

Canadian Extradition Law Practice

by Gary Botting

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In its modern origins,¹ extradition was a fairly simple process by which sovereign states could transfer fugitives from criminal justice between and among each other.² The “laws” which governed these transactions were mostly of the international variety, constructed by way of treaties setting out the agreed conditions under which extradition would be undertaken, which were in turn domestically implemented in the appropriate manner.³ The “crime control” agenda which underpinned extradition was obvious: it was mutually beneficial for states to cooperate in this way so as to uphold international comity and maintain the domestic and international social order that crime was deemed to threaten.

From its outset, however, a heavy policy component of extradition law and practice was the state’s interest in protecting the individual who had come onto its territory, alleged or convicted criminal though he or she might be. Traditionally, states jealously guarded their own criminal jurisdiction and were reluctant to take any action that might be seen as enforcing the criminal law of another state. Coupled with this was the desire not to become involved in the internal affairs of even a treaty partner state, a concern raised particularly during the 18th and 19th centuries when individuals were often as likely to be fugitives from a difficult political situation as from any criminal activity. These concerns were particularly paramount among common law states which, unlike civilian countries, extradited their own nationals to face foreign process. Thus a set of international law principles developed which accorded certain protections to the individual in the extradition process. By way of example, one could look to the “political offence” exception⁴ or the rules of “specialty”⁵ and “dou-

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1. The extradition regimes of the present day are generally held to have their origins in 18th century Europe. See generally Christopher Blakesley, “The Practice of Extradition from Antiquity to Modern France and the United States: A Brief History” (1981) 4 B.C. Int’l. & Comp. L. Rev. 39.
 2. See generally Geoff Gilbert, *Transnational Fugitive Offenders in International Law: Extradition and Other Mechanisms* (The Hague: Kluwer Law International, 1998) c. 1 [Gilbert]. See also Anne Warner La Forest, *La Forest’s Extradition to and from Canada*, 3rd ed. (Aurora: Canada Law Book, 1991) c. 1-2 [La Forest, *Extradition*].
 3. In common law states such as Canada, treaties must be “transformed” into domestic law by way of implementing legislation. See generally Hugh Kindred and Phillip Saunders eds., *International Law: Chiefly as Interpreted and Applied in Canada*, 7th ed. (Toronto: Emond Montgomery Publications, 2006) c. 4.
 4. Gilbert, *supra* note 2, c. 6.
 5. *Ibid.*, c. 5.

ble criminality"⁶. However, these mechanisms were truly meant to be protective of the interests of states themselves, and protection accorded to fugitives was more of a knock-off effect.⁷

As extradition law and practice developed, this juxtaposition of international criminal cooperation, on the one hand, and protection of the individual, on the other, continued to provide the foundation. The tension between these two goals was manifested, yet extradition schemes the world over continue to display an often finely tuned balance between what Professor La Forest has termed the "liberty" and "comity" interests at stake.⁸ As judicial involvement in extradition evolved and became standardized, an extradition "practice" emerged at the domestic level, though given the infrequency with which extradition occurred, the practice was both rarefied and obscure.

Over the last 25 years, concern with the rise of international and transnational crime spurred on governmental efforts to develop and streamline the tools of inter-state criminal cooperation. Accordingly, extradition, as the central instrument in these efforts, assumed more prominence. At the same time, there was increasing awareness that this process engaged human rights concerns in a significant way.⁹ In particular, individuals had no standing at international law to assert or invoke any of the treaty protections, these being matters of executive determination at the inter-state level, and people in most states did not have recourse to an external human rights body whose decisions could actually be given effect to prevent an extradition.¹⁰ Therefore, the domestic extradition proceeding was effectively the last line of defense for the fugitive, the place of final redress for persons who alleged that extradition to a particular state would violate their fundamental rights—the right of liberty no less important, perhaps, than any other. The tension between liberty and comity has thus recently intensified, and while extradition practice remains complex, it could not seriously be said to be languishing in obscurity any longer.

In Canada, extradition law and practice have a long history, extending back to the *Jay Treaty* of 1794 concluded between Great Britain and the United States. Of late, however, the most significant development has been the introduction of the new *Extradition Act*¹¹ in 1999. The new *Act* was the brainchild of the federal Department of

6. *Ibid.*, c. 3.

7. Though they were often not inconsiderable as a means of indirectly protecting human rights. See William Gilmore, "The Provisions Designed to Protect Fundamental Rights in Extradition and Mutual Legal Assistance Treaties" in *International Co-operation in Criminal Matters: Balancing the Protection of Human Rights with the Needs of Law Enforcement* (London: Commonwealth Secretariat, 2001).

8. See Anne Warner LaForest, "The Balance Between Liberty and Comity in the Evidentiary Requirements Applicable to Extradition Proceedings" (2002-03) 28 *Queen's L.J.* 95 [La Forest, "Liberty and Comity"].

9. See generally John Dugard & Christine Van den Wyngaert, "Reconciling Extradition With Human Rights" (1998) 92 *A.J.I.L.* 187. Specific to the US context, see Christopher Pyle, *Extradition, Politics and Human Rights* (Philadelphia: Temple University Press, 2001).

10. The exception being, of course, those states that are party to the European Convention of Human Rights, compliance with which is overseen by the European Court of Human Rights (and, until recently, the European Commission) whose decisions must be given actual effect.

11. S.C. 1999, c. 18 [Act].

Justice, which had expressed concern that the previous legislation (which, in form and substance, dated back to 1877) was “antiquated” and created difficulties for many states—notably civil law countries¹²—to obtain extradition from Canada.¹³ The goal was no less than to ensure that “Canada will not be a safe haven for fugitives from justice.”¹⁴ To this end, the extradition process was significantly modified and consolidated, clearly with an eye towards accommodation of treaty partners. A high-quality explanatory text co-authored by three Crown (or former Crown) extradition practitioners, which provided a detailed concordance between the old and new legislation, and explained the new developments, was published in 2002.¹⁵

The year 2002 also saw the beginning of shots across the bow of Justice Canada by commentators who were concerned that much of the “protective” aspect of extradition law and practice had been stripped away by the new legislation, in favour of Canada being seen as a “leader” in the fight against international and transnational crime.¹⁶ No less an authority than Professor La Forest, author of the leading treatise on extradition in Canada,¹⁷ opined that the new legislation had unduly “limit[ed] the liberty interest in favour of comity” and undermined due process, without a clear case being made for doing so.¹⁸ Notably, this commentary emerged in the wake of a set of significant extradition decisions by the Supreme Court of Canada¹⁹ and the Ontario Court of Appeal,²⁰ which saw those courts reverse high-profile extradition decisions on the basis that the actions of extradition courts and/or of the Minister of Justice had undermined the protective function of extradition proceedings in a manner which contravened the *Charter*²¹. Even in the face of such laudable decisions, however, it became clear that Canada generally remained blissfully unaware of the international legal trend toward the proposition that extradition to face foreign legal process directly engaged state obligations under international human rights law.²²

12. See La Forest, *Extradition*, *supra* note 2 at 151-61.

13. *House of Commons Debates*, 135 (8 October 1998) at 9004.

14. Department of Justice, News Release, “New Extradition Act Comes Into Force” (17 June 1999), online: Department of Justice Canada <<http://canada.justice.gc.ca/en/news/nr/1999/extrle.html>>.

15. Elaine F. Krivel, Q.C., Thomas Beveridge & John Hayward, *A Practical Guide to Canadian Extradition* (Toronto: Carswell, 2002).

16. See e.g. Dianne L. Martin, “Extradition, The Charter, and Due Process: Is Procedural Fairness Enough?” (2002) 16 *Sup. Ct. L. Rev.* (2d) 161.

17. La Forest, *Extradition*, *supra* note 2.

18. La Forest, “Liberty and Comity”, *supra* note 8 at 95.

19. *United States v. Burns and Rafay*, [2001] 1 S.C.R. 283, 151 C.C.C.(3d) 97; *United States v. Shulman*, [2001] 1 S.C.R. 616, 152 C.C.C.(3d) 294; *United States v. Cobb*, [2001] 1 S.C.R. 587, 152 C.C.C.(3d) 270; *United States v. Tsioubris*, [2001] 1 S.C.R. 613, 152 C.C.C.(3d) 292; *United States v. Kwok*, [2001] 1 S.C.R. 532, 152 C.C.C.(3d) 225.

20. *Canada (Minister of Justice) v. Pacificador*, (2002), 60 O.R. (3d) 685 (Ont. C.A.) (leave to appeal dismissed, S.C.C. Bulletin, 2003 at 286).

21. *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11.

22. This notwithstanding two rulings by the United Nations Human Rights Committee that, by extraditing fugitives to face the death penalty in the US, Canada had violated its obligations under the International Covenant on Civil and Political Rights. See *Ng v. Canada* (No. 469/1991), UN Doc. A/49/40, Vol. II, p. 189, 15 H.R.L.J. 149; *Judge v. Canada* (No. 829/1998), UN Doc. CCPR/C/78/D/829/1998. For more on this point, see Robert J. Currie, “Charter Without Borders? The Supreme Court of Canada, Transnational Crime and Constitutional Rights and Freedoms” (2004) 27 *Dal. L.J.* 235.

The foregoing long-winded walk through some extradition basics is relevant for this reason: with the publication of *Canadian Extradition Law Practice*²³ in 2005, British Columbia lawyer and author Gary Botting has waded into this extremely contentious fray. The intriguing thing is that he has done so not with a treatise on extradition law, but with a book that resembles nothing more than a conventional “practice manual” which would fit nicely on the shelf beside “Federal Court Practice 2005” or another such text. This, however, is decidedly a book that should not be judged by its cover.

In terms of its format, the book is a thorough and useful manual for lawyers practicing in the extradition area. It is divided into two parts. The first half comprises a heavily annotated version of the *Act* that tracks the organization of the legislation itself. Each annotation provides, where relevant, content under the headings “Commentary,” “Cross-reference,” “Treaties,” “Former Acts,” “Practice Note” and “Case Law.” As these headings would suggest, the annotations provide the necessary linkage between parts of the *Act* and other relevant instruments (treaties, older legislation, other relevant statutes), as well as explaining and contextualizing the role and function of the particular section.

The second half of the book is a group of appendices which collect together useful documents: up-to-date versions of all multilateral and bilateral extradition treaties to which Canada is a party, older treaties and legislation (particularly the former *Extradition Act* and *Fugitive Offenders Act*), and those forms particularly relevant to this area of practice.

Again, from the practitioner’s point of view, the book is nothing short of excellent; a match in most regards for the only other resource currently available.²⁴ It has a number of useful features, including a concise list of statutory limitations under the *Act*²⁵ and a Table of Cases²⁶ cross-referenced to both the legislation and relevant treaties—the latter containing a number of obscure or unpublished decisions from Canada, the US and the UK. The case law annotations for each section of the *Act* are thoroughly researched and usefully summarized, and the annotations themselves contain interesting bits of historical information. Under Section 2, for example, the reader learns that the *Jay Treaty* provisions on extradition covered only murder and forgery, “the latter being a pet peeve of President George Washington, who had borne the brunt of a series of forgeries purporting to be confessional letters from him to his wife.”²⁷ One mild criticism of the functionality of the book is that the index is too brief, as a thorough and multi-layered index is indispensable in this context as in so many other areas of criminal practice. Also, it might have been helpful to provide a general overview of the complex extradition process, perhaps by way of a flow chart or similar mechanism.

23. Gary Botting, *Canadian Extradition Law Practice* (Markham: LexisNexis Canada, 2005).

24. Krivel *et al.*, *supra* note 15.

25. Botting, *supra* note 23 at xv.

26. *Ibid.* at xvii-xxvi.

27. *Ibid.* at 30. This kind of detail is no doubt attributable to, and drawn from, Botting’s recent book, *Extradition Between Canada and the United States* (New York: Transnational Publishers, 2005).

There is another side to *Canadian Extradition Law Practice*, however, for as much as it is a standard “practice manual” it is also a detailed, section-by-section critique of the *Act*—the tone of which can be described as harsh, if not vitriolic. This is evident before one even cracks the annotated *Act* portion, as the volume opens with an essay (entitled “Overview”)²⁸ that reads as a scathing indictment of the new *Act* and the new legislative and policy approach to extradition it ushered in. It focuses, logically, on extraditions between Canada and the US, which make up the majority of cases heard by this country’s courts, but uses these cases to attack the foundations of the “new” extradition law. Invoking Professor La Forest’s important essay,²⁹ Botting emphasizes that the Crown’s interest in international comity in the criminal cooperation area now far outweighs the protection of the individual; but, he says, six years in, that this is only part of the problem:

When these changes are combined with rigid principles of *stare decisis* and narrow statutory interpretation, Canadian extradition procedure has become little short of repressive. Canadian courts from the top down have used the new provisions, in combination with precedents predating the *Act*, to perpetuate judicial fictions and conceits which constitute dangerous incursions on the liberty interests of anyone caught up in the extradition web.³⁰

The author’s disgruntlement with specific parts of the *Act* is made clear in the Annotations. By Botting’s estimation, an extremely large number of provisions are ripe for *Charter* challenge. Moreover, both the “Commentary” and “Practice Note” categories are often used as vehicles for blunt, often colourful opinions on the propriety, coherence or desirability of the section in question. Indeed, these are so numerous that they can be found by opening the book at random. For example, opening to Section 37 (dealing with how the extradition court is to determine that the person before the court is the person requested) reveals the following under “Practice Note”:

Judges might be less vulnerable to risking their own credibility and more likely to avoid casting themselves as witnesses in the proceedings if they skirt the issues raised by this section and insist that the Attorney General call witnesses to make the physical comparison.³¹

Botting’s idiosyncratic approach is, on occasion, the source of some of the text’s limitations. A particular bugbear he identifies in the new legislation is that it has diluted or even dispensed with the double criminality requirement, to the point that “Canada has lost sight of the entire purpose of extradition.”³² He largely attributes this to the fact that the *Act* (as well as, for example, the Canada-US Extradition

28. *Ibid.* at 1-9.

29. La Forest, “Liberty and Comity”, *supra* note 8.

30. Botting, *supra* note 23 at 6.

31. *Ibid.* at 127.

32. *Ibid.* at 195.

Treaty) has extended the ability to extradite beyond the traditional category of “crimes” to “offences,” to the extent that “even traffic offences may become the subject of extradition.”³³ This is something of a tempest in a teapot, as this development reflects the fact that contemporary extradition practice has had to move beyond traditional crimes to ensure it catches certain kinds of statutory offences, which is not shocking or altogether unwarranted. The central goal, that the emphasis be on the fugitive’s alleged “acts or omissions, not on the precise requirements of the criminal laws of each State”³⁴ is still upheld, since the conduct alleged must still constitute an offence under Canadian law before extradition can be granted.³⁵ Similarly, he gives great effect to the fact that the *Act*, consistent with earlier Supreme Court of Canada decisions, does not provide for the protection of the presumption of innocence per section 11(b) of the *Charter*.³⁶ However, it is highly arguable that the presumption of innocence never did play much of a role in domestic extradition proceedings, since the requested state is not the forum for the ultimate trial and the object of protecting the individual does not require the operation of this presumption in a substantive way.

Such limitations do not detract from the solidity and usefulness of the book, *Canadian Extradition Law Practice*. One can agree with much of the editorial content (as, indeed, I do) while noting that it is highly unusual for this kind of book. I am hesitant, however, to criticize it for its overt partiality, not least because the author is implicitly candid about his leanings. This is basically a defense-side text, a kind of resource not unknown to Canadian criminal law literature, and one that balances the playing field in an area where the only other book available exhibits something of a Crown bias.³⁷ This is a regrettable state of affairs in some ways, but perhaps necessary until a new edition of Professor La Forest’s excellent but out-of-date text³⁸ is released.

Perhaps more importantly, Botting has put his finger on just how troubling the intersection between international criminal cooperation and human rights can be. The implications of misaligning the balance between inter-state comity and individual human rights can be profound, and any expansion of Crown powers bears watching. Witness the recent arrest of marijuana activist Marc Emery, on an extradition warrant pursuant to US charges of, *inter alia*, conspiracy to distribute marijuana seeds and conspiracy to distribute marijuana.³⁹ It appears that the US has asserted criminal

33. *Ibid.*

34. Gilbert, *supra* note 2 at 112.

35. See *Act*, *supra* note 11 at s. 3. See Botting, *supra* note 23 at 30. In his commentary on the section, Botting correctly raises the concern that this requirement is subject to the provisions of the particular extradition treaty, which might be looser than is desirable.

36. Botting, *supra* note 23 at 6.

37. See Brock Martland, Book Review of *A Practical Guide to Canadian Extradition* by Elaine F. Krivel, Q.C., Thomas Beveridge & John W. Hayward (2002) 60 *Advocate* (B.C.) 923 at 924.

38. La Forest, *Extradition*, *supra* note 2.

39. Rod Mickleburgh “Prominent pot activist facing extradition to U.S.” *The Globe and Mail* (30 July 2005) A7.

jurisdiction on an extraterritorial basis, and conviction on either charge carries a minimum of ten years in prison, a maximum of life.⁴⁰ Are either of these aspects of the case acceptable to the Canadian public?⁴¹ Is extradition on these terms consistent with the *Charter*?⁴²

It is questionable whether Canadians know enough to care enough about asking these questions. The extradition practice area is one heavily dominated by the Crown, which negotiates the treaties and effectively writes the legislation, and to use a hackneyed phrase, we must be aware of any “democratic deficit” that arises from this. It is beyond question that criminal justice authorities the world over require sophisticated and far-reaching powers to deal with the perniciousness and tenacity of modern criminal enterprise. However, whether extradition law and practice undermines Canada’s commitment to high human rights standards, both on the international and domestic planes, is and should be a matter of public concern and scrutiny. On this point, *Canadian Extradition Law Practice* makes a practical contribution.

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40. *Ibid.*

41. See La Forest, *Extradition*, *supra* note 2 at 55-64. This is not to suggest that there is anything necessarily illegal about extraditing to a requesting state whose jurisdiction over the fugitive arises from an extra-territorial criminal law, even on an “objective territoriality” basis. Rather, I am raising the simple political proposition that Canadians might be uncomfortable with the prospect of extraditing a Canadian citizen to face the harsh US anti-drug regime, particularly where the allegedly criminal acts involve marijuana and occurred on Canadian soil.

42. The Supreme Court of Canada held that, in cases under the old legislation, it would not interfere with extraditions involving prison sentences that would not pass constitutional muster in Canada. See *United States v. Jamieson*, [1996] 1 S.C.R. 465, 104 C.C.C. (3d) 575; *United States v. Whitley*, [1996] 1 S.C.R. 467, 104 C.C.C. (3d) 447; *United States v. Ross*, [1996] 1 S.C.R. 469, 132 D.L.R. (4th) 383. See also *Gwynne v. Canada (Minister of Justice)*, [1998] B.C.J. No. 222, 103 B.C.A.C. 1 (C.A.), leave to appeal to S.C.C. refused [1998] S.C.C.A. No. 95; *United States v. Latty* (2004), 183 C.C.C. (3d) 126, leave to appeal to S.C.C. granted [2004] S.C.C.A. No. 160.