurisdiction to hear *Charter* issues.

In the dataset, then, there are two types of *Charter* arguments that may be presented at an extradition hearing: arguments relating to the constitutionality of the *Act*, and *Charter* rights claims related to executive conduct. Arguments regarding the constitutionality of the *Act*, comprising 6.84% of the grounds of appeal, overwhelmingly focused on the new evidentiary requirements at sections 32 and 33 of the *Act*. However, there were also challenges to section 5 of the *Act*, which allows for extradition regardless of whether the alleged acts occurred within the territory of the requesting state and whether or not Canada could exercise jurisdiction in similar circumstances, which was dismissed as not being within the purview of the extradition judge, and one challenge to the double criminality provisions at section 3(1) (alongside challenges to sections 32 and 33 – all challenges dismissed as having previously been decided). Occasionally, the constitutional challenges were to other associated statutes, including offences in the *Criminal Code* and provisions of the *Privacy Act*.[423]

Finally, other *Charter* and other rights challenges comprise 4.70% of the grounds raised on appeal. This category rounds up the *Charter* grounds of appeal of the rarer variety, where their individual presence is insufficient to constitute separate categories. In the dataset these include grounds

[422] Per s 29(1)(a) *Act*, *supra* note 3.
[423] *Criminal Code*, supra note 90; *Privacy Act*, RSC 1985, c P-21.

related to double jeopardy, issues of delay, or the right to be heard. However, the true amount of *Charter* rights claims is much higher: some of the evidence-related grounds, and grounds relating to stays of proceedings or abuse of process, are also normally *Charter* rights claims by virtue of the legal tests involved, but these claims are sufficiently numerous in the dataset to warrant their own categories.

3.3.2 Grounds of Judicial Review

The grounds of judicial review are both more numerous and more varied, which makes sense given that the Minister's decision on surrender must account for "all relevant circumstances."[424] As discussed above, this dataset only includes applications for judicial review by the sought individual, including those that were heard alongside committal appeals. In total, 359 grounds for judicial review were raised across 152 cases, for a mean number of grounds of 2.36, as shown in Table 9 below.

Table 9: Judicial Review Grounds	
Ground Type	**Number**
Cotroni and/or s 6(1) *Charter*	77
s 7 *Charter*/ s 44 *Act* – circumstances	111
Reasonableness of decision	58
Extradition Treaty argument	16
Constitutional challenges to a statute	12
Disclosure + evidentiary issues	31
Related to exercise of MOJ discretion or otherwise procedural	23
Indigenous Status	4
Not specified	18
Not analysed because decision was set aside as a result of the committal appeal	9
Total	**359**

As with the grounds for committal appeals, there were several cases in which the grounds were not specified, and as noted above in Table 2C, there are also cases in which the surrender order was not reviewed because the enjoined committal appeal was quashed. The numbers in each of

[424] Per s 44(1)(a) *Act. Ibid*.

these categories thus also represent the same number of decisions in which they arise, because a case cannot simultaneously not specify a ground of review and also deal with a "named" ground of review (such as a disclosure-related ground), and because if the surrender order was set aside, no grounds of review were analysed if they were ever mentioned. These categories are included in the table above to encapsulate the whole dataset, but in the paragraphs that follow, these two categories are excluded from the analysis. These two categories represent 17.76% of the judicial review decisions, and 7.52% of all grounds of judicial review. Excluding these two categories results in 125 decisions and 332 grounds of judicial review, for a mean of 2.66 grounds of review raised per decision. These numbers will be used for the remainder of the ensuing analysis.

Similar to the committal appeal grounds, there are categories which clearly dominate the grounds for review; as with committal appeals, these grounds are closely tied to the legal contours of the surrender decision subject to review. However, unlike with committal appeals, the surrender decision is discretionary and involves a broad consideration of factors. As a result, these categories are rather broad and, as such, there will be some discussion of further details within these broad categories.

The first category involves grounds for review regarding the Minister's decision on section 6(1) of the *Charter* mobility right of a Canadian citizen not to be forced to leave Canada, and/or the *Cotroni* factors guiding these decisions. Some decisions discussed the ground as it relates to the *Charter* and in others as it relates to the *Cotroni* factors (and still others, both); in practice, regardless of how the ground was formulated, these decisions deal with some form of claim to protection against extradition because of the sought individual's citizenship. Seventy-seven such grounds were raised out of 332, or 23.19% of all grounds of judicial review raised. The prevalence of this ground is expected. As mentioned above, 50.76% of decisions involved a Canadian citizen, and as reviewed in Chapter 3, extradition infringes the citizen's right to remain in Canada. Therefore, extradition must be justified, opening up such decision to review. Within this category, 36 of the 77 instances of this ground specifically raised the issue or possibility of prosecution in Canada, 46.75% of this category. Additionally, in three out of the four cases where Indigenous status was discussed, section 6(1) was raised. Comparing this data to the data on citizenship,

arguments related to *Cotroni* or section 6(1) were raised in a total of 72 decisions: 71[425] in which the sought individual retained Canadian citizenship and, interestingly, one case of a permanent resident who had arrived in Canada as a refugee – in this latter case, the arguments concerned whether *Cotroni* or section 6(1) could apply.[426]

The second and third categories of review are closely related but are distinguishable. The second category involves grounds alleging breaches or infringements of section 44 of the *Act* and/or section 7 of the *Charter*. Section 44(1)(a) of the *Act* requires the Minister to refuse surrender where it would be unjust or oppressive; as noted in Chapter 3 above, for much of the post-*Charter* extradition jurisprudence, the refusal to surrender has been equated to, or considered directly alongside, section 7 of the *Charter* and whether surrender would be contrary to a principle of fundamental justice. As a result, it is not uncommon for applicants to allege that a surrender order breaches section 44 of the *Act* and section 7 of the *Charter* in one ground, or for the courts of appeal to consider both provisions when assessing an argument. The third category of grounds of review, those challenging the reasonableness of the decision, is related to the second category, in that reasonableness is the standard of review which attaches to the latter category as long as the correct legal test is applied. As a result, many of the grounds challenging the reasonableness of the Minister's decision refer to decisions on specific matters, such as assurances or concerns regarding conduct by the requesting state, which overlap with grounds of appeal alleging infringements of section 44(1)(a) of the *Act* or section 7 of the *Charter*.

The reason for distinguishing these two categories stems from how a matter is dealt with within the court of appeal's decision. Take the example of assurances: where the refusal to obtain certain assurances (or the assurances that have been obtained) is argued to render surrender unjust or oppressive, simply unacceptable, or shocking the conscience of Canadians, the ground is placed in the second category. Where the ground is framed as being a matter of reasonableness – i.e. it was unreasonable for the Minister to order surrender without obtaining certain assurances, the ground was added to the third category.

[425] Both the 72 and 71 include the three cases in which Indigenous Status is raised.
[426] It was held that it could not.

The second category is clearly more populous, and accounts for 33.43% of all grounds of appeal raised; the third category, 17.47% of all grounds raised. These two grounds combined account for 50.90% – slightly more than half of all grounds. Again, this result is to be expected. Section 44(1)(a) of the Act is broadly worded, but also imperative: the Minister must refuse to surrender an individual if they are satisfied that such surrender is unjust or oppressive. Moreover, while in practice this decision receives significant deference by the courts, such deference cannot ignore that the decision is still reviewable on a reasonableness standard. The combination of these two elements makes for a hotly contested legal landscape in which the contours of the Minister's broad discretionary power are shaped, especially now that *Vavilov* has arguably given counsel sharper tools with which to make unreasonableness arguments that chip away at instinctive deference.

Perhaps surprisingly, disclosure and evidentiary issues, primarily issues relating to the sufficiency of the evidence for committal, comprise nearly one tenth of the grounds raised on judicial review, at 9.34% of grounds.[427] This result is unexpected because, as has been repeatedly emphasised, evidentiary questions are primarily the purview of the extradition judge. Jurisprudence consistently confirms that the judicial and Ministerial phases of extradition are distinct with particular obligations at each.[428] In the dataset there were occasions in which the Minister did engage with concerns about evidence or disclosure, although at no point did the Minister order disclosure or re-assess the evidence, and the structure of the extradition process does not leave it open for the Minister to second-guess or overrule the extradition judge. Thus, the choice to continue raising these issues on judicial review a choice that appears to be incongruous with the stage of proceedings.

Since extradition has a treaty-based foundation, it is not unexpected that on occasion sought individuals attempt to ground their arguments in the applicable extradition treaties; these types of claims constitute 4.82% of the grounds of judicial review in this dataset.[429] The grounds tend to be formulated in ways that impose obligations on the Minister of Justice, for example, to seek

[427] For clarity, this group excludes grounds of appeal framed in evidentiary terms that fall under other grounds, most notably under section 6(1) or *Cotroni*, section 7, or reasonableness.
[428] *MM v United States*, *supra* note 19 at para 16.
[429] Technically these arguments are also statutory arguments, as extradition treaties are incorporated by reference into the *Extradition Act*, but their distinct source of the obligation – a treaty negotiated between government officials versus a statute drafted and voted upon by Parliament – makes it useful to separate them from statutory arguments.

assurances that article 12 of the Canada-United States extradition treaty (covering the rule of specialty) will be respected. In some instances, the sought individual raised article 17*bis* of the *Amending Protocol*,[430] which provides guidance where both contracting parties have jurisdiction to prosecute. This article would particularly be helpful for sought individuals in this dataset who do not hold Canadian citizenship and do not benefit from the analysis of the *Cotroni* factors.

As with the committal appeals, occasionally judicial review applications were based in part on arguments regarding the constitutional validity of statutes, comprising 3.61% of grounds of review raised. The challenges vary and include challenges to the same sections 32 and 33 of the *Act* which have been subject to Charter challenges at the committal stage, as well as challenges to the *Act* generally (in the one case, for not specifying how pre-surrender detention should be allocated).

A final noteworthy category are grounds of appeal that related to the Minister's exercise of their discretion or other procedural concerns. These types of grounds did not deal with particular rights claims or the quality of the Minister's reasoning regarding any particular argument raised before them. Rather, the issues raised are that the Minister did not exercise their discretion to consider an argument put before them or otherwise unduly limited their ability to consider an argument or to act, or that another aspect of the procedure unduly impacted the sought individual's ability to engage with the process. Most notably, one such ground was an allegation made by the sought individual against the conduct of their former counsel. In total, this category accounts for 6.93% of decisions.

3.3.3 Judicial Review Decisions' Use of the Minister's Reasons for Surrender

This final sub-section provides an initial examination of the inclusion and use of the Minister of Justice's reasons accompanying a surrender order, in a judicial review decision of that order. Knowing the degree to which these reasons are incorporated into a judicial review decision is valuable. First, the Minister's decision and reasons are not publicly available, rendering reviews of said decision the only glimpse that outsiders can glean into the process in most instances.

[430] The Amending Protocol was entered into by Canada and the United States in 1991 and amended the existing treaty between the two countries with the stated objective of rendering extradition between them "more effective" (see *1988 Protocol, supra* note 141 at preamble).

Second, the degree to which a court chooses to engage and not engage with this decision can provide some insights into the appeal court's own values and decision-making preferences – and, when looked at systematically, how much rule-of-law and rights values are informing the overall legal system's treatment of sought individuals.

In Table 10 below, this use of the Minister's reasons in the court's own reasons is tabulated according to the outcome of the case and the degree of use. The outcomes of the case are the same as those seen in Tables 2B and 2C above, and the totals in the rightmost column reflect the sum of all judicial review decisions outcomes.

The second variable in this table, the use of the Minister's reasons, was divided into four categories based on degree of incorporation of these reasons within judicial decisions. The greatest degree of incorporation is directly quoting the Minister's reasons, with the least incorporation being no mention of the Minister's reasons.[431] The middle categories, where the court paraphrases the reasons and where the reasons are mentioned but not engaged with, were somewhat more delicately defined. Ultimately, the distinctions intend to separate decisions where the court mentions that the Minister considered an element in their decision but does not elucidate the reasoning the Minister used in the decision (and thus mentioned, but did not engage with the reasons), in contrast with decisions by the court that explained or exposed the Minister's reasoning without directly quoting the reasons themselves (hence having paraphrased).

For the purposes of data collection, where multiple uses of the Minister's reasons were combined within one decision, the decision was categorised according to the use representing the most meaningful incorporation: for example, where a decision both quoted and paraphrased the Minister's reasons, the decision was categorised as having "quoted" the reasons. The reason for doing so is to facilitate engaging with this data at its most fulsome. Practically speaking, this only affects data under the three leftmost categories; as long as the Minister's reasons on at least one point were mentioned, the decision was categorised as having "mentioned, not engaged" (or

[431] Technically, the most incorporation a court could have would be if the entire decision was reproduced either in the body of the decision or as an appendix to the decision. However, this option is not listed on the continuum of engagement because it did not occur in the dataset. Ideally, these decisions would be publicized by the Minister of Justice, the actual decision-maker, at the time of their release so that they could be accessed by anyone.

paraphrased or quoted, as the case may be). Only cases in which no mention was made at all of any of the Minister's reasons was the decision determined to have "not mentioned" the reasons, in Table 10 below.

Table 10: Judicial Review Outcomes and Usage of MOJ Reasons					
Outcome	**Use of MOJ Reasons**				
	Quoted	**Paraphrased**	**Mentioned, not engaged**	**Not Mentioned**	**Total**
Dismissed	46	23	15	34	**118**
Abandoned - dismissed	0	0	0	1	**1**
Allowed, remit to Minister for reconsideration or further submissions	12	1	2	0	**15**
Allowed, individual discharged	3	0	0	1	**4**
Allowed, order modified	2	0	1	0	**3**
Adjourned	0	0	1	1	**2**
Set aside because committal appeal allowed	0	0	2	7	**9**
Total	**63**	**24**	**21**	**44**	**152**

From this data, it appears that the courts incorporate the Minister's reasons for surrender into their decisions more often than they do not: together, the quoted and paraphrased categories comprise 57.24% of the uses, a combined 87 out of 152 decisions. The remaining categories, of mentioning but not engaging with the reasons, and of not mentioning the reasons, comprise the remaining 42.76% of decisions (a total of 65 decisions). At the same time, the courts seem to be tied to the extremes of these uses: either directly quoting (63 decisions total) or not mentioning reasons at all (44 decisions total) – a combined 70.39% of decisions.

Turning to the outcomes brought about in these decisions, given the clear majority of decisions in which a judicial review was dismissed, it is unsurprising that the most common outcome, in all categories of the use of the Minister's reasons, is the dismissal of the sought individual's application for judicial review. The datapoint that raises some concern is that in 34 cases, the

judicial review application is dismissed without any mention of the reasons the Minister gave for surrender. This datapoint represents 77.27% of decisions that do not mention any reasons, and 28.81% of all dismissed applications for judicial review.

A lack of reasons provided by an appeals court presents two significant issues in extradition contexts. First, for the individual facing extradition proceedings, it provides no explanation for why the court has rejected their application for judicial review – which, as seen above in section 3.3.2, more often contains at least one *Charter* claim than it does not. The courts play a crucial, constitutional role in determining the content and contours of *Charter* rights, a role that inherently involves acting as a check against the power of the legislature and the executive. A dismissal without engaging with the impugned decision or incorporating it lacks the ability to meaningfully check the executive power that directly impacts *Charter* rights within extradition proceedings, and it does not provide the sought individual with an examination of their rights from a non-partisan state entity. The Minister of Justice is acting on behalf of the requesting state, and also deciding on the rights of the individual they are seeking.

Second, such a dismissal impedes the public's (not to mention scholars') ability to understand the extradition process. An area of law with such intimate ties to *Charter* litigation should be exposed to public scrutiny in the same way that regular criminal law proceedings are open to the public. The Minister's reasons are not made public by the Department of Justice; instead, their entry into public examination only occurs if a surrender order is subjected to judicial review. In practical terms, that means that the decision and reasons enter into a given court of appeals archives. However, access to these archives currently largely depends on physical access to the courts of appeal, which are few in number and spread out across Canada. All of this extreme non-transparency occurs despite the fact that extradition involves the rare interaction between state and individual in which a specific Cabinet Minister takes a decision directly implicating an individual and their rights.

Beyond this particular datapoint, there are a few others worth noting. First, in every single case in which the surrender order was remitted to the Minister for reconsideration or to allow the individual to make further submissions, the court of appeal at minimum mentioned the reasons the

Minister gave in support of surrender; in most cases (80.00% exactly), these reasons were directly quoted, indicating a high level of court use of the Minister's original decision will not stand. A similarly elevated percentage of decisions quoted the Minister's reasons (75%) in which the court quashed the surrender order and discharged the sought individual, putting an end to extradition proceedings.[432] As mentioned, these are the only circumstances in which the Minister's decision to surrender is contradicted by the courts; one cannot help but notice the disparity in treatment of the initial decision based on whether or not the impugned decision stands.

Still, in a clear majority of decisions (71.05%), at minimum courts of appeal have mentioned the reasons the Minister gave for surrender, and of those, most decisions included substantial engagement with the decision by either paraphrased or quoting the Minister directly.

4. Discussion of Results and Conclusions

The final section in this chapter turns to a qualitative examination of the reasoning of the Minister of Justice and to a lesser extent the court of appeal, within a series of case studies. The focus will be on how particular decisions were reached, and the ways in which the Minister (and the courts) engage with or avoid *Charter* protections in extradition contexts. As has been seen in the preceding sections, the data presents some very clear trends: overwhelming dismissals of judicial review applications and committal, significant proportions of the dataset comprised of a limited series of alleged criminal offences, and clear majorities of the types of grounds presented to courts of appeal by individuals seeking to overturn extradition proceedings decisions that bring them closer to removal to the requesting state. As a result, the case studies below are similarly lopsided in that some case studies are representative of more decisions in the dataset than others. Unless specifically mentioned otherwise, the cases named below are cases in the dataset for this project.[433]

4.1 Reviewing the ATP

As mentioned in Chapter 3, the *Act* does not provide a process for challenging the ATP. However, as these are decisions taken by the Minister of Justice, they are subject to challenge. In practice,

[432] Unless the decision was subject to further appeal to the Supreme Court of Canada, or if the Minister re-instituted extradition proceedings.
[433] See Appendix A below for the full list of cases in the dataset.

many of the issues regarding the ATP involve the disparity between the offences listed therein and the offences listed on a Surrender Order, as the latter tends to describe the offences in accordance with the extradition request provided by the extradition partner. These offences do not always bear a resemblance to the ATP offences.

Challenges to the ATP before the committal judge tend to raise issues relating to the lack of information contained within the ATP, specifically lack of particularities that would enable the sought individual to better understand the case to meet in the requesting state (recall that at the committal hearing, the sought individual is only entitled to and usually only receives the ATP, the ROC, and any other evidence the requesting state leads to meet the test for committal – there are no general disclosure rules such as apply to evidence in the hands of the state in a Canadian criminal prosecution). For example, in the *United States v Fong*, the sought individual argued that the ATP did not describe the offences it contained with sufficient particularity for him to know the case to meet, an argument the court rejected in examining the factual record before the court.[434]

Issues with the ATP impact the proceedings that follow, in particular, any discrepancies between the ATP and the surrender order. In *United States v Barbu*, not only a case in the dataset but also a core authority on this matter, the Ontario Court of Appeal was divided over whether the offences on the surrender order needed to match those at committal.[435] In *Barbu*, the sought individual consented to committal on the charges in the ATP, but was surrendered on charges in the United States which appeared to differ from those to which he had consented committal.[436] The majority of the Ontario Court of Appeal held that the outcome in the earlier *Fischbacher*[437] allowed the Minister to surrender the individual on offences that were different from the offences at committal as stated on the ATP.[438] In contrast, the dissent stressed the importance of maintaining harmony at all three stages of extradition: the issuance of the ATP, the committal hearing, and the surrender order.[439] The dissenting judge noted that later stages should not usurp or undermine the authority of the preceding stages – in particular, in this case, the Minister should not undermine the findings

[434] *United States v Fong*, [2005] OJ No 270, 2005 CarswellOnt 302 at paras 2, 20.
[435] 2010 ONCA 891 [*Barbu*].
[436] *Ibid* at para 7, 39.
[437] *Canada (Justice) v Fischbacher*, 2009 SCC 46.
[438] *Barbu*, *supra* note 435 at para 35.
[439] *Ibid* at para 54.

of the committal judge and that "blind faith" cannot be granted to the Minister of Justice in the issuance of the ATP.[440]

The *Barbu* case raises serious concerns for the integrity of the extradition process and has broader implications for rights arguments. Separating the committal and surrender stages to the point where the former can have no impact or constraint on the latter, the majority in this case allows for the Minister to detach themself from the judicial process, rendering an early check on the Minister's power – the committal hearing – an exercise in futility. This outcome flies in the face of any notion of the rule of law and of any concept of protecting rights dependent on the non-arbitrariness of law, and it arguably offends the notion that when someone is subjected to the state's coercive power, as they are in extradition, that person should be informed why. This ruling is particularly severe when one recalls the limited amount of information available to the sought individual at committal. Furthermore, this ruling sets a dangerous precedent regarding the treatment of consent at the committal hearing, and whether a sought person's consent could or should be vitiated where a significant discrepancy arises between the ATP and the surrender order. While Canada does employ a conduct-based double criminality approach, this does not prohibit, but arguably demands, that it be specified the conduct for which the individual is sought.

For example, in *Barbu* the sought individual consented to his committal on drug trafficking and possession of property obtained by crime charges, but no mention is made anywhere that he had also been sought for charges relating to membership in a larger conspiracy – incidentally, also criminalised conduct in Canada, though not present on the ATP. Had it been present, it is possible Barbu would have wanted to challenge his committal on that charge. He was deprived of that right directly as a result of the Minister's decision.

Within the dataset the *Barbu* ruling proved persuasive, being cited in *United States of America v Davies*,[441] and the ruling was followed in spirit in *Gaudreault c Procureure générale du Canada (États-Unis d'Amérique)*.[442] In this latter case, a unanimous Quebec Court of Appeal bench also

[440] *Ibid* at para 60.
[441] *United States of America v Davies*, 2017 ABCA 46 at paras 25-26.
[442] *Gaudreault c Procureure générale du Canada (États-Unis d'Amérique)*, 2017 QCCA 1747.

held that the divergence between the names of the offence on the ATP versus on a surrender order does not impede the right to make full answer and defence because this divergence is merely a product of conduct-based double criminality.[443]

The effect of these explicit rejections by the courts of maintaining a sense of uniformity in the understanding of the charges faced by the sought individual is that the courts grant extreme latitude to the Minister of Justice in their carrying out of their functions under the *Act*, even in the absence of a legal imperative to do so. It appears that the case law's requirement for deference, and the focus of the reasonableness test in extradition being on the outcomes of the Minister's decision, allow for this degree of non-interference by the courts. Yet, this non-interference is not entirely statutorily required: rather it is a product by the decisions that courts make regarding their own ability to interfere against the Minister of Justice.

4.2 *Cotroni*, Article 17*bis*, and the Minister of Justice

As has been repeatedly mentioned, the *Cotroni* decision and the guidance it has provided to courts and Ministers of Justice since its release has been a central piece of the law when discussing the surrender of an individual whose alleged offences have occurred on Canadian soil, even though the test deals substantively not with Canadian territorial location and ability to prosecute offences but with the rights of citizens to remain in Canada per section 6(1) of the *Charter*. As a result, the Minister of Justice has had to contend with this decision in slightly more than half of the decisions in this dataset, per Table 4 above.

From the beginning, the linkage between citizenship rights and location of the offence is not inherently intuitive. Although most people living in Canada are citizens, there are of course, many people who live here who do not have citizenship, but who may nevertheless be accused of having committed a criminal offence or be sought for extradition. Recall that in this dataset, citizenship could not be determined in 91 out of 197 decisions. Many of the factors in *Cotroni* – such as the location of the evidence, the investigative agencies involved, the feasibility of domestic prosecution, sentencing disparities, and where the impact of the alleged offence is felt – are irrelevant to any identity factors of the sought individual, including their citizenship. However,

[443] *Ibid* at paras 63-65.

their limitation to citizenship has caused those sought for extradition who do not have the benefit of citizenship to turn elsewhere for similar protections.

One such alternative site for factors to consider when contemplating extradition for alleged offences committed within Canada has been article 17*bis* of the *Amending Protocol*. Although this article only applies to Canada-US extradition, it has been used multiple times throughout the dataset alongside or as an alternative to section 6(1) of the *Charter* and the *Cotroni* factors.

On a plain reading, the article invites the executives of both countries to consult each other when both have the jurisdiction to prosecute, in consideration of "all relevant factors."[444] Its language does not render obligatory such consultation but does oblige the requested jurisdiction to render a decision whether to extradite or to submit the case to "its competent authorities for the purposes of prosecution."[445]

Effectively, both *Cotroni* and article 17 *bis* require the Minister to confront head-on the situation of cases in which extradition could be sought but where domestic prosecution is available. Within this dataset, it appears both that successive Ministers of Justice have regularly preferred extradition, up to and including when Canadian prosecutions had been commenced, and that the courts of appeal will mostly not challenge these decisions absence egregious errors of law by the Minister.

Recall from Table 9 that 77 grounds of judicial review involved *Cotroni* or section 6(1) of the *Charter* and a further 16 involved a Treaty-based argument. Of the latter number, eight grounds of appeal raised article 17 *bis*. Ministerial decision-making on both of these points reveal some interesting trends.

First of all, it appears to be a matter of regular practice that the Minister receives *Cotroni* assessments from provincial and/or federal prosecutors.[446] Second, and related to the first, is that

[444] *1988 Protocol*, *supra* note 141 at Article 17*bis*.
[445] *Ibid*.
[446] Whether a prosecution falls under provincial or federal prosecutorial jurisdiction depends on the alleged offence; while most criminal prosecutions are the responsibility of provincial prosecutors, certain types of offences, such as

while the Minister must additionally make their own determination under *Cotroni*, they do not seem to interfere with decisions taken by domestic prosecutors to not instate or to terminate domestic criminal proceedings, although prosecutors' reasons for doing so are not made known. This in effect means that the Minister of Justice has forestalled even considering whether the case should instead be prosecuted in Canada because they treat the decision as already made.[447]

For example, in one case in the dataset, *United States of America v Thamby*, the Minister of Justice stated that he accepted the Canadian prosecutors' decision to stay proceedings in favour of extradition proceedings in the United States and that, as the Minister of Justice, he had no authority to direct the prosecutors' decision otherwise.[448] It is not clear from the decision what motivated the prosecutors to stay the charges beyond the existence of the issued ATP, as existing laws do not prioritise one path over another. Primarily basing his decision on the location of the victim (the United States), and the nature of the evidence located in Canada (primarily documents), the Minister held that there was nothing unreasonable in this course of action. However, what the Minister did not discuss in his decision, leading it to be quashed and remitted for reconsideration,[449] was that Thamby had originally intended to plead guilty and, had a clerical error at the court not occurred, he would have done so prior to the issuance of the ATP.[450] The Ontario Court of Appeal in this instance noted that deference to the Minister's decision is premised on the Minister having conducted a proper analysis, which includes dealing with the particular facts of the case before the Minister which was not done in the case of the plea issue.[451]

However, the Court of Appeal dismissed a subsequent judicial review following the Minister's reconsideration, in which the Minister ordered surrender despite the clerical error.[452] In this later decision, the Court of Appeal was satisfied the unusual facts of the case had been appropriately considered and that a clerical error was not trumping section 6(1) of the *Charter*. This decision is

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those against the *Immigration and Refugee Protection Act*, or those involving the *Controlled Drugs and Substances Act*, often attract federal prosecution.

[447] The problem with this line of reasoning is that in practice it leads to delegation of a central sub-decision of matters under the Minister's (non-delegable) authority.

[448] *United States of America v Thamby*, 2011 ONCA 333 at para 24. Direct quotation from the Minister's reasons for surrender given in the case.

[449] Ibid at paras 21, 23.

[450] Ibid at para 3.

[451] Ibid at para 21, 23.

[452] *United States of America v Thamby*, 2011 ONCA 829 at paras 5-6.

considerably shorter than the first judicial review, and it is not clear how the Minister arrived at this second decision (or reconsideration). The only quotation from the reconsideration decision re-emphasises the age and location of the victims as central factors, a conclusion the Minister reached in his initial reasons for surrender.[453]

The lack of challenge to the follow-up judicial review by the court, by seeking leave to appeal to the Supreme Court of Canada, demonstrates an acquiescence to executive power and a shallow appreciation of the right contained in section 6(1) of the *Charter*. The sequence of events in *Thamby I* and *II* appear to suggest that, as long as the Minister acknowledges the relevant factors in the decision, review of the decision will be conducted on a discretionary reasonableness standard, with reasonableness broadly construed – notwithstanding the Cotroni test being constitutionally mandated (and thus arguably under pressure from pre-*Vavilov Dunsmuir* jurisprudence that held constitutional matters be subjected to the correctness standard). In indicating that a factor not present in the Minister's analysis should be present because it is relevant, it seems reasonable to expect that this factor is sufficiently relevant to potentially modify the decision. That the ultimate deciding factors – the age and location of the victim – nevertheless dominates what is visible of the Minister's decision and the courts' engagement with it even in the later decision speaks to the courts' unwillingness to meaningfully engage with the substance of Ministerial decisions, despite having a duty to take seriously the reasonableness standard of review.

4.3 Extradition and Indigenous Peoples

As can be seen in the dataset, decisions involving Indigenous people are rare, but did exist in the dataset. They have been separated when looking at the arguments presented on judicial review in part because the claims themselves are structured differently and take into account considerations that, even if they stem from similar provisions (such as sections 6(1) or 7 of the *Charter*), their content and the way in which they are argued were fundamentally different.

First, a note about outcomes: as seen above, there were four decisions in the dataset in which the sought individual was Indigenous. Of these four, one decision dismissed the application for judicial

[453] *Ibid* at para 7.

review, one remitted the matter to the Minister of Justice for reconsideration, and two decisions resulted in a discharge of the individuals sought for extradition.

The sole case in which judicial review of the surrender order resulted in a dismissal was *Martin v Canada (Minister of Justice)*.[454] Martin, a member of the Métis Nation of British Columbia sought by the United States, had argued that the American judicial system did not account for Métis heritage in its sentencing regime.[455] A unanimous court disagreed, stating that "Aboriginal origin" was considered and absent representations to the contrary it was mere speculation that this would not include Martin on the basis that he was Métis.[456]

Sheck v Canada (Minister of Justice) was a judicial review of a surrender order that resulted in the matter being remitted to the Minister to receive further submissions from Sheck based on the reasons given by the majority at judicial review.[457] The arguments in *Sheck* involved a consideration of sections 6(1), 7, and 15 of the *Charter* as they applied to Sheck and to his children, specifically relating to the separation from their father that would result if Sheck was extradited and ended up facing a significant prison sentence in the United States, in light of Canada's history of policies separating Indigenous children from their parents.[458] The arguments based on sections 6(1) and 15 failed on procedural grounds as they were not raised before the Minister of Justice.[459] However, the majority found that the Minister had committed several errors of reasoning – specifically, that she had concluded without basis that Indigenous status would mitigate an American sentence, that she did not consider the likely Canadian sentence, and did not consider the impact of separation on Sheck's children. Rather than striking the order however, the majority specified that Sheck was to be permitted to make further submissions on these particular points, and the Minister was to then reconsider her decision.[460]

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[454] 2017 BCCA 220 [*Martin*].
[455] *Ibid* at para 35.
[456] *Ibid* at paras 70-71.
[457] 2019 BCCA 364 at para 107 [*Sheck*].
[458] *Ibid* at paras 21, 41. Put otherwise: because Sheck risked being imprisoned across the border, his children would be deprived of his presence as father.
[459] *Ibid* at para 44.
[460] *Ibid* at para 107. For clarity, reconsider is meant to convey that the Minister had to decide anew, not that there is an expectation of a different outcome.

The dissent in Scheck is largely uninteresting – the judge disagreed with both the analysis and disposition of the majority opinion – except for the language used by the dissenting judge to describe Scheck. Unlike the majority, who used the term Indigenous and specifically referred to Scheck's band membership, the dissenting judge repeatedly used the term "Aboriginal." Given that Scheck was decided in 2019, the use of an outdated term, especially when more specific language is available as is the case where band membership is known, is at a minimum a curious choice. But it appears more than that: it reads as insensitive and dismissive of the very real and fraught relationships inherently at play when the Canadian state is seeking to use its coercive powers to subject an Indigenous person to carceral settings, removal from territory, and separation from family and community – all acts the Canadian state has used deliberately against Indigenous peoples as part of its colonial past and present.

The two decisions resulting in discharges demonstrate an amplified version of that insensitivity and dismissiveness. These decisions, both contained in the case *United States v Leonard*, were released several years earlier and several provinces eastward of the first two decisions canvassed above.[461] The two individuals facing extradition, Leonard and Gionet, both Indigenous, had their cases joined by the Ontario Court of Appeal because they dealt with essentially the same arguments relating to how the Minister of Justice dealt with the application of *Gladue*.[462] Specifically, in the reasons for surrender relating to both, the Minister rejected the application of *Gladue* factors to extradition because it would be unfair to allow the sought individual to "escape" prosecution when "accused persons in Canada must generally face prosecution regardless of their heritage, or the fact that surrender would have a negative effect on their family."[463]

This reasoning prompted an unusually harsh rebuke of the Minister of Justice by the court, which held that the Minister's decisions contained several errors of law regarding the purpose and

[461] 2012 ONCA 622 [*Leonard*].
[462] *R v Gladue*, [1999] 1 SCR 688. The main thrust of this decision is that sentencing courts were obliged to consider the particular context of sentencing Indigenous offenders, including historical factors and in particular to consider all alternatives other than a carceral sentence. Although its aim had been to target the overrepresentation of Indigenous peoples in Canadian carceral facilities, its impact on this point has been debated even as its scope has been expanded to include judicial interim release and, here, extradition.
[463] *Leonard, supra* note 461 at para 36 (Leonard) and para 42 (Gionet), quoting the Minister's decision for each person. The language used by the Minister for both decisions and quoted by the court of appeal, was identical. I would note that the reasoning employed by the Minister of Justice is startlingly close to the reasoning found in accusations of "reverse racism."

application of *Gladue*.[464] First, the Minister was incorrect in his assertion that there were no arguments to be made regarding either Indigenous status or *Gladue* under sections 6(1) and 7 of the *Charter*: simply put, there were, particularly regarding sentencing disparities.[465] The Minister also erred in law by suggesting that *Gladue* was unfair to non-Indigenous accused when, in fact, *Gladue* was meant to correct existing discrimination in the criminal law system in Canada.[466] The Minister's third legal error was the false dichotomy between either extradition to face prosecution, or no prosecution at all.[467]

On the final point, the criticism of the Minister's decision extended to his failure to conduct an independent *Cotroni* assessment. Per the court:

> For present purposes, it suffices to say that for the minister to rest his decision to surrender the applicants on the ground that PPSC has decided not to bring charges in Canada, a decision he has not reviewed, amounts to a form of unacceptably circular reasoning that effectively evades his obligation to conduct an independent *Cotroni* analysis and insulates the *Cotroni* analysis from judicial review.[468]

The cumulative effect of these legal errors amounted to an improper analysis under section 6(1) of the *Charter*, a breach of section 7 of the *Charter*, and a breach of section 44 of the *Act*.[469]

The only point of divergence in the *Leonard* decision was the appropriate remedy; it was common to all judges that the Minister's decision could not stand as it was infected with legal errors.[470] A majority of the court held that the appropriate remedy, given these serious deficiencies of the Minister's decision, was to set aside the surrender orders and discharge Leonard and Gionet, thus terminating the extradition proceedings against them.[471]

The *Leonard* decision is unusual in the dataset not just because it led to the discharge of two individuals, a rare outcome in this dataset, and not just because the court used exceptionally strong

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[464] *Ibid* at paras 46, 57.
[465] *Ibid* at para 54.
[466] *Ibid* at para 60.
[467] *Ibid* at para 61.
[468] *Ibid* at para 71.
[469] *Ibid* at para 46.
[470] *Ibid* at para 80.
[471] *Ibid* at para 95; the dissenting judge would have remitted the matter for reconsideration (para 101).

language in its rebuke of the Minister, but because the quoted decision from the Minister demonstrates such outrageous legal errors that they almost seem deliberate. *Gladue* was not a recent decision by the time Leonard and Gionet were facing surrender. It had been part of the legal landscape for more than a decade. Yet, the quoted passages of the Minister's reasons embody what is either an impressive failure on the part of the Minister of Justice to grasp an important and established aspect of criminal law which itself would be worrying given the important functions the Minister plays in several areas of public law – or the Minister made those arguments while fully understanding the implications of *Gladue* and its rationale and was attempting to blunt its effects. If it is the latter case, that certainly seems to be a policy choice made by a political actor in furtherance of a political objective, giving the lie to the notion of the Minister of Justice as being an impartial or independent decision-maker. The significance of this possibility will be further explored in section 4.5 below.

4.4 Wither International Human Rights Law?

A glaring absence in the dataset is any mention of international human rights law, either as a ground of review or appeal, or as a substantive argument raised before the Minister (at least insofar as this is ascertainable within the data). This is surprising for several reasons. First, and as reviewed in Chapter 3, Canada has been brought before international bodies responsible for dealing with international human rights treaty claims brought against state parties, such as Canada, who have willingly submitted to these bodies' authority. These bodies have even decided against Canada on more than one occasion in extradition cases. Second, given the emphasis on treaty obligations, one would think both the Minister and the courts would take a broader view of "international obligations" that included other treaties to which Canada has voluntarily signed on. Third, there is precedent for basing claims on Canada's international treaty obligations to challenge acts taken domestically within administrative legal contexts, most notably in *Baker*, and these sources of state obligations can be helpful in substantiating domestic rights claims.[472]

One possible explanation for the absence of this field of law may be that such arguments simply are not being raised before the courts. Extradition defence work is generally done by criminal defence counsel, who normally formulate rights claims pursuant to the *Charter*; given extradition's

[472] See *Baker*, *supra* note 31.

close relationship to criminal law and process, it is understandable that the *Charter* would therefore be the main source of rights claims in this practice context.[473] However, that would not explain why the courts do not look on their own motion to international human rights law for guidance, which they would be entitled to do. Particularly given the focus on international obligations in the last two decades of *Charter* and, to a lesser extent, administrative law jurisprudence, it is disappointing that the courts have taken such a narrow view of such obligations to only encompass (largely bilateral) extradition treaties, many of which were signed several decades ago and may not have received recent updates, let alone ones infused with international human rights law considerations.

4.5 The Risks of Administrative Law Standards of Review, Part Two

The foregoing analysis returns to a point made at the end of Chapter 3, regarding the risks of employing an administrative law standard of review developed for independent and impartial decision-making bodies to decisions rendered by a political actor against individuals directly subjected to that political actor's authority. This is worsened by the degree of deference granted to this political actor as a presumed "expert" on political matters, even as the decisions taken largely feature legal arguments based on *Charter*-protected rights.[474]

One way that this deference shows up in this dataset is the degree to which decisions by courts of appeal engage with the Minister's decision and the grounds raised on judicial review. In the previous section, it was demonstrated that where the Minister's decision was quashed, there tended to be much more engagement with the decision, either by quoting passages directly or by paraphrasing the Minister's reasons. As seen above, in some cases the direct quotations were followed by harsh rebukes of the reasoning, which perhaps indicates how seriously the court viewed legal errors committed by the Minister regarding law that applied specifically to Indigenous peoples. Given the relative rarity of cases in which the Minister's decision did not

[473] This is an explanation but not a justification, as it could be argued that not being aware of international human rights law's possible relevance to extradition are not acting with full competence. That said, the lack of awareness may also be laid at the door of standard legal education in Canadian law schools, and potentially the provincial bars, for not providing sufficient education or training on the matter.

[474] If one wanted to be contrarian, one might suggest that expertise in matters of international comity and cooperation were more the purview of the Minister of Foreign Affairs than of the Minister of Justice, who is responsible for extradition matters.

stand, it is difficult to extrapolate too much from these outcomes, towards a generalised account of the relationship between the appeal court and the Minister. Even so, greater engagement with the Minister's decisions when that decision will not stand may indicate that the court considers it particularly important to justify an intervention in favour of the sought person versus against the sought person.

In contrast, low or no engagement with the Minister's reasons was most commonly found in cases that were dismissed. Looking across the tables in the preceding sections of this chapter, it is difficult to ignore a trend of a consistent section of decisions in any given category measured, where no information at all is available. This pattern indicates yet another worrying trend: that of decisions being made dismissing judicial review applications where little or no information is provided other than the outcome, at least in the published decision. There are several reasons why this pattern is worrying. First, because it fails to adhere to the rule that decisions must contain sufficient information to permit the parties to understand the reasons the court reached its decision – this is also known as the duty to give reasons. This duty is arguably of particular import when the outcomes involve the deployment of coercive and carceral powers of the state against the losing party (in judicial review dismissals, this is the sought individual). Reasons also provide parties a basis on which they may seek an appeal of the decision.

Second, as seen in the trajectory of extradition jurisprudence outlined in Chapter 3, most applications for judicial review are likely to have some connection to rights claims by sought individuals. These rights, and these claims, are important – for the individual to be informed of the reasons their liberty is to be taken away, as well as for the public and for the development of the law in general. Brief, perfunctory decisions that provide no details and no analysis inhibit the potential furthering of the law and the public's understanding of it; it serves to shield the law from scrutiny. If there is no information, then there is no basis for scrutiny. Moreover, it directly contradicts the importance that administrative law places on the existence and sufficiency of reasons for decisions taken, which was emphasised in *Baker* and *Vavilov*.[475] This presents a legal conundrum of its own, given that the law regarding judicial review of administrative decisions has been imported and relied upon in extradition law.

[475] See the discussion in Chapter 2 above.

While the data collected and analysed here does not extend to claims of causality from an empirical standpoint, the co-occurrence of a standard of review that requires deference be paid to a political-actor-become-decision-maker, with outcomes that show little to no engagement on a regular basis with challenges to the decision to which deference is paid, is worth being noted. That it can so often be the case where *Charter* claims are in play should give us pause. At the very least, that this dynamic exists in an interplay between the judiciary, the self-proclaimed guardians of the constitution, and the Minister of Justice, who is responsible for overseeing *Charter* compliance of proposed legislation, should be cause for reflection on a system allowing for such a dynamic to exist in the first place.

Chapter 5: Conclusion: Where do we go from here?

The preceding chapters inevitably lead us to one question: where can the Canadian extradition apparatus go from here? This work has demonstrated that the current practices in Canada place a near insurmountable primacy on fulfilling extradition treaty obligations at the near total expense of consideration or protection of the rights of individuals sought in this process. If the protection of individual rights is to play a meaningful role moving forward, changes need to be made, in both the immediate and longer-term.

First, and as has been called for previously, given the serious risks to individuals' rights and the consequences of infringements upon them, Canada should place a moratorium on all current extradition proceedings and requests. The system as it currently functions simply is unable to adequately protect the rights of the individuals caught up in it, to devastating consequence.

Second, the Department of Justice should publicly release all surrender decisions that have been made, at minimum since the coming into effect of the most recent *Extradition Act*. These decisions are a core piece of the legal journey of these cases and provide crucial information relating to the development of extradition law in Canada. They are, in effect, jurisprudence. Releasing these decisions would also assist sought individuals and their counsel in better understanding the Justice Minister's legal reasoning in order to maximise the effectiveness of submissions to the Minister.

However, both proposals are band-aids. They do not fix the core of the issues facing the Canadian extradition process. It is difficult to see how, going forward, human rights can be adequately protected in this process without changing the process itself to bring it back under human rights scrutiny (particularly from the *Charter*). While it is possible that such changes could be accomplished through the courts via overturning existing jurisprudence, doing so shifts the burden onto the sought individual on a case-by-case basis and the on the limited resources to which they have access, and involves a great deal of uncertainty regarding the outcome of such a challenge. Ultimately, the executive and legislative branches share responsibility in rights protection with the courts. They therefore also share the burden of formulating law that can adequately in practice (not just on paper), provide meaningful protections of individual rights. In this respect, clearly the *Act*

is a deeply flawed statute in dire need of a serious overhaul, including in light of the comparatively greater human rights protections of jurisdictions like Great Britain and especially Ireland, and in light of the build-up of relevant international human rights law since 1999.

Even this proposal comes with risks. In the first place, this path to reform requires that the legislation be formulated to take away power from the executive, and from a specific member of the executive who is part of the legislature. Simply put, it requires the state to willingly give up power, and specifically to do so in the context of coercive and carceral powers. Moreover, unlike in other areas of administrative law, the state as represented by the Minister of Justice is not a neutral decision-maker in extradition; it is also an interested actor representing the interests of the requesting state. Thus, any legislative reform that will better protect individual rights will also impede Canada's ability to act on behalf of requesting states. It would likely mean a greater "fail" rate for extradition requests.

Thus, a final pair of proposals are warranted. First, regardless of what happens moving forward, for as long as political actors like the Minister of Justice are making decisions that directly impact a specific person's rights, extradition matters should be considered a distinct area of law and review standards should be tailored to the particularities of this area of law as it is practised. Administrative law standards of review were not developed to account for a partisan decision-maker having a direct say in the outcome of decisions bearing on *Charter* rights. Extradition proceedings serve the purpose of criminal prosecution; that said prosecution occurs abroad does not change its purpose. Engagement on review should be explicitly alive to this practical reality.

Second, there should be a redress mechanism that would force Canada as a sending state to act, when an individual is surrendered and they are subsequently subjected to human rights abuses as a result. There are a few possible procedures that could work: domestically, a private international law remedy to seek an injunction requiring Canada to demand the return of the surrendered individual and seeking the dropping of charges (and a concurrent remedy in the requesting state to seek a stay of the charges). Alternatively, a transnational or international arbitration procedure may be more useful, that both states consent to as part of their extradition treaty. Whatever the mechanism, these remedies should clearly be articulated in the *Extradition Act*, alongside a

requirement for the Minister to suspend operation of the relevant extradition treaty – thus halting extraditions to that requesting state – until the extradition partner has also incorporated into its domestic law the right to the remedies flowing from the relevant extradition treaty. Where the Minister fails to act on this matter, courts should be empowered to suspend operation of the relevant treaty.

These problems are not unique to extradition law. In fact, contrary to what has been repeatedly emphasised in jurisprudence and scholarship, the issues raised are not unrelated to questions being asked of the criminal law system more generally in Canada. The concerns over adequately protecting rights, the use of coercive and carceral state power are live issues animating academic and popular discussion. That these problems take on transnational dimensions in extradition law does not bar relevance of these wider conversations.

In this thesis, I have sought to elucidate and illuminate the oft-overlooked field of extradition law in Canada with an explicit focus on the rights and the experience of the sought individual as rights-holder in this process. Throughout, this thesis has argued that the current state of rights protections in Canadian extradition law, at least where the person is sought for prosecution of alleged criminal offences committed within Canada's territory, fails to provide meaningful protection to individual constitutional rights. These failures are in part by design, in the deliberate construction of a law that grants significant power to a single member of the executive, including to decide on important legal and constitutional questions as a first-instance decision maker. But they are also those of implementation: the Minister of Justice and courts of appeal have repeatedly sidelined rights protections in the name of international comity, even in circumstances where such outcomes are not required by statute and even when such decisions seem to be at odds with the statute. This focus on the rights of the sought individual provides a much-needed reorientation in scholarship on extradition law, a reminder that real humans, real persons, will be the ones most impacted by the exercise of state power for the purposes of pursuing criminal prosecutions – even when those prosecutions will occur abroad. It is hoped that this work can provide a greater understanding of the practice of extradition in Canada, both as it has developed over time, and how it continues to play out in courtrooms across the country.

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Appendices

Appendix A: Full List of Cases in the Dataset

Case Name	Citation	Type of Decision	Where offence committed	Requesting State	Outcome of decision
Manningham v United States of America	2004 CanLII 27432 (ON CA)	committal appeal + judicial review	Canada	United States	appeal and judicial review both dismissed (para 8)
United States v Mathurin	2015 ONCA 581	committal appeal	Canada	United States	refer matter to extradition judge in respect of s 489.1 matters (para 4)
USA v Kerfoot	2011 BCCA 33	committal appeal + judicial review	Canada	United States	matter referred to extradition judge for re-hearing (para 16) and surrender order set aside (para 16)
United States v Kerfoot	2016 BCCA 306	committal appeal + judicial review	CANADA	United States	dismissed appeal and application (para 109)
United States v Ighedoise	2019 ONCA 937	committal appeal	Canada	United States	appeal allowed on second ground and matter referred back to extradition judge for reconsideration on s 24(2) Charter - effect of the breach (para 54)
United States v Viscomi	2019 ONCA 490	committal appeal + judicial review	CANADA	United States	appeal and judicial review dismissed (para 63); DISSENT - allow appeal, quash committal, send back for re-hearing (para 68)

United States v Viscomi (VISCOMI)	2015 ONCA 484	orders and committal appeal + judicial review	CANADA	United States	committal appeal allowed and order set aside, appellant discharged, surrender order necessarily set aside as well (para 12)
United States v Lane	2017 ONCA 396	judicial review	CANADA	United States	dimiss application (para 100)
Canada (Attorney General) v Lane	2014 ONCA 506	CROWN committal appeal	CANADA	United States	appeal allowed, stay set aside, remitted for new extradition hearing (para 4)
United States v Le	2013 ONCA 55	judicial review	CANADA/US	United States	judicial review dismissed (para 3)
United States of America v McAmmond	2005 CanLII 20 (ONCA)	committal appeal + judicial review	CANADA	United States	appeal and judicial review dismissed (paras 6-7)
Dash c Ministre de la Justice du Canada (DASH ACCUSED)	2017 QCCA 321	judicial review	CANADA	United States	judicial review dismissed (para 4)
RAMAKRISHNAN ACCUSED		judicial review	CANADA		judicial review dismissed (para 4)
MAGI ACCUSED		committal appeal + judicial review	CANADA		appeal and judicial review dismissed (paras 4-5)
IFEJEH ACCUSED		judicial review	CANADA		judicial review dismissed (para 4)
SPENCER POWER ACCUSED		judicial review	CANADA		judicial review dismissed (para 4)
BEDFORD ACCUSED		judicial review	CANADA		judicial review dismissed (para 4)

France v Ouzghar	2009 ONCA 69	committal appeal + judicial review	CANADA	France	everything dismissed
Igwe v Canada (Ministère de la Justice) (États-Unis d'Amérique)	2016 QCCA 1791	committal appeal + judicial review	CANADA	United States	everything dismissed (para 37)
United States of America v Romano (ROMANO)	2016 BCCA 450	judicial review	CANADA	United States	dismiss judicial review
DJURACIC		judicial review	CANADA		dismiss judicial review
ANDERSON		judicial review	CANADA		dismiss judicial review
NENASHEFF		judicial review	CANADA		dismiss judicial review
United States of America v Romano (ROMANO)	2016 BCCA 444	appeals from orders + committal appeal	CANADA	United States	appeals dismissed
DJURACIC		appeals from orders + committal appeal	CANADA		appeals dismissed
ANDERSON		appeals from orders + committal appeal	CANADA		appeals dismissed
NENASHEFF		appeals from orders + committal appeal	CANADA		appeals dismissed
United States of America v Fraser (FRASER)	2017 BCCA 136	committal appeal	CANADA	United States	appeal allowed, set aside committal, new hearing (para 7)
JOINSON		committal appeal	CANADA		same as above
FERGUSON		committal appeal + judicial review	CANADA		judicial review moot, same as above (para 7) and disclosure app to

					get new hearing (para 93)
Vachon c Canada (Procureur général) (États-Unis d'Amérique)	2014 QCCA 2076	judicial review	CANADA	United States	dismiss judicial review
United States of America v Thamby	2011 ONCA 333	committal appeal + judicial review	CANADA	United States	appeal dismissed (abuse of process argument); surrender order quashed, remit for reconsideration on the specific facts of the case (para 6)
United States of America v Thamby	2011 ONCA 829	judicial review	CANADA	United States	judicial review dismissed (para 9)
Di Rienzo v Canada (Procureur général)	2007 QCCA 1715	committal appeal	CANADA	United States	appeal dismissed (para 4)
Di Rienzo v Canada (Ministre de la Justice)	2007 QCCA 1712	judicial review	CANADA	United States	application dismissed (para 4)
Palma c Canada (Ministre de la Justice)	2007 QCCA 1714	committal appeal + judicial review	CANADA	United States	dismiss appeal (para 4) and dismiss application (para 8)
Ellis c Canada (Ministre de la Justice)	2007 QCCA 1713	committal appeal + judicial review	CANADA	United States	dismiss appeal (para 4) and dismiss application (para 8)
Galdamez-Serrano c Canada (Procureur général)	2009 QCCA 1334	committal appeal	CANADA/US	United States	appeal dismissed (para 4)

Galdamez c Canada (Procureur général)	2009 QCCA 1333	committal appeal + judicial review	CANADA/US	United States	appeal dismissed (para 4); judicial review also dismissed (para 38)
Galdamez c Canada (Ministre de la Justice)	2009 QCCA 1329	judicial review	CANADA/US	United States	application dismissed (para 4)
Damas-Hernandez c Canada (Procureur général)	2009 QCCA 1332	committal appeal + judicial review	CANADA/US	United States	appeal dismissed (para 4), dismiss judicial review (para 37)
Damas-Hernandez c Canada (Procureur général)	2009 QCCA 1330	committal appeal + judicial review	CANADA/US	United States	appeal dismissed (para 4), dismiss judicial review (para 37)
United States v Galdamez	2009 QCCA 851	committal appeal	CANADA/US	United States	dismissed (para 2)
United States of America v Mylvaganam	2009 ONCA 495	committal appeal	CANADA	United States	dismissed (para 11)
United States of America v Cameron	2017 BCCA 385	judicial review	CANADA	United States	judicial review dismissed (para 34)
USA v Cameron	2014 BCCA 314	committal appeal + judicial review	CANADA	United States	appeal dismissed, application allowed, set aside surrender order to permit the sought individual to make submissions re adequacy of medical treatment (para 71)
United States of America v Davies (DAVIES)	2017 ABCA 46	committal appeal + judicial review	CANADA	United States	everything dismissed (para 2)
SHAH		committal appeal	CANADA		committal dismissed (para 2)

Reda v Canada (Minister of Justice)	2006 QCCA 1253	judicial review	CANADA/US	United States	judicial review dismissed (para 5)
Reda v United States of America	2006 QCCA 1254	committal appeal	CANADA/US	United States	appeal dismissed (para 5)
Yamba v Canada (Minister of Justice)	2016 BCCA 219	judicial review	CANADA	United States	judicial review dismissed (para 4)
Frenette c Procureure générale du Canada (États-Unis d'Amérique)	2017 QCCA 1749	committal appeal	CANADA	United States	appeal dismissed (para 3)
Gaudreault c Procureure générale du Canada (États-Unis d'Amérique)	2017 QCCA 1747	committal appeal + judicial review	CANADA	United States	appeal and application both dismissed (para 66)
Gaudreault c Procureure générale du Canada (États-Unis d'Amérique)	2017 QCCA 1744	judicial review	CANADA	United States	dismissed (para 3)
Gaudreault c Procureure générale du Canada (États-Unis d'Amérique)	2017 QCCA 1748	committal appeal	CANADA	United States	appeal dismissed (para 19)
Robertson v Canada (Minister of Justice)	2013 BCCA 505	judicial review	CANADA	United States	judicial review dismissed (para 34)
United States of America v Kavaratzis	2004 CanLII 18251 (ON CA)	CROWN committal appeal	CANADA	United States	appeal allowed, discharge set aside, and because prima facie case had been made out, committal ordered by CA (para 27)

Canada (Minister of Justice and Attorney General) v Kavaratzis	2006 CanLII 13237 (ON CA)	judicial review	CANADA	United States	review dismissed (para 2)
United States v Pakulski	2014 ONCA 81	committal appeal + judicial review	CANADA/US BORDER	United States	committal appeal dismissed (para 5); surrender judicial review adjourned (para 9)
Cusson c Canada (Procureur général)	2009 QCCA 1851	committal appeal + judicial review	CANADA	United States	majority: dismiss appeal; dissent: allow appeal and quash committal (paras 3-4); majority allowed judicial review for the sole purpose of striking the export charge from the surrender order (para 31)
Cusson c Canada (Ministre de la Justice)	2009 QCCA 1849	judicial review	CANADA	United States	application partly allowed for the purpose of striking one of counts (para 3); MAJ dismiss rest of application (para 4); DISS: would have allowed rest of application (para 5)
United States v Nguyen	2012 ONCA 398	judicial review	CANADA	United States	application dismissed (para 2)
United States v Nguyen	2012 ONCA 397	committal order	CANADA	United States	dismissed (para 2)

United States of America v Reumayr	2003 BCCA 375	committal appeal + judicial review	CANADA	United States	committal appeal dismissed but judicial review is allowed and matter returned to MOJ for reconsideration of the inconsistency issue between surrender and committal order (para 44)
Canada (Minister of Justice) v Reumayr	2005 BCCA 391	habeas corpus + judicial review	CANADA	United States	MAJ: dismiss habeas corpus appeal and application (para 168); DISS: grant habeas corpus and discharge s 69 (para 96) and order stay of extradition (para 97)
United States v Savein	2014 BCCA 290	committal appeal + judicial review	CANADA	United States	appeal and judicial review both dismissed (para 4)
United States v Costanzo	2009 BCCA 120	committal appeal	CANADA	United States	appeal dismissed (para 18)
USA v Ranga	2012 BCCA 81	committal appeal	CANADA	United States	appeal dismissed (para 38)
USA v Ranga	2012 BCCA 82	judicial review	CANADA	United States	dismissed (para 17)
India v Badesha (BADESHA)	2016 BCCA 88	judicial review	CANADA	India	MAJ: judicial review allowed, MOJ order set aside until reasonable assurances received (para 74) - remit matter to MOJ (para 7); DISS: would dismiss

					application (para 127)
SIDHU	same as above	same as above	CANADA	same as above	same as above
India v Badesha (BADESHA)	2018 BCCA 470	abuse of process + judicial review	CANADA	India	applications all dismissed (paras 100, 119)
SIDHU		same as above	CANADA		applications all dismissed (paras 100, 119)
Dutilly c Canada (Ministre de la Justice)	2009 QCCA 1848	judicial review	CANADA	United States	MAJ: allow application and quash extradition (para 3); DISS: dismiss application (para 4)
Belapatino Savaresse c Procureure générale du Canada (États-Unis d'Amérique)	2019 QCCA 123	committal appeal	CANADA	United States	partly allow appeal, quash committal order, partly allows disclosure application and orders disclosure within 30d, returns file to court for new hearing on committal (paras 3-7)
United States of America v Wilson	2016 BCCA 326	committal appeal + judicial review	CANADA	United States	dismiss appeal and application (para 102)
United States v Wilson	2011 BCCA 514	committal appeal + judicial review	CANADA	United States	appeal allowed, new committal hearing ordered,

					judicial review moot (para 58)
Fernandes c Attorney General of Canada (United States of America)	2018 QCCA 1833	committal appeal + judicial review	CANADA	United States	appeal and application dismissed (paras 8-9)
France v Liang	2007 ONCA 741	committal appeal + judicial review	CANADA	France	appeal and application dismissed (para 52)
Canada (Attorney General) v Sunduk	2016 MBCA 90	committal appeal	CANADA	United States	appeal dismissed (para 9)
United States v Fong	2005 Carswell Ont 302	committal appeal + judicial review	CANADA	United States	committal appeal dismissed, judicial review application adjourned on final point re witness (para 4) - sort of, MOJ to receive reconsideration request within 30d of this decision and advise court, if not, the judicial review will be dismissed as all other arguments failed (para 38) - judicial review adjourned (para 39)
United States of America v Nadarajah	2010 ONCA 859	committal appeal + judicial review	CANADA	United States	all dismissed (para 7)
United States of America v Sriskandarajah	2010 ONCA 857	committal appeal + judicial review	CANADA	United States	all dismissed (para 9)

USA v Latty (LATTY)	2004 CanLII 27198 (ON CA)	committal appeal + judicial review	CANADA	United States	appeal and application dismissed (para 17)
WRIGHT		committal appeal + judicial review	CANADA		same as above
Lorenzo Lopez c Canada (Procureur général) (États-Unis d'Amérique)	2011 QCCA 2083	committal appeal	CANADA	United States	dismiss appeal (para 7)
Reinales c Canada (Ministre de la Justice)	2012 QCCA 836	judicial review	CANADA	United States	dimiss application (para 47)
United States of America v Barbu	2010 ONCA 891	judicial review	CANADA/US	United States	MAJ: dismiss application (para 46); DISSENT: allow application and remit for reconsideration (para 75)
Bulaman c Canada (Procureur général) (États-Unis d'Amérique)	2015 QCCA 1473	judicial review	CANADA	United States	application dismissed (para 3)
USA v Pal	2010 BCCA 480	committal appeal + judicial review	CANADA	United States	both dismissed (para 35)
USA v Pal	2008 BCCA 359	committal appeal + judicial review	CANADA	United States	appeal and review conceded, matter returned for new hearing (para 1)
Martin v Canada (Minister of Justice)	2017 BCCA 220	judicial review	CANADA	United States	dismiss (para 72)
United States v Cavan	2015 ONCA 664	judicial review	CANADA	United States	dismiss (para 99)

Obazee c Canada (Procureure générale) (États-Unis d'Amérique)	2016 QCCA 1669	judicial review	CANADA	United States	application dismissed (para 41)
United States v Edwards	2011 BCCA 100	committal appeal + judicial review	CANADA	United States	both dismissed (paras 42, 48)
Sheck v Canada (Minister of Justice)	2019 BCCA 364	judicial review	CANADA	United States	MAJORITY: allow application, remit for MOJ to reconsider and permit sought individual to make further submissions in light of these reasons (para 107); DISSENT: would dismiss (para 149)
United States of America v Thomlison	2007 ONCA 42	committal appeal + judicial review	CANADA/US	United States	both dismissed (para 9)
United States v Yu	2012 ONCA 876	judicial review	CANADA	United States	dismissed (para 12)
Farmer v United States of America	2002 CanLII 41026 (QC CA)	committal appeal	CANADA	United States	dismissed (para 11)
Wacjman v United States of America	2002 Carswell Que 2621	committal appeal + judicial review	CANADA	United States	appeal and judicial review application are both dismissed (para 114)
USA v Wakeling	2012 BCCA 397	committal appeal + judicial review	CANADA	United States	dismiss both (paras 60-61)
United States of America v Guevara-	2018 BCCA 55	committal appeal +	CANADA	United States	dismiss both appeals and

Mendoza (GUEVARA MENDOZA)		judicial review			applications (para 9)
MENDOZA		committal appeal + judicial review	CANADA		dismiss both appeals and applications (para 9)
United States of America v Trotter	2015 BCCA 413	committal appeal	CANADA	United States	appeal dismissed (para 41)
United States of America v Thornett	2014 BCCA 464	committal appeal + judicial review	CANADA/US BORDER	United States	both dismissed (para 44)
United States of America v Wong	2017 BCCA 109	committal appeal + judicial review	CANADA	United States	both dismissed (para 54)
United States of America v Dhanda	2010 BCCA 200	committal appeal + judicial review	CANADA	United States	judicial review abandoned appeal dismissed (para 8)
United States of America v Fordham	2005 BCCA 197	judicial review	CANADA	United States	dismiss application (para 37)
United States v Whyte	2016 ONCA 624	committal appeal + judicial review	CANADA	United States	appeal and application dismissed (para 82)
USA v Adam	2014 BCCA 136	committal appeal + judicial review	CANADA	United States	MAJ: dismiss both (para 82); DISS: dismiss committal, allow application and remit for reconsideration (para 97)
Plata c Canada (Ministre de la Justice)	2011 QCCA 2378	judicial review	CANADA/US BORDER	United States	allow application in part and remit for reconsideration (para 3)
Plata c Canada (Procureur général)	2011 QCCA 2377	committal appeal + judicial review	CANADA/US BORDER	United States	appeal dismissed, surrender order returned to MOJ to consider

					assurances for other charges (para 42)
United States of America v Anderson	2007 ONCA 84	committal appeal + judicial review	CANADA	United States	everything dismissed (para 48)
United States v Prudenza (PRUDENZA)	2006 Carswell Ont 6614	committal appeal + judicial review	CANADA	United States	everything dismissed (para 2)
DALGLISH		committal appeal + judicial review	CANADA		everything dismissed (para 2)
ANDERSON		committal appeal	CANADA		adjourned (SEE ABOVE) (para 6)
Pelchat c Canada (Procureur général)	2008 QCCA 74	committal appeal + judicial review	CANADA	United States	COMMITTAL appeal allowed, reverse judge's judgement and strike all except first offence from the order (para 23); SURRENDER: allowed review, strike all counts except the 6th (in US charges terms) (para 36)
United States of America v Magnifico	2007 ONCA 535	committal appeal + judicial review	CANADA	United States	both dismissed (para 3)
Logan v The Attorney General of Canada (on behalf of the United States of America)	2015 NBCA 60	committal appeal	CANADA/US BORDER	United States	appeal dismissed (para 32)
Logan v The Attorney General of	2015 NBCA 59	judicial review	CANADA/US BORDER	United States	dismissed judicial review (para 2)

Canada (on behalf of the United States of America)					
United States v Rosenau	2010 BCCA 461	committal appeal	CANADA/US BORDER	United States	appeal dismissed (para 11)
United States v Leonard (LEONARD)	2012 ONCA 622	committal appeal + judicial review	CANADA/US BORDER	United States	application granted and surrender order set aside (para 95); committal appeal dismissed; dissent only on remedy - woulld remit (para 101)
GIONET		judicial review	CANADA	United States	application granted and surrender order set aside (para 100) - dissent only on remedy, would remit (para 101)
United States v Gionet	2011 ONCA 217	committal appeal	CANADA	United States	appeal dismissed (para 3)
United States of America v Argueta-Gonzalez	2019 BCCA 445	judicial review	CANADA	United States	dismiss judicial review
Fleischer c Canada (Procureur général) (CR FLEISCHER)	2006 QCCA 1011	committal appeal + judicial review	CANADA	United States	everything dismissed
JG FLEISCHER		committal appeal + judicial review	CANADA		everything dismissed
WASSERMAN		committal appeal + judicial review	CANADA		everything dismissed
Fleischer c Canada (Procureur	2006 QCCA 1013	judicial review	CANADA	United States	dismissed (para 4)

général) (CR FLEISCHER)					
JG FLEISCHER		same as above	CANADA		same as above
WASSERMAN		same as above	CANADA		same as above
Shamshoum c Canada (Ministre de la Justice)	2006 QCCA 1012	judicial review	CANADA	United States	allows application and quashes MOJ decision (paras 4-5)
Kajoyan c Canada (Procureur général)	2006 QCCA 1009	committal appeal + judicial review	CANADA	United States	committal appeal allowed for purpose of striking the charge of conspiracy to mail fraud s 381/s 465, dismisses for the rest, and dismisses the application for judicial review (paras 4-6)
R v Kajoyan (SHAMSHOUM)	2006 QCCA 1010	committal appeal + judicial review	CANADA	United States	allows appeal, quashes committal, releases sought individual from custody and denies application for sought individual to remain in custody until MOJ decision (paras 3-8); as a consequence, quash MOJ order to surrender in addition to the above (para 41)
United States of America v Doak	2015 BCCA 145	committal appeal + judicial review	CANADA	United States	both dismissed (para3)

Latulippe c Procureure générale du Canada (LATULIPPE)	2018 QCCA 596	committal appeal + judicial review	CANADA	United States	appeal and application both dimissed (paras 66-67)
IGHEKPE		committal appeal + judicial review	CANADA		appeal and application both dimissed (paras 66-67)
JALBERT		committal appeal + judicial review	CANADA		appeal and application both dimissed (paras 66-67)
United States of America v Abdullahi	2019 ABCA 238	committal appeal	CANADA	United States	appeal dismissed
United States of America v Anekwu	2008 BCCA 138	committal appeal + judicial review	CANADA	United States	allow appeal, set aside committal and surrender orders, new extradition hearing ordered (para 8)
Rowan v Canada (Attorney General)	2018 SKCA 104	committal appeal + judicial review	CANADA	United States	appeal and application both dismissed (para 129)
Deland c Procureur général du Canada (États-Unis d'Amérique) DELAND	2020 QCCA 655	committal appeal + judicial review	CANADA	United States	committal appeal allowed, surrender necessarily set aside; new hearing (paras 5-9)
SINGH CO-ACCUSED		committal appeal + judicial review	CANADA		committal appeal allowed, surrender necessarily set aside; new hearing (paras 5-9)
United States v Cail	2009 ABCA 345	committal appeal + judicial review	CANADA	United States	appeal and application both dismissed (para 34)

United States of America v Orphanou	2011 ONCA 612	committal appeal + judicial review	CANADA	United States	everything dismissed
Garz c Canada (Ministre de la Justice)	2006 Carswell Que 14775	judicial review	CANADA	United States	dismissed (para 4)
Garz c Canada (Procureur général)	2006 QCCA 222	committal appeal + judicial review	CANADA	United States	committal and judicial review dismissed (para 101)
Cummings c Canada (Ministre de la Justice)	2006 Carswell Que 14776	judicial review	CANADA	United States	dismissed (para 4)
United States of America v Cummings	2006 QCCA 223	committal appeal	CANADA	United States	appeal dismissed (para 4)
Canada (Attorney General) v Atkinson	2011 QCCA 1966	committal appeal	CANADA	United States	dismissed (para 2)
Murphy c Canada (Ministre de la Justice)	2017 QCCA 799	judicial review	CANADA/US BORDER	United States	dismissed (para 7)
Maisonneuve c Canada (Ministre de la Justice)	2008 QCCA 511	judicial review	CANADA	United States	dismissed (para 4)
Kaitting c Canada (Ministre de la Justice)	2008 QCCA 514	judicial review	CANADA	United States	dismissed (para 4)
Katona c Canada (Ministre de la Justice)	2008 QCCA 515	judicial review	CANADA	United States	dismissed (para 4)
Marinov c Canada (Ministre de la Justice)	2008 QCCA 509	judicial review	CANADA	United States	dismissed (para 4)
Iovannone c Canada	2008 QCCA 510	judicial review	CANADA	United States	dismissed (para 4)

(Ministre de la Justice)					
Karachinsky c Canada (Ministre de la Justice)	2008 QCCA 512	judicial review	CANADA	United States	dismissed (para 4)
Katona c Canada (Ministre de la Justice)	2006 QCCA 972	judicial review	CANADA	United States	allows application, quash surrender order, remit to MOJ in light of judgment, re actual participation of Cdn and US authorities (paras 4-6)
Iovannone c Canada (Ministre de la Justice)	2006 QCCA 973	judicial review	CANADA	united States	allows application, quash surrender order, remit to MOJ in light of judgment, re actual participation of Cdn and US authorities (paras 4-6)
Marinov c Canada (Ministre de la Justice)	2006 QCCA 974	judicial review	CANADA	united States	allows application, quash surrender order, remit to MOJ in light of judgment, re actual participation of Cdn and US authorities (paras 4-6)
Kaitting c Canada (Ministre de la Justice)	2006 QCCA 975	judicial review	CANADA	united states	allows application, quash surrender order, remit to MOJ in light of judgment, re actual participation of Cdn and US authorities (paras 4-6)

Karachinsky c Canada (Ministre de la Justice)	2006 QCCA 976	judicial review	CANADA	united States	allows application, quash surrender order, remit to MOJ in light of judgment, re actual participation of Cdn and US authorities (paras 4-6)
Maisonneuve c États-Unis d'Amérique	2006 QCCA 977	judicial review	CANADA	United States	allows application, quash surrender order, remit to MOJ in light of judgment, re actual participation of Cdn and US authorities (paras 4-6)
R v Kolitsidas	2005 QCCA 740	judicial review	CANADA	United States	dismissed (para 4)
Kirstein v Attorney General of Canada (United States of America) (KIRSTEIN)	2018 QCCA 2124	committal appeal + judicial review	CANADA	United States	everything dismissed (para 24-25)
EL BERNACHAWY		judicial review	CANADA	same as above	application dismissed (para 25)
BUCHAN		judicial review	CANADA	same as above	application dismissed (para 25)
KAMALDIN		judicial review	CANADA	same as above	application dismissed (para 25)
United States of America v Delvicchio	2002 Carswell Que 2231	committal appeal	CANADA	United States	dismissed (para 10)
United States v Huynh	2007 ONCA 846	committal appeal	CANADA	United States	dismissed (para 3)

United States v Loewen	2009 BCCA 116	committal appeal	CANADA	United States	dismissed (para 11)
Mahoney v Canada (Minister of Justice)	2004 Carswell Ont 1941	judicial review	CANADA/US BORDER	United States	dismissed (para 3)
Canada (Minister of Justice) v Kunze	2005 BCCA 87	judicial review	CANADA	United States	application dismissed (para 20)
United States v Dixon	2011 BCCA 225	committal appeal + judicial review	CANADA	United States	appeal and application dismissed (para 50)
R v Koforowola	2006 Carswell Que 9259	judicial review	CANADA	United States	application dismissed (para 13)
United States v Lake	2006 Carswell Ont 5346	judicial review	CANADA/ US	United States	dismiss application (para 42)
United States v Cheema	2007 BCCA 341	committal appeal + judicial review	CANADA	United States	dismiss appeal and application (para 33)
Racine c Canada (Ministre de la Justice)	2014 QCCA 1639	judicial review	CANADA	United States	application dismissed (para 3)
United States v Akinbobola	2020 ONCA 331	CROWN committal appeal	CANADA	United States	allow appeal, set aside discharge, order committal (para 23)
United States v Balawi	2003 Carswell Ont 3167	committal appeal	CANADA/US BORDER	United States	dismissed (para 4)
Hall v Canada (Minister of Justice)	2017 BCCA 241	judicial review	CANADA/US BORDER	United States	dismissed (para 38)
Brunton-Guérard v Canada (Attorney General)	2007 QCCA 1056	judicial review	CANADA	United States	application dismissed (para 45)

Deland v Canada (Minister of Justice)	2007 QCCA 1057	judicial review	CANADA	United States	application dismissed (para 37)
Deland v Canada (Procureur général)	2007 Carswell Que 4949	committal appeal	CANADA	United States	appeal dismissed
Deland v Canada (Procureur général)	2007 Carswell Que 4950	committal appeal	CANADA	United States	appeal dismissed
Brunton-Guérard c Canada (Procureur général)	2007 Carswell Que 4951	committal appeal	CANADA	United States	appeal dismissed
Smida c Canada (Procureur général)	2007 Carswell Que 5572	committal appeal	CANADA	United States	appeal dismissed
United States v Asiegbu (DANIELSON CO-SOUGHT)	2008 BCCA 519	committal appeal + judicial review	CANADA	United States	everything dismissed (para 1)
United States v Lillemo	2005 BCCA 198	committal appeal + judicial review	CANADA	United States	everything dismissed (para 7)
United States v Dumitrescu	2011 ONCA 802	committal appeal	CANADA	United States	appeal dismissed (para 6)
Changberlin v Procureure générale du Canada (États-Unis d'Amérique)	2018 QCCA 427	committal appeal	CANADA	United States	appeal dismissed (para 5)
United States v Graziani	2008 BCCA 79	committal appeal + judicial review	CANADA	United States	appeal and application both dismissed (para 1)
Damgajian v United States of America	2017 QCCA 621	committal appeal + judicial review	CANADA/US	United States	dismiss appeal (para 2); judicial review application

					quashed and remitted to MOJ (para 3)
United States v Huynh	2005 ONCA 305	committal appeal	CANADA	United States	appeal allowed, committal quashed, discharge appellant (para 11)
United States v Budd	2006 Carswell Ont 3699	committal appeal + judicial review	CANADA/US	United States	everything dismissed (para 1)
United States v Murshed	2006 Carswell Ont 1970	committal appeal + judicial review	CANADA	United States	everything dismissed
Chityal v États-Unis	2006 QCCA 124	committal appeal + judicial review	CANADA	United States	everything dismissed