

**Changing Canada's Extradition Laws: The Halifax Colloquium's  
Proposals for Law Reform**

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## Executive Summary

Canada's laws on extradition are in need of reform.

Extradition is the legal process by which countries send individuals to face criminal prosecution and incarceration in foreign countries. In Canada, extradition proceedings are conducted by the International Assistance Group (IAG), a specialized office of Justice Canada, under the 1999 *Extradition Act*. Extradition is an important part of the global fight against transnational crime, and Canada's extradition system is administratively efficient; so far as publicly-available figures indicate, Canada fulfills most extradition requests from other countries, and individuals who are sought for extradition are almost always unsuccessful in challenging it.

But is this as it should be? Increasingly, Canadians are becoming dissatisfied with our extradition laws. The Meng Wanzhou case has raised questions about the government's conduct of extradition proceedings that have significant foreign policy implications. Canadians have also raised concerns about the wrongful extradition of Dr. Hassan Diab to France in 2014. Dr. Diab, a Canadian citizen, was held in solitary confinement in a French maximum-security prison for over three years. He was released without ever being committed for trial when it became apparent that the French case against him was nowhere near ready for trial and had been profoundly flawed from the start—indeed, was too unreliable even to justify a French trial—even though the IAG had aggressively pursued his extradition.

Upon Dr. Diab's return to Canada in 2018, Prime Minister Trudeau stated that the extradition should never have happened, and that his government would ensure that no case like it would ever happen again. However, an external review of the case found that all relevant laws and policies had been followed by the IAG and the Minister of Justice. The federal government has shown no interest in making any changes. Disturbingly, in 2021 the government of France re-instituted the prosecution against Dr. Diab, despite the acknowledgment by French courts that the evidence is completely inadequate to sustain the case.

The Prime Minister's promise, it seems, has been broken. In light of the *Diab* case, among others, it is clear that parts of our extradition process are also broken.

In September 2018 a group of academics, defence counsel and human rights organizations met at Dalhousie University for the *Halifax Colloquium on Extradition Law Reform*. In its deliberations this group identified a number of problems with the current system, including that:

- The “committal” process conducted by courts is inherently unfair and compromises the ability of the person sought to meaningfully challenge the foreign case against

- them. It reduces Canadian judges to “rubber stamps”; it permits extradition and deprivation of liberty on the basis of unreliable material;
- The “surrender” decision made by the Minister of Justice is the product of a process under which fundamentally legal issues are dealt with through a highly-discretionary and explicitly political process, which is also unfairly weighted toward extradition and against the rights of the person sought;
  - The IAG is excessively adversarial in the way in which it conducts extradition proceedings, and acts without any separation between the litigators and the decision-makers; and
  - Canada’s international criminal cooperation processes are generally conducted under a veil of unnecessary secrecy, and lack of transparency is a serious problem.

The Halifax group has assembled this set of law reform proposals in order to spark a public discussion and, we hope, Parliamentary inquiry. We propose that:

1. The *Extradition Act* and related policies and protocols should be amended in accordance with three general principles: fundamental fairness, transparency and a re-balancing of roles, both between the courts and the government and between constitutional/*Charter* protection and administrative efficiency.
2. As the *Diab* case among others demonstrates so tragically, it should not be presumed in law that states with which Canada has extradition relations will act in good faith.
3. The committal process should incorporate the presumption of innocence, as well as some legal tools that would allow the person sought a meaningful opportunity to challenge the reliability of the case against them, including more use of first-person evidence and cross-examination. In particular, exculpatory evidence in the hands of either the requesting state or the Canadian government must be disclosed in a timely manner.
4. The Minister’s surrender decisions should be subject to a more exacting standard of review, and the *Act* should be amended to re-allocate some legal questions to the courts.
5. Surrender should only be permitted if the requesting state is ready to take the case to trial.
6. Canada’s obligations under international human rights law should be taken explicitly into account throughout the process.
7. If diplomatic assurances are used to facilitate surrender, they must be meaningful, transparent, monitored and legally enforceable.
8. The role of the IAG should be re-formulated so that its members work as traditional “ministers of Justice,” seeking a fair and just result in each case rather than a litigation “win.” This may involve breaking the office into different divisions to reflect their different roles.
9. There should be government/Parliamentary oversight of the activities of IAG, and the ability for meaningful public scrutiny of its activities and of the extradition process generally. This should involve appropriate transparency and publication of data and information.

10. In cases where Canadian citizens are sought for extradition but Canada could also prosecute, extradition should be barred in favour of a Canadian prosecution unless the government can prove that it is actually in the interests of justice to extradite. This would give meaning to s. 6 of the *Canadian Charter of Rights and Freedoms*.
11. All of Canada's extradition arrangements should be reviewed and subjected to public scrutiny, on an ongoing basis. As a starting presumption, Canada should not have extradition treaties with countries that have records of human rights abuse or have failed to ratify human rights treaties.
12. The government of Canada should dedicate more resources to investigating and extraditing alleged war criminals who are present on Canadian territory.

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# Changing Canada's Extradition Laws: The Halifax Colloquium's Proposals for Law Reform

## *Introduction*

As an advanced industrialized G7 state with a globalized economy, Canada is both a transit point and a destination for individuals involved in “transnational” (i.e. touching more than one state) criminal activities. This is compounded by our long, undefended and easily-crossed border with the U.S.—a state with a large population, the largest national economy in the world, and significant crime and incarceration rates. Given the increasing globalization of crime it is necessary, from a policy point of view, that Canada be an effective participant in inter-state cooperation to address, suppress and deter transnational crime. Indeed, so much crime is transnational that any serious system of criminal justice must have strategies to address the inter-state aspects.

This includes the use of extradition. Extradition is the oldest and still one of the primary tools to accomplish the goal of inter-state cooperation, and one that Canada has used since the 18<sup>th</sup> century. It has been defined as follows:

the formal rendition of a criminal fugitive from a state that has custody (the requested state) to a state that wishes either to prosecute or, if the fugitive has already been convicted of an offence, to enforce a penal sentence (the requesting state).<sup>1</sup>

Today, the procedures for extradition to and from Canada are set out in the *Extradition Act*,<sup>2</sup> brought in by the government of Canada in 1999. During the process of having the Act passed, the government of the day argued that Canada was seen as rather a weak partner in global extradition affairs, particularly in the extradition of individuals from Canada to requesting states. While extraditions from Canada were accomplished with reasonable facility among Commonwealth States (under the now-repealed *Fugitive Offenders Act*), states whose criminal justice systems stemmed from different legal traditions found accessing the Canadian system difficult. Moreover, the entire system was procedurally clunky, and cases took a long time to wend their way through. The goal of this “new” *Extradition Act* was to make the extradition process more streamlined and efficient, to get rid of delays and provide for easier access by a broader range of extradition partner states.<sup>3</sup>

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<sup>1</sup> Robert J. Currie & Joseph Rikhof, *International & Transnational Criminal Law*, 3<sup>rd</sup> ed (2020) at 531.

<sup>2</sup> SC 1999, c 18.

<sup>3</sup> The legislative process that gave birth to the 1999 Act is reviewed in detail in Maeve W McMahon, “The Problematically Low Threshold of Evidence in Canadian Extradition Law: An Inquiry Into Its Origins: and Repercussions in the Case of Hassan Diab” (2019) 42 Man LJ 303, where Professor McMahon points out that the evidentiary base for these arguments was questionable.

Nearly two decades later, there is no doubt that this goal was accomplished. Canada's extradition process is, if nothing else, a model of administrative efficiency, looked to by other states which are considering reforming their own laws.<sup>4</sup> To the extent this can be ascertained in a fairly un-transparent system (see "Transparency and Accountability," below), the vast majority of individuals sought for extradition from Canada are, in fact, extradited.<sup>5</sup> As most people engaged in extradition affairs will know, the most common advice defence lawyers give when first consulted by a client facing extradition (particularly to the U.S.) is that they should immediately make contact with the prosecuting attorney in the foreign state and attempt to negotiate a plea bargain in exchange for not contesting extradition. Extradition is, mostly, inevitable under the 1999 *Act*.

It should be recalled at the outset of this discussion that, from a public policy standpoint: 1) a robust, efficient and effective international extradition system is a good thing, and it is in the interests of all Canadians that it be so, provided that it is fair and constitutionally sound; and 2) people sought for extradition are often accused of very serious crimes, and requesting states are entitled to expect that those allegations should be tried in a domestic court.

However, it has become increasingly clear that the mechanics built into the *Extradition Act* are heavily slanted towards the Crown's interest in efficiency and against the interests of individuals in receiving fair process. In particular, the law provides insufficient safeguards that might allow individuals to meaningfully challenge extradition in cases where the requesting state's case is weak or unreliable. Powered by the dynamics of the 1999 legislation, the Crown has successfully urged upon the courts the argument that Canada's commitment to its treaty partners to cooperate in the fight against transnational crime is, essentially, the primary interpretive principle for the legislation.

As Professor La Forest's prescient 2002 article pointed out,<sup>6</sup> the judicial role in the process has been mostly gutted, due to presumptions that remove the requesting state's evidence from meaningful scrutiny. The Supreme Court's attempt to reverse the conversion of the extradition judge to a "rubber stamp" in the *Ferras* case<sup>7</sup> was ultimately unsuccessful, and the Court appears to have doubled down on this in its recent judgments by making it virtually impossible for the individual sought to challenge the reliability of the requesting state's evidence.<sup>8</sup>

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<sup>4</sup> See, eg, New Zealand Law Commission, *Modernising New Zealand's Extradition and Mutual Legal Assistance Laws* (2016).

<sup>5</sup> Lisa Laventure & David Cochrane, "Canada's high extradition rate spurs calls for reform," CBC News (May 30, 2018), online: <https://www.cbc.ca/news/politics/extradition-arrest-canada-diab-1.4683289>.

<sup>6</sup> Anne W La Forest, "The Balance between Liberty and Comity in the Evidentiary Requirements Applicable to Extradition Proceedings" (2002) 28 Queen's LJ 95.

<sup>7</sup> *United States v. Ferras*, 2006 SCC 33.

<sup>8</sup> *MM v. United States of America*, 2015 SCC 62. For an extensive analysis of this point see Robert J. Currie, "Wrongful Extradition: Reforming the Committal Phase of Canada's Extradition Law" (2021) 44 Manitoba LJ (forthcoming), online: <https://ssrn.com/abstract=3664754>.

The role of the Minister of Justice was expanded enormously under the *Act*, the result of which is that the Minister makes a number of predominantly legal decisions based in part on decidedly non-legal goals (e.g. diplomatic relations), and enjoys what is probably the most deferential standard of review available in Canadian law in doing so.<sup>9</sup> The policy imperative on fulfilling extradition requests has led the Minister to seek or order surrender in cases where the individual sought stood a reasonable likelihood of facing double jeopardy,<sup>10</sup> indefinite civil detention post-sentence,<sup>11</sup> torture and mistreatment by out-of-control prison officials,<sup>12</sup> trial by a state already complicit in significant abuses of the individual's human rights,<sup>13</sup> sentencing regimes which do not take aboriginal status into account,<sup>14</sup> "life without parole" sentences,<sup>15</sup> and extreme disparities in sentence as between Canada and the requesting state.<sup>16</sup> Some of these were turned back by the courts, but many were not.

The Supreme Court has upheld (in *Fischbacher*<sup>17</sup>) the *Act*'s dilution of the "double criminality" requirement, under which the conduct for which the individual is sought by the requesting state must also be an offence in Canada. The result is that individuals can be *committed* for extradition on the basis that the evidence could sustain prosecution for a particular offence, only to be surrendered by the Minister for offences which are much more serious in the requesting state—to the point that the jeopardy to be faced in the requesting state barely resembles what might happen to the individual in Canada.

Judges have for the most part resolutely resisted defence attempts to have the requesting state disclose evidence, even where there is an air of reality to claims of unfairness or problems with the requesting state's case, on the (legally dubious) basis that our procedure cannot apply extraterritorially to the requesting state.

Moreover, the law is particularly un-protective of Canadian nationals, in stark contrast to many other states which do not even extradite their citizens or at least provide greater procedural protections.<sup>18</sup> The right of all Canadian citizens to remain in Canada under s. 6 of the *Charter* is dealt with via the *Cotroni*<sup>19</sup> analysis, which is essentially a meaningless exercise in formalism.

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<sup>9</sup> See *Lake v. Canada (Minister of Justice)*, 2008 SCC 23.

<sup>10</sup> *Bouarfa c. Canada (Ministre de la Justice)*, 2012 QCCA 1378; *United States v Qumsyeh*, 2015 ONCA 551.

<sup>11</sup> *Carroll v. Canada (Attorney General)*, 2017 NSCA 66.

<sup>12</sup> *India v. Badesha*, 2017 SCC 44.

<sup>13</sup> *United States v. Khadr*, 2011 ONCA 358

<sup>14</sup> *United States of America v. Leonard*, 2012 ONCA 622.

<sup>15</sup> *United States v. Muhammad 'Isa*, 2014 ABCA 256.

<sup>16</sup> *United States of America v. Johnstone*, 2013 BCCA 2; *United States v. Reumayr*, 2003 BCCA 375; *Gwynne v. Canada (Minister of Justice)* (1998), 103 B.C.A.C. 1 (BCCA); *Doyle Fowler c. Canada (Ministre de la Justice)*, 2011 QCCA 1076; *Dangajian c. The Attorney General of Canada (United States of America)*, 2017 QCCA 621; *United States v. Hillis*, 2021 ONCA 447.

<sup>17</sup> See *Canada (Justice) v. Fischbacher*, 2009 SCC 46.

<sup>18</sup> Typically, states which have a civil law tradition (as opposed to Canada's common law tradition) do not extradite their citizens; examples include France, Switzerland, Germany and Brazil.

<sup>19</sup> *United States of America v. Cotroni*, [1989] 1 SCR 1469; *Sriskandarajah v. USA*, 2012 SCC 70.

And current indications are that some Canadian Justice officials may have engaged in active efforts to “support” the extradition requests of foreign states via significant back-channel communication and activities (including the suppression of exculpatory evidence) that sought to actually undermine the ability of individuals to hold the state to a duty of fairness in proceedings.

Years of concern about extradition has gone unheard, and at times been actively combatted, by the federal Crown and in particular Justice Canada’s International Assistance Group (IAG), which is charged with overseeing all extraditions. All of this came to a head with the case of Dr. Hassan Diab, extradited to France on the basis of dubious evidence after a hotly-contested multi-year extradition process, which saw the extradition judge describe the French case as “a weak case where a conviction seems unlikely;” a case dependent on opinion evidence he found to be “very problematic, very confusing, with conclusions that are suspect;” a case where he was caused to “wonder about the reliability” of the key evidence on which the French case relied; a case which he found to be “substantially undermined.” The judge held that if Diab received a fair trial in France he would likely be acquitted.<sup>20</sup> Diab was imprisoned for over three years in solitary confinement in a maximum-security prison—only to eventually be released *without having been formally committed for trial* when it became clear to the French courts that there was no case. Media inquiries produced evidence of concerted IAG efforts to shore up the French case, which has shone a spotlight into the murky back-channel world of inter-state cooperation.

It is worth recalling that, when the *Extradition Act* was brought in, Parliament was assured by the Department of Justice that Canadians would not moulder away in foreign states awaiting trial, nor would extradition procedures be used to facilitate foreign investigation. Hassan Diab’s case shows that neither of these promises is being taken seriously.

Both the Prime Minister and the Minister of Foreign Affairs expressed concern about what happened to Diab. Prime Minister Trudeau stated that “what happened to [Diab] should never have happened,” and promised that the federal government would “make sure this never happens again.”<sup>21</sup> However, in the end, an external inquiry led by former Ontario Deputy Attorney General Murray Segal found that all laws were upheld and all relevant procedures followed. The only reservations expressed by Justice Canada officials about the case was that it had taken too long to go through the courts.<sup>22</sup>

Hassan Diab and his family are still living with the trauma of his wrongful extradition. Moreover, observers of the case have been scandalized by the reinstatement of the case by France’s top court, despite that court’s acknowledgment that the case against Dr. Diab is even weaker than it was

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<sup>20</sup> *France v. Diab*, 2011 ONSC 337 at para. 191.

<sup>21</sup> David Cochrane & Lisa Laventure, “Hassan Diab to boycott external review of 2014 extradition to France,” *CBC News* (24 July 2018), online: <https://www.cbc.ca/news/politics/hassan-diab-boycott-external-review-france-extradition-1.4758418>.

<sup>22</sup> Murray D. Segal, *Independent Review of the Extradition of Dr. Hassan Diab* (Justice Canada, 2019), online: [https://www.justice.gc.ca/eng/rp-pr/cj-jp/ext/01/review\\_extradition\\_hassan\\_diab.pdf](https://www.justice.gc.ca/eng/rp-pr/cj-jp/ext/01/review_extradition_hassan_diab.pdf)

before.<sup>23</sup> To date, there has been no public indication that the government is interested in extradition law reform. The Prime Minister's promise has been broken.

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<sup>23</sup> David Cochrane, "Canadian academic Hassan Diab ordered to stand trial in French terrorism case," *CBC News* (19 May 2021), online: <https://www.cbc.ca/news/politics/hassan-diab-france-trial-1.6032288>.

## I. *The Halifax Colloquium*

In the spring of 2018 Professor Rob Currie of the Schulich School of Law, Dalhousie University, proposed the convening of a closed-door meeting of a group of experts in extradition and human rights law. The goal of this session was to discuss a broad range of issues of concern arising from Canada's extradition law, and to formulate a preliminary set of principles and proposals that would serve as the basis for a broader extradition law reform conference to be held subsequently in Ottawa. With sponsorship and assistance from the Canadian Partnership for International Justice (CPIJ) and the MacEachen Institute for Public Policy at Dalhousie University, the *Halifax Colloquium on Extradition Law Reform* was held on September 21<sup>st</sup>, 2018 at the MacEachen Institute, chaired by Professor Currie and with doctoral student Laura Ellyson serving as rapporteur. In attendance were:

Don Bayne, Bayne Sellar Ertel Carter, Ottawa  
Seth Weinstein, Greenspan Humphrey Weinstein, Toronto  
Prof. Joanna Harrington, Faculty of Law, University of Alberta  
Prof. James Turk, School of Journalism, Ryerson University  
Anthony Moustacalis, Moustacalis & Associates, Toronto  
Alex Neve, Secretary General, Amnesty International (Canada)  
Josh Paterson, Executive Director, British Columbia Civil Liberties Association

Below are the proposals that were formulated at the Colloquium.<sup>24</sup> It is hoped that these will be useful in helping to frame the larger conversation about extradition law reform.

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<sup>24</sup> Michael Lacy of the firm Brauti Thorning, Toronto, provided written submissions towards the finalization of the Proposals.

## II. The Halifax Proposals

### 1. *Statement of Principles*

In extradition proceedings, the liberty of the individual sought is at stake. This is no less true than in a domestic criminal proceeding. In fact, in a sense the stakes are even higher, since a criminal conviction in Canada can be overturned on appeal or otherwise dealt with legally, whereas an individual who is extradited is essentially at the mercy of a foreign state. The individual may, as in Hassan Diab's case, be sent to a foreign land where he/she must defend their liberty without speaking the local language or knowing of any counsel; they will certainly be deprived of the support of family, friends and community, both at trial and when serving any sentence imposed.

Accordingly, it is not appropriate for extradition law and process to be expeditious at the expense of due process, fundamental fairness and transparency. Summary proceedings of the kind currently in place are unacceptable. The wrongful extradition of Hassan Diab is the clearest evidence of this.

Canada's extradition laws and policies, and in particular the *Extradition Act*, should be re-visioned and amended in accordance with three general principles: 1) fundamental fairness; 2) transparency; and 3) a re-balancing of roles, both between the courts and the government and between constitutional/*Charter* protection and administrative efficiency.

What follows below is a set of proposals for changes to various aspects of extradition law and practice. Some are broad and policy-oriented, others are more specific and process-oriented. In our view, the principles of fairness and transparency are woven throughout the entire body of proposals. The principle of re-balancing roles between courts and government applies with more specificity, but forms an important pillar of the proposals.

### 2. *Removing the Presumption of Good Faith*

- It is presumed in Canadian extradition law that states with which Canada has extradition treaties: a) have criminal justice systems that are acceptable to Canada, from the point of view of protecting procedural rights and appropriate sentencing regimes; b) will act in accordance with any diplomatic assurances that are provided; and c) will act in good faith in prosecutions for which extradition is sought.
- This presumption, which cuts across both the committal and surrender phases of extradition cases, cannot be maintained. This has been amply demonstrated by the *Diab* case, among others. Beyond Canada's international legal duty to act in good faith in order to discharge its obligations under the extradition treaty, each extradition case must begin with a "clean slate." The individual sought should not have to overcome

the presumption in order to have issues and challenges meaningfully considered in a case.

### 3. *The Committal Phase*

- The overall issue with the committal hearing as it is currently framed in the Extradition Act is that it is fundamentally unfair to the individual sought. Ultimately the Supreme Court of Canada's ruling in the 2006 *Ferras* case has not been complied with: the extradition judge does not have a meaningful ability to judge whether extradition can be legally sustained in a given case. The entire committal process is built to accommodate the requesting state and not to protect the individual's right to a fair extradition hearing.
- We recognize that an extradition hearing can be, in some sense, expeditious and should not be the equivalent of a criminal trial. Nonetheless, in its current formulation the Act creates a process that neuters the "principles of fundamental justice" pursuant to s. 7 of the *Charter*. Because Canada does not have ultimate control over the fairness of the process that the person sought will face in the requesting state, the hearing must be more robust than the preliminary inquiry model upon which it is based.
- The Act should specifically impose the presumption of innocence on the committal hearing, and this should inform all decisions that are made by the extradition judge. Extradition, after all, engages both Canadian and foreign criminal law.
- The "record of the case" approach should be abandoned or modified. In particular, the presumption of reliability for the requesting state's case should be removed. The Minister should have the burden of demonstrating that the requesting state's case is reliable, on either a balance of probabilities or beyond a reasonable doubt.
- Key witness evidence should be provided in the form of affidavits and the witnesses should be made available for cross-examination. The purpose of the cross-examination would be to explore whether the witness is fundamentally reliable and not for exploring credibility simpliciter. This is especially important if the witness has taken a plea deal. This can easily be accomplished by way of video or internet-based communication, to spare the expense, delay and administrative difficulties of bringing witnesses to Canada.
- The defence must have available to it meaningful disclosure from the foreign state, including correspondence between the requesting state and Canada (subject to redaction on the basis of appropriate forms of privilege). This should include all exculpatory evidence in the hands of the requesting state; otherwise, the requesting state should be required to provide assurance that it has no exculpatory evidence in its possession.
- Any evidence that is in the hands of the Canadian government, whether independently gathered by Canadian officials or disclosed to them, should be disclosed to the defence, including all exculpatory evidence.

- Expert evidence should be the subject of specific reports or affidavits and not included as part of any summary of available evidence. It should be the subject of a separate admissibility inquiry during the committal hearing.
- The requesting state should not be permitted to rely on any unsourced intelligence or evidence derived from unsourced intelligence.
- Evidence regarding the existence of an excuse, defence or justification that would be available to the individual sought, under the law of either Canada or the requesting state, should be admissible at the instance of the individual sought. The requesting state should be entitled and required to respond. Careful consideration must be given to the threshold at which an applicable and substantiated excuse, defence or justification would actually bar extradition.
- On the issue of double criminality, the Act should be amended to re-introduce some version of the “alignment test” proposed by the British Columbia Court of Appeal—but rejected by the Supreme Court—in the Fischbacher decision. The extradition judge’s assessment of double criminality must involve consideration of whether the individual faces fundamentally higher jeopardy in the requesting state than would be faced in Canada for the same conduct. This includes both substantive jeopardy and sentencing considerations.

#### 4. *The Surrender Decision*

- While compliance with international human rights law is important for the entire extradition process, it is the surrender phase at which these standards are most central and should inform all decision-making.
- The Minister’s surrender decision attracts what is probably the most deferential standard of review available in Canadian law.<sup>25</sup> This is said to be justified by the fact that the Minister is operating within the Crown prerogative over foreign affairs, regarding which the common law courts were historically submissive. In a country that has a constitutionalized set of human rights protections, this kind of deference is no longer appropriate. It has been said that, “What the Charter gives, administrative law takes away.” This tendency must be guarded against in extradition proceedings.
- While it may have some international diplomatic texture, the Minister’s surrender decision is ultimately a legal one, which should comply with the *Charter* and with Canada’s international human rights law obligations. The standard of review should be one approaching “correctness.”
- All of this should apply with particular stringency to the provisions of the Act that either require or allow the Minister to decline surrender. The deferential standard of review has resulted in case law which emphasizes Canada’s obligations under the extradition treaties/arrangements (usually framed as “international comity”) without

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<sup>25</sup> See *Lake, supra*.

- meaningful counterbalance by human rights protections. Each of the grounds of refusal raises a distinct question of law and should be treated as such.
- Human rights protections, in particular, raise legal questions. Careful consideration should be given to whether certain grounds of refusal should be wholly judicialized and made part of the committal phase. Examples would be whether the individual sought would face double jeopardy, prosecution for a political crime, unfair trial, serious mistreatment including torture, cruel sentencing regimes, politicized criminal proceedings, or other unjust or oppressive treatment.
  - Surrender should only be permitted where the requesting state is ready to take the case to trial. It should not be permitted for the purpose of allowing the requesting state to perfect its investigation and continue to prepare its case, regardless of the manner in which that state's procedure operates. This should be incorporated into extradition treaties and arrangements.
  - In accordance with Canada's obligations under the *UN Convention on the Rights of the Child*, the "best interests of the child" should be an important consideration in any extradition case where children would be affected.

## **5. *Post-Surrender Considerations***

- In some cases extradition is only permitted on the basis of "diplomatic assurances," under which the Minister of Justice concedes that there are concerns about the treatment of the individual in the requesting state, but allows extradition on the basis of assurances from the requesting state that the individual will not be mistreated and/or will receive necessary accommodation (e.g. medical).
- The use of diplomatic assurances is contentious internationally and was controversial among the members of the Halifax group. While assurances can facilitate extradition and protect the rights of the individual in some cases, some forms of assurance can be difficult to monitor and guarantee, particularly those regarding torture and mistreatment by state officials. This difficulty is compounded by the fact that, while the Minister has been willing to obtain assurances in some cases, there is less willingness to monitor whether they are being complied with in some cases.
- This situation is complicated further by the fact that the official position of the government appears to be that while the presence of assurances is the only thing that makes extradition constitutionally acceptable in some cases, the government is under no legal duty to monitor whether the assurances are being complied with.<sup>26</sup>
- To the extent there was consensus around assurances in Halifax, it was on the point that they must be meaningful and legally enforceable if they are to be used to facilitate extradition. Post-surrender monitoring should be the subject of a specific agreement between Canada and the requesting state, to which the individual sought must have input, and it must be both transparent and enforceable.

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<sup>26</sup> See *Boily v. Canada*, 2016 FC 899 and 2017 FC 1021.

## 6. *The Conduct of the International Assistance Group*

- Justice Canada generally, and the International Assistance Group (IAG) in particular, exist at a tense nexus of the federal government in conducting extradition. They are responsible for advancing the interests of requesting states, but also have a fundamental and constitutional obligation to protect the rule of law and the interests of justice in the extradition process.
- The manner in which the IAG currently operates is skewed towards facilitating foreign state requests, and insufficiently protective of the fairness of the extradition process, particularly where Canadian citizens are involved. In short, the IAG and its delegate counsel are excessively adversarial in how they conduct extradition cases. This is suggested by Crown conduct in the Diab case, where the Crown was active in trying to shore up France’s case while it was collapsing, and withheld exculpatory evidence from the defence, among other things.<sup>27</sup> It is also suggested by the most recent phase of the *Badesha* case, where the British Columbia Court of Appeal characterized the IAG’s conduct as “subterfuge” and stated that it had “a very serious adverse impact on the integrity of the justice system.”<sup>28</sup>
- Like other federal agencies, such as the Immigration and Refugee Board, the IAG should adopt an explicit mandate to the effect that it administers its duties “efficiently, fairly and in accordance with the law.”<sup>29</sup>
- Whatever policies and practices govern the operations of the IAG should be made public and scrutinized, with a view to re-balancing the role of the Crown. “Extradition at nearly any cost” is not an appropriate policy driver for this government agency.
- It is worth considering whether a separate sub-division should be set up as counsel or advocates for requesting states.

## 7. *The Cotroni Question and s. 6 of the Charter*

- The current manner in which the Minister and the courts assess whether s. 6 will be breached (and not saved by s. 1) in extradition, called the “*Cotroni* question,” is a meaningless exercise in formalism. The issue is a *fait accompli* for the Crown in virtually every case. This is not appropriate for a *Charter* right.
- The Act should be amended to provide for a meaningful assessment of whether extradition of a citizen can be justified, or whether prosecution in Canada is to be preferred.
- Specifically, Canada should enact something like the “forum bar” rule that has been implemented in the U.K., under which in a case where Canada has jurisdiction to

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<sup>27</sup> We acknowledge that Murray Segal’s external inquiry report found that the Crown’s conduct here was well within its current legal and ethical remit. We are suggesting that the parameters of this remit need to change.

<sup>28</sup> *India v. Badesha*, 2018 BCCA 470 at para 77.

<sup>29</sup> See the Board’s website: <https://irb-cisr.gc.ca/en/Pages/index.aspx>.

- prosecute the individual, then extradition would be barred unless the state can prove that it is in the interests of justice to extradite.
- In some cases a meaningful forum bar would require Canada to exert broader extraterritorial jurisdiction than it currently does for the majority of offences. This is worth pursuing, since it is uncomplicated from an international law perspective and can be accomplished by way of amendments to the *Criminal Code* and other criminal legislation.
  - Canada should also look at the option of a mandatory practice of temporary surrender of Canadian citizens, whereby they could be extradited to the requesting state for trial but be returned to Canada to serve any sentence imposed.

## 8. *Transparency & Accountability*

- For too long, the International Assistance Group has been very much a closed shop, with an unnecessary secrecy in place. As the *Diab* and *Badesha* cases, among others, have shown, this is no longer acceptable.
- As a governing principle, there should be government/Parliamentary oversight of the activities of this division, and the ability for meaningful public scrutiny of its activities, and of the extradition process generally.
- A significant amount of data about extradition cases, including statistics, should be published (subject to appropriate forms of confidentiality and privilege) on the Justice Canada website. This should include situations where diplomatic assurances are in place, as discussed above.
- The *Extradition Act* should be amended to require the filing of an annual or bi-annual report that would detail the activities of the IAG each year, including status of all active or concluded cases.
- Consideration should be given to whether the IAG requires a mandatory oversight process administered by Parliament or its delegate (a model might be found in the Security and Intelligence Review Committee (SIRC), which oversees CSIS and the CSE).
- In individual cases, Ministerial decisions regarding surrender and *Cotroni* assessments should be reported in the same manner as court decisions.

## 9. *Treaty Practice*

- All of Canada's current extradition treaties should be reviewed, with the goal of ensuring that they are up to date, fully reciprocal, and reflect the fairest possible procedures. A similar examination should be done for Canada's arrangements with the states appearing in the Schedule to the *Extradition Act*.
- A template of desirable treaty provisions should be made public, approved by Parliament, and serve as the basis for all future extradition treaty negotiations.
- All extradition arrangements should be reviewed, through a publicly accessible process, at regular intervals (e.g. every ten years).

- Canada should not have operative extradition treaties with states that have not ratified the UN Torture Convention and at least one of the major human rights conventions which protects civil/procedural rights (the International Covenant on Civil and Political Rights (ICCPR), the European Convention on Human Rights, the OAS Convention, etc.).
- China is not a party to the ICCPR, the leading international human rights treaty to protect the right to a fair trial. Given the overall human rights record of China, Canada should suspend the current discussions regarding the negotiation of an extradition treaty with that state.

## **10. Extradition of Alleged War Criminals**

- While this is a minor part of the overall reform agenda presented here, there have been calls over many years for Canada to expand its activities regarding the investigation and prosecution of alleged perpetrators of international crimes (genocide, crimes against humanity, war crimes, torture). Extradition is an important tool toward pursuing this policy goal.
- Canada should increase the budget dedicated to investigating alleged perpetrators who are present on Canadian soil, with a view to extraditing them to states willing to prosecute.
- Canada should also seek extradition of alleged perpetrators to Canada for trial, in cases where there is a reasonable national interest in conducting such trials.