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## The Double Criminality Rule and Extradition: A Comparative Analysis

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## **Abstract**

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**KEYWORDS:** criminality, analysis, rule

# The Double Criminality Rule and Extradition: A Comparative Analysis

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## I. INTRODUCTION

The double or dual criminality rule is one that is more or less uniformly applied in principle in extradition law and process on a worldwide basis. However, the particular construction differs from jurisdiction to jurisdiction, often quite considerably. The aim of this article is to sample but a small segment of practice by looking at the law of just three states: Canada, the United Kingdom, and the United States of America. These three were selected mainly because of historical and geographical considerations. For example, Canada and the United Kingdom, along with other Commonwealth countries, have a special scheme for the so-called "rendition" of fugitive criminals based upon historical ties. In addition, Canada and the United States, being so geographically close, are clearly appropriate and necessary partners for extradition matters. This article will place primary focus on the extradition law of Canada, and will show that Canada is in the process of reforming both its rendition and extradition laws.

The purpose of this article is to: first, differentiate between extradition to foreign states and "rendition" between Commonwealth countries; second, address the differences in approach between interpretation of extradition treaties and extradition statutes; third, make a comparative analysis of the laws of the United Kingdom, the United States, and Canada; and fourth, analyze the interaction between extra-territorial jurisdiction over criminal offenses and double criminality, and lastly, to draw some conclusions on the future of the rule of double criminality in potential new Canadian extradition law.

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## II. EXTRADITION AND RENDITION: COMPARISONS AND CONTRASTS

### A. *Extradition*

The basic precept of extradition law, contained in many countries' extradition statutes and bilateral treaties, is that there must be a threshold requirement of double criminality, otherwise known as duality of offenses. Under this doctrine, the offense for which extradition is sought must be one for which the requested state would in turn be able to demand extradition. In other words, the offense must be considered criminal in both states. Double criminality is based upon a reciprocal characterization of the offenses<sup>1</sup> and a type of mutuality of obligations<sup>2</sup> between states. It is also premised upon the maxim *nulla poena sine lege*, or "no punishment without law."<sup>3</sup> As one author succinctly stated: "No person may be extradited whose deed is not a crime according to the criminal law of the State which is asked to extradite as well as the state which demands extradition."<sup>4</sup>

It is important to note right at the outset of this article that the double criminality principle has not been viewed as a principle of customary international law automatically binding states. Instead, it has been considered a creature of treaty and statute. One commentator has argued that double criminality "is not so much a rule of international law as a consideration based on policy and expediency."<sup>5</sup> Thus, a fugitive cannot raise the double criminality question as a bar to extradition if the applicable treaty or statute — or both, depending upon the

1. The reciprocal characterization is perhaps tied into the view of extradition as a form of mutual assistance in criminal matters between states. See M.C. BASSIOUNI, *INTERNATIONAL EXTRADITION, UNITED STATES LAW AND PRACTICE* 324 (1987).

2. M.C. BASSIOUNI, *INTERNATIONAL EXTRADITION AND WORLD PUBLIC ORDER* 314 (1974).

3. I. SHEARER, *EXTRADITION IN INTERNATIONAL LAW* 137-41 (1971); see also Karle, *Some Problems Concerning the Application of the European Convention on Extradition*, in *LEGAL ASPECTS OF EXTRADITION AMONG EUROPEAN STATES* 51 (1970); H. Schulz, *The Principles of the Traditional Law of Extradition*, in *LEGAL ASPECTS OF EXTRADITION AMONG EUROPEAN STATES* 7, 12-13 (1970).

4. 1 L. OPPENHEIM, *INTERNATIONAL LAW* 701 (8th ed. 1955).

5. 1 H. V.E. HARTLY BOOTH, *BRITISH EXTRADITION LAW AND PROCEDURE* 50 (1980) (citing O'Higgins, *British and Irish Extradition Law and Practice* (1961) (unpublished Ph.D. thesis)); see also Brabyn, *Exceptional Accusation: Cases Under the Extradition Acts 1870 to 1935*, 1987 *CRIM. L. REV.* 796, 797 n.7.

forum — is silent. In the famous case of *Factor v. Laubenheimer*,<sup>6</sup> the Supreme Court of the United States held that the principle is based not on international law but on treaty.<sup>7</sup>

In the past, there has been some confusion between the distinct concept of double criminality and the extraditable offense. Under existing Canadian law, section 2 of the *Extradition Act* provides that an “extradition crime” is one that if committed in Canada or within Canadian jurisdiction would be one of the crimes listed in Schedule 1 of the Act.<sup>8</sup> The majority of Canada’s extradition treaties which pre-date the new “no list” approach likewise have a schedule and section 3 of the Act provides that if there is an inconsistency between the Act and the treaty, the treaty will prevail. In “list” treaties, the approach is really two-tiered. The first tier considers whether the offense is listed in the treaty as extraditable. If the offense is not included in the list in the treaty, then the analysis is over, and extradition is not possible. However, if the offense is included in the list, it is necessary to move to the second tier and consider whether double criminality exists.

In “no-list” treaties, the related principles of criminality of conduct and double punishability are of ultimate importance. It has been aptly put by one author that “[t]he requirement of double criminality provides the substantive basis needed to ensure that the process shall not . . . be arbitrary.”<sup>9</sup>

6. 290 U.S. 276 (1923).

7. *Id.* at 287, 300. *But see* I. SHEARER, *supra* note 3, at 138: “The rule seems to be universally established by practice, however, that it could without much doubt be regarded as a customary rule of international law should the question ever arise as a result of some chance omission in the wording of a treaty.” Shearer’s conclusion does not seem to gel with actual practice. *See, e.g., In re Assarsson*, 687 F.2d 1157 (8th Cir. 1982); *In re Assarsson*, 635 F.2d 1237 (7th Cir. 1980).

8. Extradition Act, CAN. REV. STAT. ch. E-23, § 2 (1985).

9. M.C. BASSIOUNI, *supra* note 2, at 322. There has been much debate as to the two potential ways to interpret double criminality. The *in concreto*, or objective, approach looks to the exact labelling of the offense and its constituent elements. *See* 41 R. INT. DR. PEN. 12 (1970), for resolutions adopted by the 1969 10th Congress of the International Association of Penal Law, which indicates a preference for the *in concreto* approach. The *in abstracto*, or subjective, approach looks to the actual criminal nature of the act without undue preponderance on the label and full identity of the elements in the states. *See* C. van den Wyngaert, *Double Criminality as a Requirement to Jurisdiction*, in *DOUBLE CRIMINALITY: STUDIES IN INTERNATIONAL LAW* 43 (N. Jareborg ed. 1989) for an example of a preference for the *in abstracto* approach.

## B. Rendition

The surrender of fugitives to and from parts of the Commonwealth is called rendition. It has the same basic meaning as extradition but there are fundamental differences in Canada between its application under the *Fugitive Offenders Act*,<sup>10</sup> and extradition pursuant to the *Extradition Act*.<sup>11</sup> First, no treaties are required for rendition. This is premised upon the historical connection of the members of the Commonwealth and the feeling at the inception of the scheme in the late nineteenth century that the rigid formality and safeguards of the extradition process with "foreign" states were not appropriate or necessary within Canada.

Second, under Canada's *Fugitive Offenders Act*, there is no list of extraditable offenses and no provision for double criminality. Under section 3 of the Act, the only requirement is that the offense carry a penalty in the requesting province of at least twelve months' imprisonment with hard labor.<sup>12</sup> Under section 4, the offense does not have to be criminal in Canada, nor does it have to be punishable in Canada with at least twelve months' imprisonment with hard labor.<sup>13</sup> The argument to be addressed towards the end of this article is the need to bring rendition into line with extradition by providing that both rendition and extradition offer similar safeguards.

## III. TREATY INTERPRETATION AND STATUTORY INTERPRETATION

The differences in approach between interpretation of extradition treaties and statutes become apparent when the question considered is what role extradition actually plays. From an international law perspective, it is a treaty matter bearing on the rights and duties of states; thus, emphasis is placed on inter-state cooperation. From a domestic law perspective, extradition may be viewed as a part of the criminal process and is thus necessarily interpreted in a fashion that stresses the protection of the fugitive's rights.

Generally speaking, the rule fundamental to the Vienna Convention on the Law of Treaties is that of literal interpretation according to

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10. Fugitive Offenders Act, R.S.C. ch. F-32 (1985).

11. Extradition Act, R.S.C. ch. E-23 § 2 (1985).

12. Fugitive Offenders Act, R.S.C. ch. F-32 § 3 (1985).

13. *Id.* at § 4.

the ordinary meaning of the words used in the text.<sup>14</sup> There is also the essential commitment that treaties are to be interpreted in good faith, "which is at once psychological and ethical, requiring adherence to ordinary meaning and context."<sup>15</sup> A treaty must necessarily be interpreted in a manner that is calculated to give it effect and content rather than to deprive it of meaning.<sup>16</sup>

Applying this principle to extradition treaties, the approach of courts in Canada, and certainly in the United Kingdom, has been that of liberal interpretation to give effect to the treaty. As one commentator stated, "treaties should receive a fair and liberal meaning and . . . in extradition matters the ordinary technical rules of criminal law should only apply to a limited extent."<sup>17</sup>

In *Schmidt v. The United States*,<sup>18</sup> Mr. Justice La Forest made the following declaration:

I would add that the lessons of history should not be overlooked. Sir Edward Clarke instructs us that in the early 19th century the English judges by strict and narrow interpretation, almost completely nullified the operation of the few extradition treaties then in existence: see *A Treatise Upon the Law of Extradition* (4th ed., 1903), c. V. Following the enactment of the British *Extradition Act, 1870* (U.K.), 33 & 34 Vict., c. 52, upon which ours is modelled, this approach was reversed. The present system of extradition works because courts give the treaties a fair and liberal interpretation with a view to fulfilling Canada's obligations, reducing the technicalities of criminal law to a minimum and trusting the courts in the foreign country to give the fugitive a fair trial . . .<sup>19</sup>

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14. Vienna Convention on the Law of Treaties, May 23, 1969, U.N. Doc. A/Conf.39/27, reprinted in 8 INT'L LEG. MAT. 679 (1969) (instrument of accession deposited by Canada, October 14, 1970, pursuant to Order in Council, P.C. 1979-1339; entered into force January 27, 1980). Although it has not been ratified by the United States, the Vienna Convention provisions are considered to the greatest extent to be declaratory of customary international law. See RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES (1987).

15. See S.A. WILLIAMS & A.L.C. DE MESTRAL, AN INTRODUCTION TO INTERNATIONAL LAW 359 (2d ed. 1987).

16. *Id.*; see also M. McDUGALL, THE INTERPRETATION OF AGREEMENTS AND WORLD PUBLIC ORDER 156 (1967).

17. G.V. LA FOREST, EXTRADITION TO AND FROM CANADA 57 (2d ed. 1977).

18. [1987] 1 S.C.R. 500.

19. *Id.* at 524. According to section 52 of the Canadian Charter of Rights and Freedoms, see Part I, Constitution Act, 1982, which is Schedule B, Canada Act 1982 (U.K.), ch. 11. Should a treaty provision, as implemented into Canadian law by the

In the United States one author has stated that

[w]here a provision is capable of two interpretations either of which would comport with the other term of the treaty, the judiciary will choose the construction which is more liberal and which would permit the relator's extradition, *because the purpose of the treaty is to facilitate extradition between the parties to the treaty*.<sup>20</sup>

The author further observed that "[a]t times the judiciary will interpret terms beyond their actual meaning to encompass their spirit and intent . . . ." <sup>21</sup> This approach of liberal interpretation of extradition treaties may be labelled "cooperative," as it responds to the mutual interests of states in having a flexible extradition process and reciprocal cooperation.<sup>22</sup>

*Halsbury's Laws of England* characterizes this approach as follows: "The words used in such [extradition] treaties are to be given their ordinary, international meaning, general to lawyer and layman alike, and not a particular meaning which they may have attracted in certain branches of activity in England."<sup>23</sup> In the case of *Belgium v. Postlewaite*,<sup>24</sup> Lord Bridge of Harwich addressed this issue and referred to the well-known dictum of Lord Russell in *In re Arton (No. 2)*,<sup>25</sup> where the latter stated: "In my judgment those treaties ought to

*Extradition Act*, violate a Charter Right and not be saved by section 1, the provision will be struck down as would domestic legislation itself. See *Schmidt*, [1987] 1 S.C.R. at 518, where Justice La Forest states that "[t]here can be no doubt that the actions undertaken by the Government of Canada in extradition as in other matters are subject to scrutiny under the Charter . . ." See also *Operation Dismantle Inc. v. The Queen*, [1985] 1 S.C.R. 441, 455, 464.

20. M.C. BASSIOUNI, *supra* note 1, at 88 (emphasis added) (citing the rule of liberal interpretation of extradition treaty terms); see also *U.S. v. Wiebe*, 733 F.2d 549, 554 (8th Cir. 1984); *Brauch v. Raiche*, 618 F.2d 843 (1st Cir. 1980); *In re Sidona*, 584 F. Supp. 1437, 1447 (E.D.N.Y. 1984).

21. M.C. BASSIOUNI, *supra* note 4, at 89 (citing L. OPPENHEIM, *supra* note 4, at 952-53). This rule was applied in *Melia v. United States*, 667 F.2d 300 (2nd Cir. 1984).

22. See C. Warbrick, *The Criminal Justice Act 1988: The New Law on Extradition*, 1989 CRIM. L. REV. 4, 5 n.19; see also *Bozano v. France*, 9 Eur. H.R.R. 297, 326-7 (ser. A) (1987) (Schermers, J., dissenting).

23. 18 HALSBURY'S LAWS OF ENGLAND para. 216, at 88 (4th ed. 1977).

24. [1987] 2 All E.R. 985 (H.L.); accord *United States v. Howe*, [1989] 3 All E.R. 315.

25. [1896] 1 Q.B. 509.



receive a liberal interpretation, which means no more than that they should receive their true construction according to their language, object, and intent."<sup>26</sup>

Lord Bridge went on to hold that the judgment in *Arton* was good authority for the proposition that the court should not interpret any extradition treaty, unless so constrained by the language, in a way which would "hinder the working and narrow the operation of most salutary international arrangements."<sup>27</sup> It is interesting to note that in *Postlewaite* Lord Bridge refers to Lord Widgery's statement in *R. v. Governor of Ashford Remand Centre, ex parte Beese*.<sup>28</sup> In *Beese*, Lord Widgery held that because an extradition treaty is a contract between two sovereign states, it must be construed as if it were a domestic statute.<sup>29</sup> However, in applying that principle in *Postlewaite*, Lord Bridge held that the parties to bilateral extradition treaties have entered into reciprocal rights and duties for the purpose of bringing to justice those who have committed grave crimes and thus to "apply to extradition treaties the strict canons appropriate to the construction of domestic legislation would often tend to defeat rather than to serve this purpose."<sup>30</sup> Thus, in *Postlewaite* Lord Bridge indicated that we should be looking for the underlying intention of the high contracting parties in interpreting the treaty provisions.<sup>31</sup>

This emphasis on inter-state cooperation in an era of transnational and international crime may be seen as conflicting with the protective function of extradition law. One commentator has made the following suggestion:

The conflict between the cooperative and protective functions of extradition law creates a certain tension, something exacerbated by the different views among States about the exact place of extradition in the criminal process. To the extent that extradition is seen [as] simply part of the process of gaining custody of the fugitive, the protections appropriate are relatively slight and the matter may be regarded as administrative rather than judicial.<sup>32</sup>

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26. *Id.* at 517.

27. *Postlewaite*, [1987] 2 All E.R. at 991.

28. [1973] 1 W.L.R. 969.

29. *Id.* at 973.

30. *Postlewaite*, [1987] 2 All E.R. at 992.

31. *Id.*

32. Warbrick, *supra* note 22, at 5 (footnotes omitted).

The protective side of the extradition procedure clearly lays emphasis on the penal law aspects and provides for procedural safeguards for the fugitive.<sup>33</sup> The *Postlewaite* case illustrates a preference for the cooperative approach, and this preference can also be seen in other fairly recent extradition cases dealing with evidentiary issues,<sup>34</sup> the political offense exception,<sup>35</sup> and the double criminality rule itself.<sup>36</sup>

In conclusion, on this issue of interpretation, it appears that courts in Canada, the United Kingdom, and the United States have in recent times emphasized the cooperative intent of the parties to extradition treaties when called upon to interpret their provisions. It is only where the domestic statute is in question that the courts have been more protective. When the courts have been required to interpret the extradition legislation, such as the *Extradition Act* or *Fugitive Offenders Act*, then the penal aspects have been stressed and where ambiguities have been found they have been construed in favor of the fugitive.<sup>37</sup> In *Regina v. Governor of Pentonville ex parte Cheng*,<sup>38</sup> in the House of Lords, Lord Simon of Glaisdale argued that "the positive powers under the Act [i.e. to extradite] should be given a restrictive construction and the exceptions from those positive powers a liberal construction."<sup>39</sup> Moreover, "[s]ince the common law, as so often, favours the freedom of the individual, the rules enjoining strict construction of a penal statute or of a provision in derogation of liberty . . . merely reinforce the presumption against change in the common law."<sup>40</sup>

#### IV. COMPARATIVE ANALYSIS OF STATUTES AND CASE LAW

In order to interpret and analyze the direction in which extradition law is heading, it appears most fruitful to engage in a comparative

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33. For a recent case in which the European Court of Human Rights held that extradition to Switzerland involved a violation of the European Convention on Human Rights, article 5(1)(f), see *Bozano v. France*, 9 Eur. H.R.R. (ser. A) 297 (1987).

34. *R. v. Secretary of State for the Home Office ex parte Rees*, [1986] 2 All E.R. 321.

35. *Cheng v. Governor of Pentonville Prison*, [1973] 2 All E.R. 204; *Keane v. Governor of Brixton Prison*, [1972] 1 All E.R. 1163.

36. *U.S. v. McCaffery*, [1984] 2 All E.R. 570; *Denmark v. Nielsen*, [1984] 2 All E.R. 81.

37. See *In re Aronson*, [1989] 3 W.L.R. 436, 466.

38. [1973] App. Cas. 931.

39. *Id.* at 954.

40. *Id.*

study of the status of the law in the United Kingdom, the United States, and Canada. This comparative study is particularly helpful in light of the fact that there is a new British statute that has recently addressed the question under consideration.

### A. *The United Kingdom*

In December 1989 the United Kingdom enacted a new *Extradition Act*. For the sake of the following analysis, this section will be divided into the pre-December 1989 case law — based on the earlier *Extradition Act*,<sup>41</sup> *Fugitive Offenders Act*,<sup>42</sup> and Treaties — and the post-1989 composite statute, for which as of yet there is no judicial interpretation.

#### 1. Pre-1989 Extradition Act

When discussing the British position on double criminality, perhaps the best approach is to look at the case law and government documents leading to the 1989 Act and to comment on them first. In March 1979 the Home Secretary announced the appointment of a Working Party to review the law and practice of extradition in the United Kingdom. In 1982 this Interdepartmental Working Party produced its *Report*.<sup>43</sup> Regarding the double criminality question, the *Report* stated the traditional rule that fugitives should only be surrendered for acts which are not only offenses against the law of the requesting state, but which would also constitute offenses against the law of the requested state if committed within its jurisdiction.<sup>44</sup>

The Working Party *Report* stated that the justification for the double criminality rule is the basic principle that the fugitive should be treated by the requested state in the same way as any other person in its jurisdiction.<sup>45</sup> Therefore he should not be detained or proceeded against for acts which do not contravene the requested state's criminal law. It should be emphasized that the double criminality rule, as ex-

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41. Extradition Act, 1870, 33 & 34 Vict., ch. 52.

42. Fugitive Offenders Act, 1967, ch. 68.

43. HOME OFFICE, A REVIEW OF THE LAW AND PRACTICE OF EXTRADITION IN THE UNITED KINGDOM (1982) [hereinafter REPORT].

44. This double criminality principle was contained in the relevant British statutes at that time: the 1870 *Extradition Act*, the 1967 *Fugitive Offenders Act*, and the 1965 *Backing of Warrants (Republic of Ireland) Act*.

45. REPORT, *supra* note 43, at 10.

pressed in the 1967 *Fugitive Offenders Act*, had been interpreted differently from the double criminality provisions in the 1870 *Extradition Act*. This will be evident from the analysis of the cases that follow.

In the case of *R. v. Governor of Pentonville Prison, ex parte Budlong and Kember*,<sup>46</sup> it was held that the acts or omissions for which the extradition request is made should disclose an extraditable offense if the acts or omissions had occurred in the requested state. This case was decided under the 1870 *Extradition Act*, and the double criminality rule was well articulated by Lord Justice Griffiths. He stated that double criminality would be satisfied if it is demonstrated "that the crime for which extradition is demanded would be recognized as substantially similar in both countries [and] that there is a prima facie case that the conduct of the accused amounted to the commission of the crime according to English law."<sup>47</sup>

The 1982 *Report* stated that this was, in the view of the Working Party, the correct approach.<sup>48</sup> According to the *Report*, the test applied in *Regina v. Governor of Brixton Prison, ex parte Gardner*,<sup>49</sup> a Commonwealth rendition case under the 1967 Act, was too stringent.<sup>50</sup> In *Gardner*, Lord Parker made the following argument:

It seems to me that what is clearly contemplated [in the 1967 *Fugitive Offenders Act*] is that a request coming forward to the Secretary of State must set out in some form, and no doubt the most useful form is the warrant or warrants for arrest, the offence or offences of which the fugitive is accused . . . . *Not only must it supply a general description . . . but it must condescend to sufficient detail to enable the matter to be considered.*<sup>51</sup>

The Working Party elaborated that the strictures imposed in *Gardner* were that "the offence disclosed must be identical, either in its description or in its constituent parts, to the offence named in the requisition."<sup>52</sup>

46. [1980] 1 W.L.R. 1110.

47. *Id.* at 1122. Note that Lord Griffiths also held that it is the "substance of the two offences that must correspond, not their precise definitions." *Id.* at 1120 (citing *In re Arton* (No. 2), [1896] 1 Q.B. 509); see also *Rex v. Dix*, [1902] 18 T.L.R. 231; *Regina v. Governor of Pentonville Prison, ex parte Ecke*, 1974 Crim. L.R. 102.

48. REPORT, *supra* note 43, at 10.

49. [1968] 2 Q.B. 399.

50. REPORT, *supra* note 43, at 10.

51. *Gardner*, [1968] 2 Q.B. at 415 (emphasis added).

52. REPORT, *supra* note 43, at 10.

As the two cases indicate, there was a clear disparity in the approach between these two statutory applications. The later cases also bear this out. The key case applying the 1870 *Extradition Act* is *In re Nielsen*.<sup>53</sup> This case concerned an extradition request from Denmark, and the House of Lords held that double criminality need only be proved when the particular extradition treaty provides for it.<sup>54</sup> Lord Diplock described it as the “exceptional accusation” case.<sup>55</sup> The 1870 *Extradition Act* was held to require no more than that the conduct disclosed in the evidence delivered by the requesting state be an “extradition crime” in the United Kingdom. There are several passages from the judgment that are worth quoting, as they illustrate quite clearly the conduct-based approach to double criminality. Lord Diplock, writing for a unanimous court dismissing Nielsen’s appeal, began the opinion as follows:

It is . . . appropriate at this juncture to draw attention to the fact that, when one is describing crimes committed in a foreign state that are regarded in the United Kingdom as serious enough to warrant extradition of an offender by whom they have been committed, one is describing the way in which human beings have conducted themselves and their state of mind at the time of such conduct. Since conduct of that kind consists of wicked things that people do in real life it is possible to describe it either in broad generic terms and using popular language, or in varying degrees of specificity

. . . .  
The 1870 [Act] list uses the former technique . . . .

So in order to determine whether conduct constitutes an ‘extradition crime’ within the meaning of the Extradition Acts 1870 to 1935, and thus a potential ground for extradition if that conduct had taken place in a foreign state, one can start by inquiring whether the conduct if it had taken place in England would have fallen within one of the 19 generic descriptions of crimes in the 1870 list.<sup>56</sup>

On its own facts *Nielsen* was not an “exceptional accusation case,” which resulted in the case being decided by reference solely to whether the conduct was criminal if committed in England and covered by the

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53. [1984] 2 All E.R. 81 (H.L.).

54. *Id.* at 82.

55. *Id.* at 89. As to the term “exceptional accusation cases,” see Brabyn, *supra* note 5, at 796.

56. *Nielsen*, [1984] 2 All E.R. at 84.

1870 list.<sup>57</sup> The *Nielsen* case clarified the meaning of section 26 of the *Extradition Act* 1870. Section 26 defined an extradition crime as “a crime which, if committed in the United Kingdom or within United Kingdom jurisdiction, would be one of the crimes described in the first Schedule to this Act.”<sup>58</sup>

Until *Nielsen* it was uncertain what meaning attached to the word “crime.” There were two possibilities. The first was that “crime” referred to a specific criminal offense under the laws of the requesting state. The second possibility was that it referred to conduct that is viewed as criminal. It was this second “conduct” approach that was adopted by Lord Diplock in *Nielsen*. As one writer has stated:

It follows that, since the first Schedule provides that the list of crimes therein is to be construed according to the law existing in England at the date of the alleged crime, only English law is relevant to the question whether particular behaviour amounts to an extradition crime for the purposes of the Act. So far as the statutory definition of ‘extradition crime’ is concerned, foreign law is not relevant at all.<sup>59</sup>

It is interesting to observe that in *Nielsen* and in the next case to be considered, *United States v. McCaffery*,<sup>60</sup> the House of Lords did not use the term “double criminality” in any shape or form. It has been suggested by one commentator that by not using this term the justices “sought to disassociate themselves” from the *Budlong* definition quoted earlier in this section.<sup>61</sup> The commentator goes on to suggest that the *Budlong* requirement, “that the foreign crime with respect to which extradition is requested must be substantially similar to a relevant offence in English Law,” was forcefully rejected in *Nielsen* as having no justification in the words of the 1870 Act.<sup>62</sup> Lord Diplock’s rejection of the double criminality rule is explicit in his use of the expressions “the

57. *Id.* at 88-89. See J. Crawford, *Case No. 5: Government of Denmark v. Nielsen*, 1984 BRIT. Y.B. INT’L L. 343, reprinted in 48 J. CRIM. L. 373 (1984).

58. Extradition Act, 1870, 33 & 34 Vict., ch. 52.

59. See Brabyn, *supra* note 5, at 797. In contrast, section 3 of Canada’s *Extradition Act* refers explicitly to Canada’s extradition treaties taking precedence over the Act in the event of conflict. See *supra* note 12 and accompanying text. The treaties contain double criminality clauses of varying descriptions.

60. [1984] 2 All E.R. 570 (H.L.).

61. Brabyn, *supra* note 5, at 798. For a discussion of the *Budlong* holding, see *supra* notes 46-48 and accompanying text.

62. Brabyn, *supra* note 5, at 798.

sobriquet of 'double criminality',"<sup>63</sup> in *Nielsen* and "the so-called double criminality" rule in *McCaffery*.<sup>64</sup>

In *McCaffery*, Lord Diplock, again writing for a unanimous House of Lords, held that the proper test under *Nielsen* is "whether the conduct of the accused, if it had been committed in England, would have constituted a crime falling within one or more of the descriptions included in that list."<sup>65</sup> However, as Lord Diplock points out, "the precise matter on which evidence of foreign law would be necessary would depend on the terms of the particular extradition treaty."<sup>66</sup> Thus, the cases interpreting the 1870 *Extradition Act* can best be summed up as pointing out that proof of double criminality is only necessary where the Treaty calls for it. In all other cases it is sufficient that the conduct amounts to an extradition crime in the United Kingdom.

Under the Commonwealth scheme, a different position has been taken, as alluded to earlier in *Gardner*.<sup>67</sup> Article 12 of the *Scheme Relating to the Rendition of Fugitive Offenders Within the Commonwealth* provides that "[t]he return of a fugitive offender will be precluded by law or be subject to refusal by law . . . if the facts on which the request for his surrender is grounded do not constitute an offence under the law of the country or territory in which he is found."<sup>68</sup>

*Gardner* required correspondence of the crime in both requested and requesting states. Two writers have made the following suggestion:

As most of the requests to the United Kingdom under the Scheme emanate from countries enjoying a common legal heritage, little difficulty arose in the majority of cases in matching the ingredients of the crimes in both countries. However, in *Gardner* and a subsequent unreported case of *R. v. Pentonville Prison, ex parte Myers*

63. *Nielsen*, [1984] 2 All E.R. at 90.

64. *McCaffery*, [1984] 2 All E.R. at 573.

65. *Id.* at 573.

66. *Id.*; see also *Jennings v. United States*, [1982] 3 All E.R. 104, in which the House of Lords held that evidence was required which would prove, under the criminal law in force in that part of the United States where the conduct took place, that a criminal offence occurred subject to the requisite minimum punishability required by the Treaty. *Id.* at 113. The emphasis again, as in *Nielsen* and *McCaffery*, is on conduct "rather than the particular packaging of criminal offences." See Brabyn, *supra* note 5, at 800.

67. See *supra* notes 49-52 and accompanying text.

68. CMND. 3008 (London, 1966). See also C. Nicholls & C. Nicholls, *The Old and the New* 4 (October 1989) (unpublished paper presented at the Biennial Conference of the International Bar Association, Strasbourg).

(1972) No. 293/72, the court refused to order the surrender of fugitives because the Commonwealth crimes charged related to future pretences, as there was no corresponding crime in the United Kingdom.<sup>69</sup>

In *Canada v. Aronson*,<sup>70</sup> the issue before the House of Lords was whether the evidence was sufficient to warrant the trial of the fugitive in the United Kingdom for what he was alleged to have done in the requesting state and not simply for what he had appeared to have done wrong according to English law.<sup>71</sup> Lord Bridge of Harwich declared that he preferred this narrow construction. In fact he stated that "I do not think that the language of the statute fairly admits of the wide construction . . . . [I]f the language is ambiguous, the narrow construction is to be preferred in a criminal statute as the construction more favourable to the liberty of the subject."<sup>72</sup>

The court took the view that there was a basic fallacy in the argument of the appellants in that there was an attempt to assimilate the requirements of the 1870 and 1967 Acts. This argument failed, as the structure and machinery of both Acts is disparate. Lord Bridge stated specifically:

Nowhere in the 1870 Act is there any provision which has the effect of imposing a double-criminality rule, though such a rule may be introduced into the extradition machinery by the provisions of particular treaties. By contrast . . . [I]egislating to give effect to the [1967] scheme, it was necessary to provide that a returnable offence should both fall within one of those broad categories and satisfy the 'double criminality rule' laid down in cl 10 of the scheme [relating to the Rendition of Fugitive Offenders Within the Commonwealth, Cmnd 3008, 1966].<sup>73</sup>

Lord Lowry, joined by Lords Bridge and Elwyn-Jones, addressed the impact of extradition cases such as *Nielsen* upon rendition cases such as *Aronson* in the following words:

[T]he appellants here seem to me to have represented to your Lordship's the paramount position of *Nielsen's* case, not only in

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69. C. Nicholls & C. Nicholls, *supra* note 68, at 5.

70. [1989] 2 All E.R. 1025.

71. *Id.* at 1027.

72. *Id.*

73. *Id.* at 1028.



relation to extradition, concerning which it is of course the leading authority, but also in regard to the return of fugitive offenders [under the 1967 Act]. . . . [S]uch an approach could not validly be adopted in a fugitive offender's case.<sup>74</sup>

Lord Griffiths, one of the two dissenting judges, held that the rejection of the *Nielsen* test of conduct would make the 1967 Act unworkable.<sup>75</sup> He did not hesitate to construe the words "act or omission constituting the offence," set out in section 3(1)(c) of the 1967 Act, as a reference to the fugitive's conduct.<sup>76</sup> He went on to state that "I cannot reconcile the alternative construction with section 3(1)(a), which by its language shows that what is required is broad similarity, not exact correspondence, of offence . . . ."<sup>77</sup> This sharply divided decision, which held that Aronson could not be extradited, illustrates the problems in the double criminality rule when narrowly construed, especially where fiscal offenses are concerned.

One final case that has dealt with this issue is that of *In re Osman*,<sup>78</sup> which involved a request from the Crown Colony of Hong Kong under the 1967 *Fugitive Offenders Act*. As to the double criminality rule, Lord Parker held as follows:

The double criminality provision of FOA does not require in my judgment a meticulous and precise identity of wording . . . . The

74. *Id.* at 1048.

75. *Id.* at 1030.

76. Section 3(1)(c) of the Act provides for rendition of fugitives for "relevant offences," as follows:

(1) For the purposes of this Act an offence of which a person is accused or has been convicted in a designated Commonwealth country or United Kingdom dependency is a relevant offence if -

. . . .  
(c) in any case, the act or omission constituting the offence, or the equivalent act or omission, would constitute an offence against the law of the United Kingdom if it took place within the United Kingdom or, in the case of an extra-territorial offence, in corresponding circumstances outside the United Kingdom.

77. *Id.* Section (3)(1)(a) provides that an offence is a relevant offence if - in the case of an offence against the law of a designated Commonwealth country, it is an offence which, however described in that law, falls within any of the descriptions set out in Schedule 1 to this Act, and is punishable under that law with imprisonment for a term of twelve months or any greater punishment .

78. [1990] 1 All E.R. 999.

combined effect of *Aronson* and its predecessors [*Gardner* and *Myers*] is, in my view, that if the charge as formulated by the requesting state would constitute, if proved, an offence here, the offence is a relevant offence . . . .<sup>79</sup>

## 2. The 1989 Extradition Act

It is not within the scope of this article to enter into a comprehensive review of the 1989 Act. However, a brief account of its background will be given and the sections pertinent to this article on double criminality will be discussed. The 1989 *Extradition Act*<sup>80</sup> consolidates, with amendments, enactments relating to extradition under the 1988 *Criminal Justice Act*,<sup>81</sup> the 1967 *Fugitive Offenders Act*,<sup>82</sup> and the 1870-1935 *Extradition Acts*.

The impetus behind the new Act was not only to streamline the extradition procedure by reducing the multiplicity of legislation, but also to assist foreign states, particularly in Europe. Under the old law, the European states had difficulty in obtaining extradition, primarily due to the *prima facie* case requirement of sufficiency of evidence. In fact, "[t]he legislation ha[d] been said to be too protective of the rights of the fugitives and not sensitive enough to the cooperative needs of states dealing with international crime and mobile criminals."<sup>83</sup> The process of reform can be traced back to the 1982 *Report* of the Interdepartmental Working Party, considered earlier in this section.<sup>84</sup> This was followed by the *Green Paper on Extradition* in 1985.<sup>85</sup>

It should be noted that running through this process was the important consideration of the necessity of amendment if the United Kingdom was to become a party to the *European Convention on Extradition*.<sup>86</sup> In 1986, the White Paper entitled *Criminal Justice: Plans for Legislation*<sup>87</sup> was presented to Parliament. The proposals in these docu-

79. *Id.* at 1015-1016.

80. Extradition Act, 1989, ch. 33.

81. Criminal Justice Act, 1988, ch. 33.

82. Fugitive Offenders Act, 1967, ch. 68.

83. [3 CURRENT LAW STATUTES ANNOTATED 33 (1989)]

84. *See supra* note 43.

85. Presented to Parliament by the Secretary of State for the Home Department, 1985. CMND 9421.

86. European Convention on Extradition, 1957, E.T.S. No. 24.

87. Presented to Parliament by the Secretary of State for the Home Department, CMND 9658.

ments became legislation in Part I of the 1988 *Criminal Justice Act*. However, it was not proclaimed into force immediately. In June 1989, an Extradition Bill was introduced to consolidate legislation relating to extradition.<sup>88</sup>

The new consolidated *Extradition Act* became effective in December 1989.<sup>89</sup> Its language is clearly taken from the earlier statutes, which are now wholly or largely repealed,<sup>90</sup> and from the recommendation of the Law Commission Report. In consolidating the earlier statutes, the 1989 Act makes binding, where utilized, the language of the earlier statutes. It could be argued that the case law interpreting those statutes should not be of value. However, even though strictly speaking this might be true, "it would be unrealistic to disregard the case law on the Fugitive Offenders Act 1967 (because it never came into force, there is no case in law on Part I of the Criminal Justice Act 1988) and, indeed the consideration of similar language in the Extradition Act 1870."<sup>91</sup>

Section 2 of the new act defines "extradition crime." This definition is radically different from the definitions found in the 1870 *Extradition Act* and the 1967 *Fugitive Offenders Act*. Instead, it follows the mode of Article 2 of the *European Convention on Extradition*.<sup>92</sup> The first striking feature is contained in Section 2(1)(a). This section defines an "extradition crime" as "conduct" in the territory of a foreign state, Commonwealth country or colony, which, had it occurred in the United Kingdom, would constitute an offence punishable with a term of imprisonment of at least 12 months. Moreover, however the crime is described in the law of the foreign state, Commonwealth country or colony, it must be so punishable under that law. This section clearly follows the conduct-based line taken by the courts in *Nielsen*<sup>93</sup> and *McCaffery*,<sup>94</sup> but not that of *Aronson*.<sup>95</sup> Therefore, the narrow construc-

88. For consideration of the Bill and a Report making certain proposals, see The Law Commission and the Scottish Law Commission, *Extradition Bill: Report on the Consolidation of Legislation Relating to Extradition*, Law. Com. No. 182, Scottish Law Com. No. 119.

89. Extradition Act, 1989, ch. 33. See Hansard, H.L. Vol. 509, cols. 484, 846; Vol. 510, col. 790; H.C. Vol. 157, col. 1129.

90. See Current Law Statutes Annotated, *supra* note 83, at 33.

91. *Id.* at 33-34.

92. See *supra* note 86.

93. [1984] 2 All E.R. 81.

94. [1984] 2 All E.R. 570.

95. [1989] 2 All E.R. 1025.

tion of *Aronson* is dead.<sup>96</sup>

As to jurisdiction over the offense, section 2(1)(a) refers to the territory of the requesting state. The British courts could take a broad view of this basis of jurisdiction in a manner that can be compared to the Supreme Court of Canada's decision in *Libman v. The Queen*.<sup>97</sup> One British writer has commented: "The practical importance . . . will depend upon the extension of United Kingdom law, either by the courts or by legislation, to catch crime with an extraterritorial element."<sup>98</sup>

Sections 2(1)(b), 2(2), and 2(3) deal with extradition for extra-territorial offenses. Offenses will be extraditable where "in corresponding circumstances equivalent conduct would constitute an extra-territorial offence against the law of the United Kingdom" punishable by a minimum of 12 months imprisonment.<sup>99</sup> Thus, where there is duality of jurisdictional bases extradition will take place.<sup>100</sup> It should be noted

96. The minimum punishability requirement clearly will bring into play more offenses than before. In particular, fiscal offenses will no longer be excluded, as they generally had been in the past. *But see* R. v. Chief Metropolitan Stipendiary Magistrate, ex parte Secretary of State for the Home Department, [1988] 1 W.L.R. 1204; *see also Report, supra* note 43, at 12-13. This new approach will take immediate effect as regards treaties with such a provision. However, with the "old list" variety, that method will continue until amendment.

97. [1985] 2 S.C.R. 178. Evidence of this broad view may also be seen in *In re Reyat*, [CO 1157/88 Q.B.D. 1989]. In *Reyat*, the court held that the phrase "extra-territorial offences . . . refers to cases which are wholly foreign in concept and not those which merely have a foreign element . . ." *See also* R. v. Governor of Pentonville Prison, ex parte Osman, [1988] Crim. L. R. 611; R. v. Governor of Pentonville Prison, ex parte Herbage, 84 Crim. App. 149 (C.A. 1987); R. v. Treacy, [1971] App. Cas. 537 (H.L.).

98. C. Warbrick, *The Criminal Justice Act 1988: The New Law on Extradition*, 1989 CRIM. L. REV. 4, 8. The comments refer to the Criminal Justice Act, but as the same provisions appear in the 1989 Consolidation Act, they still stand. *See also* LAW COMMISSION, JURISDICTION OVER OFFENCES OF FRAUD AND DISHONESTY WITH A FOREIGN ELEMENT (1989); Leigh, *Territorial Jurisdiction and Fraud*, 1988 CRIM. L. REV. 280. For cases in which extradition was refused for lack of jurisdiction, *see* Governor of Pentonville, ex parte Khubchandani, 71 Cr. App. R. 241 (1980); and R. *Harden* (1962), 46 Cr. App. R. 90.

99. *Supra* note 89.

100. *See infra* notes 101-104 and accompanying text for an analysis of duality of jurisdiction. Note that this is in accord with the recent pre 1989 Act decision in R. v. Governor of Pentonville Prison, ex parte *Naghdi*, [1990] 1 All E.R. 257, where it was held that under the 1870 Act, the meaning of "within the jurisdiction of the requesting state" should not be interpreted solely in the sense as it is used by the foreign state, since this could be regarded by the United Kingdom as an "exorbitant jurisdiction." *Id.* at 265-66.

that the United Kingdom, much like Canada, utilizes a territorial approach to criminal jurisdiction,<sup>101</sup> except with respect to murder committed by its nationals abroad and offenses under the various international terrorism conventions.

Extradition will also take place for extraterritorial offenses (1) where the nationality of the offender basis of jurisdiction is used by the requesting state; (2) where the conduct took place outside the United Kingdom; and (3) if, had it occurred in the United Kingdom, it would constitute an offence subject to the minimum punishability rule of 12 months. This provision must be read in the light of the fact that many states in Europe use this active nationality basis.<sup>102</sup> It must be stressed that this application is only addressed to the nationality of the *offender* as the jurisdictional link with the requesting state. It is contrasted with the passive nationality principle, which is based on the nationality of the victim.<sup>103</sup>

A situation could present itself where a national of State A with whom the United Kingdom has an extradition relationship commits an offense in State B under the laws of State A. The conduct may be lawful in State B. However, extradition will take place if the conduct would be regarded as criminal if done in the United Kingdom and be punishable under the minimum punishability rule. One commentator supports this result by arguing that the "justification is to be found in the underlying policy of providing an effective response to certain kinds of international crime. It will eliminate the 'safe haven', e.g. drug dealing or planning terrorist operations, by allowing for the return of persons to the State most affected by the activities."<sup>104</sup>

## B. *The United States*

Until 1979 all the bilateral extradition treaties of the United

101. See *R. v. Governor of Brixton Prison, ex parte Rush*, [1969] 1 W.L.R. 165.

102. See Williams & Castel, *The Extradition of Canadian Citizens and Sections 1 and 6(1) of the Canadian Charter of Rights and Freedoms*, XXV CAN. YR. BK. INT'L. L. 263, 268-69 (1987).

103. It appears that an early version of the Criminal Justice Bill inadvertently did not so restrict it to active nationality. According to two commentators, the result would have been "to allow 'long arm' claims of, for example, the United States, which bases much of its federal jurisdiction on the nationality of the victim, particularly in the case of banks. This jurisdiction would not be recognized under the new Act." See C. Nicholls & C. Nicholls, *supra* note 68, at 12.

104. Warbrick, *supra* note 98, at 9.

States used the enumerative method. One writer has commented that the refusal to go with the no-list approach “stemmed basically from the multijurisdictional criminal justice system” in the United States.<sup>105</sup> The fear in the United States was that the no-list approach would prove unwieldy in that in every case it would have to be decided what law determines the extraditability of the offense.<sup>106</sup> However, it appears that recently “the United States Department of Justice has preferred to adopt the no-list approach, in light of the high cost in time and effort of updating treaties.”<sup>107</sup>

However, where the list approach still exists, the applicable case law indicates that extradition will not be granted unless the fugitive (sometimes designated the “relator”) is alleged to have committed an offense listed or described in some way in the applicable treaty. As is true with most countries’ list treaties, there is no detail or definition of the offenses but simply an identification formula.<sup>108</sup> It stands to reason that to determine this formula, a body of substantive criminal law must be applied and that body of law is that of the place of arrest.<sup>109</sup> In the now classic case of *Collins v. Loisel*,<sup>110</sup> Justice Brandeis stated:

It is true that an offence is extraditable only if the acts charged are criminal by the laws of both countries . . . The law does not require that the same name by which the crime is described in the two countries shall be the same; nor that the scope of liability shall be coextensive, or in other respects the same in the two countries. *It is enough if the particular act charged is criminal in both jurisdictions.*<sup>111</sup>

This opinion dove-tails with the judgment of Chief Justice Fuller in *Wright v. Henkel*,<sup>112</sup> where it was held that “it is enough if the particular variety was criminal in both jurisdictions.”<sup>113</sup>

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105. C. Blakesley, *International Extradition: An Exercise in Comparative and International Law* 37-38 (December 1989) (unpublished paper, presented at Conference on Extradition, Siracusa, Sicily).

106. *Id.* at 38; see e.g., *Factor v. Laubenheimer*, 290 U.S. 276 (1933).

107. C. Blakesley, *supra* note 105, at 38.

108. M.C. BASSIOUNI, *supra* note 1, at 336.

109. *Id.*; see also *U.S. v. Stokinger*, 269 F.2d 681 (2d Cir. 1959), *aff'd*, 361 U.S. 513 (1959).

110. 259 U.S. 309 (1922).

111. *Id.* at 312 (emphasis added).

112. 190 U.S. 40 (1903).

113. *Id.*; see also *Gluckman v. Henkel*, 221 U.S. 508 (1910).

Because of the variegated system of criminal jurisdiction divided between the federal government and the states, certain questions arise that are peculiar to the United States. For example, should double criminality be determined by the law of the state in the United States where the fugitive is found or by the law of the majority of states in the United States? In *Factor v. Laubenheimer*,<sup>114</sup> the United States Supreme Court mentioned that the crime charged was a crime under the "law of many states, if not Illinois . . . ."<sup>115</sup> This approach has been adopted by many courts in the United States.<sup>116</sup> One writer has summed up the position as follows: "What the Supreme Court in *Factor* and subsequent decisions following it appear to hold is that the judge will determine whether there is a sufficient number of States that have criminalized the action in question to legitimize his decision. The obvious defect is uncertainty."<sup>117</sup>

In the recent case of *United States v. Sensi*,<sup>118</sup> the circuit court of appeals held that double criminality does not require that the criminal laws of the requested and requesting states are "perfectly congruent."<sup>119</sup> According to the court, this would be an absurdity, based on the fact that the criminal laws of different states will rarely match exactly.<sup>120</sup> It is important to note the part of the judgment dealing with the fugitive's conduct as criminal. The court referred to the Restatement (Third) of the Foreign Relations Law of the United States, which states that the requirement for double criminality is that the "acts charged" constitute a serious offense in both states.<sup>121</sup> As the court stated, "[t]he Restatement makes clear that the focus is on the acts of the defendant, not on the legal doctrines of the country requesting extradition."<sup>122</sup>

114. 290 U.S. 276 (1923).

115. *Id.* at 300, 303.

116. *See, e.g.*, *Theron v. U.S. Marshal*, 832 F.2d 492 (9th Cir. 1987); *In re of Extradition of Russell*, 789 F.2d 801 (9th Cir. 1986); *Brauch v. Raiche*, 618 F.2d 843 (1st Cir. 1980); *In re Tang Yee-Chun*, 674 F. Supp. 1058 (S.D.N.Y. 1987); *U.S. v. Lehder-Rivas*, 668 F. Supp. 1523 (M.D. Fla. 1987).

117. C. Blakesley, *supra* note 105, at 49.

118. 879 F. 2d 888 (D.C. Cir. 1989), *aff'g* 664 F. Supp. 566 (D.D.C. 1987).

119. *Id.* at 893; *see also* *Oen Yiu-Choy v. Robinson*, 858 F. 2d 1400 (9th Cir. 1988); *Theron*, 832 F. 2d at 492; *In re Extradition of Russell*, 789 F. 2d 801 (9th Cir. 1986); *In re Suarez-Mason*, 694 F. Supp. 676 (N.D. Cal. 1988).

120. *Sensi*, 879 F.2d at 893.

121. RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 476 comment d (1987).

122. *Sensi*, 879 F.2d at 894. *See also* *United States v. Herbage*, 850 F.2d 1463

In *Reza Emami v. United States*,<sup>123</sup> a case in which an Iranian physician was found to be extraditable to West Germany for criminal insurance fraud offenses, the United States District Court for the Northern District of California held that the keynote was that the substantive conduct punishable in both states was functionally identical. Thus, the principle of dual criminality was satisfied.

Pertinent to our discussion and of comparative assistance to Canadian jurisprudential discussion is *Quinn v. Robinson*,<sup>124</sup> where the circuit court of appeals held that "[t]he question whether the offense comes within the treaty ordinarily involves a determination of whether it is listed as an extraditable crime and whether the conduct is illegal in both countries."<sup>125</sup>

One author has noted that "a few decisions have more carefully analyzed the elements of the offense against those listed in the treaty and denied extradition."<sup>126</sup> He adds that "[l]ack of treaty coverage has been a difficulty for the United States in seeking to extradite for peculiar offences like mail fraud, wire fraud, interstate transportation of stolen goods, or securities law violations, none of which are listed in any extradition treaties entered into prior to World War I."<sup>127</sup>

## C. Canada

### 1. The No-List Approach

The recent treaties and protocol that Canada has negotiated with India, France, Germany, the Philippines and the United States respectively indicate that Canada has opted for the no-list approach, which determines extradition on the basis of double criminality and a minimum punishability requirement rather than on an enumerated schedule of offenses in the treaty. This will prevent outmoded lists. However, it

(11th Cir. 1988).

123. 834 F.2d 1444 (9th Cir. 1987).

124. 783 F.2d 776 (9th Cir. 1986).

125. *Id.* at 791.

126. Kester, *Some Myths of United States Extradition Law*, 76 GEO. L.J. 1444, 1463 (1988). For listed cases, see *id.* at 1463 n.124; see also, *Melia v. U.S.* 667 F.2d 300, 302 n.1 (2d Cir. 1981).

127. Kester, *supra* note 126, at 1463. Note the following statement by the Department of Justice: "Many federal offences are based upon the commerce clause of the Constitution. Regrettably these offenses are not extraditable under most treaties. For example, the gravamen of 18 U.S.C. 2314 is interstate transportation, not theft." See U.S. DEPARTMENT OF JUSTICE, U.S. ATTORNEYS' MANUAL § 9-15.220 (1977).



is still necessary for the requesting state to show that the offense is criminal in both the requested and requesting states. In essence, the no-list approach allows potentially more offenses to be extraditable. Of particular note will be the inclusion of fiscal offenses, which unless provided for specifically in bilateral treaties are not extraditable at present.<sup>128</sup>

This approach appropriately places its concentration not on the strict denomination of the offense but upon the conduct constituting the criminal offense. This denomination or enumerative approach, may vary radically between countries and even between states in a federal system such as the United States of America. The no-list approach dictates a move away from a rigid interpretation of extraditable offenses within treaty schedules and emphasizes the conduct in question.

## 2. Canadian Case Law Interpreting Double Criminality

Canadian courts have long taken the position that even where there was an applicable list of offenses appended to a treaty, it was not necessary for the requesting state and Canada to use the same terminology. Apparently, the key factor is not that both states use the same terminology or denomination, but rather that the evidence as a whole makes a *prima facie* showing that the offender has committed what amounts to an offense in both states. In *Cotroni v. A-G of Canada*,<sup>129</sup> the Supreme Court of Canada held that the test to be used is to ask what is the essence of the offense. Accordingly, it does not matter that the particular indictment, had it been issued in Canada, would have been issued under the Criminal Code or any other statute. There is no requirement of exact identity between the offense charged in the requesting state and the Canadian offense. The focus is on criminal conduct.

In *United States v. Smith*,<sup>130</sup> Mr. Justice Borins held that "it is the conduct alleged against the [fugitive] which is central to the hearing resulting from a request for extradition. It is the alleged criminality

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128. Note, however, that this exception to extradition was recently eroded by the House of Lords in *R. v. Chief Metropolitan Stipendiary Magistrate, ex parte Secretary of State for the Home Department*, [1988] 1 W.L.R. 1204 (H.L.).

129. [1976] 1 S.C.R. 219; see also *In re Brisbois*, 133 C.C.C. 188 (Ont. H.C.) (1962); *Virginia v. Cohen*, [1973] F.C. 622.

130. 15 C.C.C. 3d 16 (1984); see also *In re Smith and the Queen*, 16 C.C.C. 3d 10 (1984).

of this conduct to which attention must be paid."<sup>131</sup> The inquiry is not focused on the legal framework of the requesting state. Instead, Canada must fit a set of facts that constitute the conduct of the fugitive into Canadian law in order to see whether conduct constitutes an offense under that particular law.<sup>132</sup> Using this "conduct" test, it is not necessary to determine whether the requesting state can make out a *prima facie* case under its criminal law. The essence is the sufficiency of evidence in the forum.<sup>133</sup>

The Supreme Court of Canada again had cause to deal with this issue in *Washington v. Johnson*.<sup>134</sup> In *Johnson*, the applicable treaty, the 1976 Extradition Treaty between Canada and the United States,<sup>135</sup> contained a list of offenses. Mr. Justice Wilson, writing for the majority, stated that the issue was whether the requesting state must establish that the offense charged in the foreign state is an offense in Canada or whether it is sufficient to show that the conduct charged would have amounted to a Canadian crime, listed in the treaty, if it had occurred in Canada.<sup>136</sup> The court noted that Article 2 of the treaty requires a combination extraditable crime and double criminality, with a minimum punishment time of one year, and held that the double criminality rule looks to the conduct of the fugitive.<sup>137</sup>

The *Johnson* court quoted the following passage from La Forest's *Extradition To and From Canada*:

An extradition crime may broadly be defined as an act of which a person is accused, or has been convicted of having committed within the jurisdiction of one state that constitutes a crime in that state and in the state where that person is found, and that is mentioned or described in an extradition treaty between those states under a name or description by which it is known in each state.<sup>138</sup>

It is not necessary for an exact identity between terminology in the two states, nor for the elements of the crime to be the same in both states.

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131. *Smith*, 15 C.C.C. 3d at 16.

132. *Id.*

133. *See United States v. Caro-Payan*, (Ont. D.C. Feb. 18, 1988) (unreported).

134. 40 C.C.C. 3d 546 (1988).

135. 1976 Extradition Treaty, Canada-United States, 27 U.S.T. 983, Can. T.S. No. 3.

136. *Johnson*, 40 C.C.C. 3d at 548.

137. *Id.* at 553.

138. G.V. LA FOREST, *supra* note 17, at 42; *see also* SHEARER, EXTRADITION IN INTERNATIONAL LAW 137 (1971).

This would be an impossible task to accomplish.<sup>139</sup> The focus is undeniably upon the conduct of the fugitive.

The British Columbia Court of Appeal recently dealt with the interplay of extraditable crime and double criminality in *United States v. McVey*.<sup>140</sup> This case involved an extradition request for the offense of submitting false statements to the United States Customs Service. This particular offense was not listed in the schedule to the Canada-United States Extradition Treaty of 1976. However, the crime of forgery is listed in the same Treaty. It was argued that the definition of forgery was broad enough to include McVey's alleged crime. In the United States his offense did not constitute forgery. The British Columbia Court of Appeal, referring once again to La Forest's text,<sup>141</sup> held that the offense must be listed in the schedule to the Treaty under some name or description by which it is known in each state.<sup>142</sup> This case demonstrates the need for the no-list approach to extradition, in which the criminality of the conduct in both states is the keynote coupled with a minimum punishability requirement. It gets away from the limiting effect of the enumerative method.<sup>143</sup>

None of the authorities discussed in this section so far bear directly upon this case. Although McVey's conduct was criminal in the United States, and would have been considered criminal if it had occurred in Canada, the difficult question is to decide what construction must be placed upon Article 2 of the Treaty.<sup>144</sup>

139. See 1 H. BOOTH, *supra* note 5, at 50, where the author states that the extradition court cannot "become a tribunal of foreign law." See also *R. v. Governor of Pentonville Prison ex parte Elliott*, [1975] Crim. L.R. 516; *R. v. Governor of Pentonville Prison ex parte Narang*, [1978] A.C. 247.

140. 33 B.C.L.R. 2d 28 (1989).

141. See *supra* note 138.

142. *McVey*, 33 B.C.L.R. 2d at 30.

143. M.C. BASSIOUNI, *supra* note 1, at 330.

144. This Article provides as follows:

(1) Persons shall be delivered up according to the provisions of this Treaty for any of the offenses listed in the Schedule annexed to this Treaty, which is an integral part of this Treaty, provided these offenses are punishable by the laws of both Contracting Parties by a term of imprisonment exceeding one year.

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

(3) Extradition shall also be granted for any offense against a federal law of the United States in which one of the offenses listed in the annexed

The key question to be addressed is whether the alleged criminal conduct in the requesting state must be enumerated in the extradition treaty as well as the offence established by Canadian law, if it has another name, or whether it is sufficient to have the dual criminality conception as to the conduct present and an enumeration of the Canadian offense in the treaty alone. In interpreting treaty articles, and attempting to shed some light on the complex double criminality issue presented in *McVey*, some fairly recent cases may be of valuable guidance. In *United States v. Smith*,<sup>145</sup> Mr. Justice Borins saw the need for double criminality with respect to the fugitive's conduct and an enumeration of the offense in the treaty. He relied upon La Forest's *Extradition To and From Canada*<sup>146</sup> for the proposition that "if the act charged falls within the definition of different crimes in the two countries, the names of the crimes in both countries must appear in the treaty; otherwise extradition will be refused."<sup>147</sup>

A second valuable case is *United States v. Caro-Payan*,<sup>148</sup> which concerned, *inter alia*, the question of whether a continuing criminal enterprise relating to drug trafficking was an extraditable offence. Madame Justice Smith's reasoning succinctly addressed the point of extradition law raised in *McVey* and referred to the earlier case of *Sudar v. United States*.<sup>149</sup> The justice stated that "a treaty must be [given] a liberal interpretation in working to achieve its stated ends."<sup>150</sup>

Madame Justice Smith applied the British cases of *Nielsen*<sup>151</sup> and

Schedule, or made extraditable by paragraph (2) of this Article, is a substantial element, even if transporting, transportation, the use of the mails or interstate facilities are also elements of the specific offense.

1976 Extradition Treaty, Canada-United States, art. II, 27 U.S.T., 983 Can. T.S. No. 3.

145. 15 C.C.C. 3d 16 (1984).

146. G.V. LA FOREST, *supra* note 138, at 52-55.

147. *Smith*, 15 C.C.C. at 28. This is the line that the British Columbia Court of Appeal took in *McVey*, 33 B.C.L.R. 2d 28 (1989), *see supra* notes 140-143 and accompanying text, and more recently in *In re Ogoshi*, No. CC891575 (British Columbia Supreme Court Nov. 3, 1989) (unreported).

148. (Ont. D.C. Feb. 18, 1988) (unreported).

149. 39 N.R. 433 (1981).

150. *Caro-Payan*, (Ont. D.C. Feb. 18, 1988) (unreported). This emphasis on not frustrating the purpose of the treaty by resorting to technical arguments can also be seen in the trilogy of cases decided by the Supreme Court of Canada: *Allard and Charette v. United States* [1987] 1 S.C.R. 564; *Mellino v. Argentina*, [1987] 1 S.C.R. 536, and *Schmidt v. United States*, [1987] 1 S.C.R. 500.

151. [1984] 2 W.L.R. 737.

*McCaffery*,<sup>152</sup> and held that the old double criminality test, which required an almost exact pairing of all the constituent elements of the offense, is not the requisite test today. Instead, the conduct test should be applied. Of the utmost relevance to the *McVey* issue is the statement that “[t]he extradition judge need only consider whether the evidence against the fugitive would justify a committal for trial if the ‘conduct alleged’ had been committed in Canada, and that conduct is a crime that is listed in the *Treaty*.”<sup>153</sup>

The decision in *Caro-Payan*, which holds that for double criminality to be present there is no need for all the constituent elements of the offense charged to be the same in both the requesting and requested state, is non-controversial. Madame Justice Smith argued that “[i]t is the conduct that must be criminal and not the offence that must be identical in both the requested and requesting State.”<sup>154</sup> She concluded that this is a natural extension of *Nielsen* and *McCaffery* and is “totally consistent” with the observations of La Forest in *Extradition to and From Canada*.<sup>155</sup>

Madame Justice Smith seems to be holding that as long as the conduct would be criminal if committed in Canada, and if that conduct is a listed crime in the treaty, then there is no necessity for it to be also referred to in the treaty list under a name by which it is known in the requesting state. This point is re-emphasized further in the same case where she states:

It is no longer necessary for the extradition judge to determine whether a “continuing criminal enterprise”, as alleged in Count 1 of the Requesting State’s indictment, is an offence known in Canada. *Rather the question is whether the “conduct” alleged against the fugitive would, if committed in Canada, constitute a crime that is listed in the Schedule of offences to the Extradition Treaty.*<sup>156</sup>

This view would appear to go against the grain of La Forest’s statement that if the “act charged amounted [to different offenses in the requesting and requested states], both crimes would have to be

152. [1984] 1 W.W.R. 867.

153. *Caro-Payan*, (Ont. D.C. Feb. 18, 1988) (unreported).

154. *Id.*

155. *Id.*; see G.V. LA FOREST, *supra* note 138, at 57.

156. *Caro-Payan*, (Ont. D.C. Feb. 18, 1988) (unreported) (emphasis added).

listed in the treaty before extradition would be granted."<sup>157</sup> The *McVey* and *Ogoshi* courts relied upon La Forest's statement, but however much assistance a doctrinal view may be, it is clearly not binding on the courts. There must be a primary interpretation of the sections of the statute and articles of the treaty. As indicated earlier, there is a good argument to be made that Article 2(1) of the 1976 Extradition Treaty does not require the offense to be listed under names by which it is known in both states.<sup>158</sup>

The third case is particularly relevant because it is factually similar to *McVey*. In *United States v. Golitschek*,<sup>159</sup> Madame Justice Smith held, similar to her holding in *Caro-Payan*, that the essence of double criminality is conduct-based. In *Golitschek*, the fugitive was alleged to have conspired with others outside of the United States to procure ten military helicopters and to take them outside of the United States to a state to which export under United States law is prohibited.<sup>160</sup> In order to accomplish this export, the fugitive and others produced and submitted a false document (end-user certificate) to obtain the required license to export from the United States Government.<sup>161</sup>

Madame Justice Smith held that the essence of the offense was a conspiracy to obtain an export license by false pretenses or by false statement.<sup>162</sup> Canada utilizes extra-territorial jurisdiction over conspiracies pursuant to section 423(4) of the Criminal Code and the substance of the conspiracy would give rise to the offense of obtaining by false pretenses, (section 321(a)), forgery or making false documents, (section 324(1)), uttering a false document, (section 325), and making false statements to obtain an export license under the *Export and Import Permits Act*.<sup>163</sup> Thus, the fugitive's conduct would be capable of

157. G.V. LA FOREST, *supra* note 138, at 56-57.

158. See *supra* notes 140-157 and accompanying text.

159. (Ont. D.C. January 1986) (unreported). Golitschek was extradited to the United States and was prosecuted and found guilty in March 1986.

160. *Id.*

161. *Id.*

162. *Id.* The false pretence was contained in the end-user certificate which indicated the helicopters were going to Spain rather than Iran. The essence of the second offense was conspiracy to forge or make false documents, based on the facts that if documents were presented to the U.S. authorities certifying that the helicopters were going to Spain so that they could effect an export to Iran, it would be by means of a false document. *Id.*

163. Madame Justice Smith refers to the *Import and Export Act*, section 16. This appears to be in error. I assume that she meant section 17 of the above named statute, dealing with false and misleading information and misrepresentation. See

prosecution in Canada if Canada was in the position of the United States.

Madame Justice Smith went on to hold that this conduct on the part of the fugitive was covered by several offenses listed in the schedule of offenses appended to the Treaty, namely Numbers 12 (obtaining property, money or valuable security by false pretences), 17 (offenses against the laws relating to forgery), and 19 (making of false affidavit or statutory declaration for any extrajudicial purpose). Article 2(2) of the Treaty stipulates that conspiracy to commit any of these offenses is also extraditable.<sup>164</sup> In addition, Count 2 on the extradition indictment alleged a conspiracy to obtain an export license by false pretenses using the telephone and telex.<sup>165</sup> Although there is no precise Canadian equivalent to fraud or obtaining property by wire, Madame Justice Smith emphasized that it is the underlying *conduct* covered by the Treaty which must be considered. In this case, it was the use of false pretenses to obtain an export license and the method by which the particular crime was executed was not relevant. Therefore, this offense was covered by Number 12 of the Schedule of Offences.

Madame Justice Smith concluded that the conduct on all counts would give rise to criminal offenses in Canada and all were listed in the Treaty. It is important to note that she did not discuss the issue raised in *McVey*, which was that in the United States the offense did not constitute forgery.<sup>166</sup> She did not question that the Schedule encompassed the offenses on the extradition indictment. As discussed earlier, this approach is the one that seems to be in keeping with the purpose behind the extradition process. The rights of the fugitive are safeguarded, as he or she will not be extradited unless the conduct is considered criminal in both states and is punishable by a term of imprisonment exceeding one year pursuant to Article 2(1) of the Treaty.

This provision is supplemented by Article 10, which requires that the evidence must be sufficient to justify committal for trial if the offense had been committed in the territory of the requested state.<sup>167</sup> The important question raised is why the *McVey* court, which failed to look

R.S.C. 1985, ch. E-19.

164. 1976 Extradition Treaty, Canada-United States, art. II, section 1, 27 U.S.T. 983, Can. T.S. No. 3.

165. *Golitschek*, (Ont. D.C. January 1986) (unreported).

166. See *supra* notes 140-143 and accompanying text.

167. 1976 Extradition Treaty, Canada-United States, art X, 27 U.S.T. 983, Can. T.S. No. 3.

beyond the crime of "forgery" as listed in the Treaty, did not consider the "false pretenses" possibility as the *Golitschek* court did.

The same approach utilized in *Golitschek* was also taken by the Superior Court of Quebec in *United States v. Meredith*,<sup>168</sup> where Mr. Justice Hannan held that the nature and type of crime in the U.S. indictment, obtaining goods using false pretenses, was recognized in Canada. He argued as follows:

If the conduct of the accused, had it been committed in Canada would give rise to offences in Canada, and these offences are caught in the net of criminal offences covered by the Treaty, then the conduct with which the accused is charged as being an offence in the United States is an extradition offence. It is not the *title of the offence which is important but rather the essential element*, so that an offence may be subject to the treaty because of its essential elements though it not be there mentioned by name.<sup>169</sup>

In assessing the position taken by Canadian courts, it is clear that the case law stresses an interpretation of treaty obligations that is liberal and fair and gives effect to Canada's international obligations. It is also clear that section 2 of the *Extradition Act* has been interpreted to mean that the conduct must be viewed as criminal, if it had occurred in Canada. Section 2 allows for extradition as long as the "Canadian version" of the criminal conduct amounting to an offense is "described" in a "list-treaty." Section 3 of the *Extradition Act* provides that in the event of inconsistency between the Act and the extradition arrangement, the arrangement will govern and the Act must be so read and construed. It is therefore necessary to look at Canada's bilateral arrangements on a treaty by treaty basis. The 1976 Extradition Treaty with the United States is for obvious geographical reasons the most utilized and is the one at issue in the recent *McVey* case.

When the wording of Article 2, (1) of the 1976 Extradition Treaty is examined, it can be readily divided into two distinct parts: (1) persons shall be extradited according to the provisions of this Treaty for any of the offenses listed in the Schedule annexed to the Treaty, which is an integral part of this Treaty; and (2) these listed offenses must be punishable by the laws of both contracting parties by a term of imprisonment of no less than one year.<sup>170</sup>

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168. No. 500-27-004092-872 (Que. S.C. Sept. 4, 1987) (unreported).

169. *Id.* at 16 (emphasis added).

170. 1976 Extradition Treaty, Canada-United States, art. II, section 1, 27



As indicated above, there may be no need for the denomination of the offense to be the same in the requesting and requested state.<sup>171</sup> Similarly, the scope of liability need not be co-extensive. It is enough for the extradition process that the offense charged is considered to be criminal conduct in both states. The intention of the parties to the treaty was to extradite on the basis of reciprocity and the second part of Article 2 (1) should be read in this light. There should be a fair and liberal interpretation of extradition treaties that will not hinder the working and narrow the operation of the arrangement.

The word "offences" utilized in Article 2 (1) of the Treaty should be read to mean "conduct," and any "conduct" listed in the treaty should be extraditable, provided the conduct is considered criminal in both states and both states have a minimum punishability for it of at least one year. This would seem to fit well within the analysis of recent Canadian and British decisions considered earlier. It should also be recognized that in determining the extraditable nature of the crime, it is necessary pursuant to Article 9(3) of the 1976 Extradition Treaty to provide that there is "such evidence, as according to the terms of the *requested* State, would justify his arrest and committal for trial if the offence had been committed there . . . ."<sup>172</sup> This is a safeguard for the fugitive - extradition will not be granted for acts not considered criminal conduct in both states or where there is an insufficiency of evidence. The basis for these Articles is found in section 18 of the *Extradition Act*.<sup>173</sup>

This issue of double criminality interfaces with the principle of specialty, which holds that a person extradited shall not be tried or punished in the requesting state for an offense other than that for which extradition has been granted.<sup>174</sup> It is important to note here that the specialty principle is linked to the rigid approach of non-extradition

U.S.T. 983, Can. T.S. No. 3.

171. See *Johnson*, 40 C.C.C. 3d at 546, discussed *supra* notes 134-139 and accompanying text; *Smith*, 15 C.C.C. 3d at 16, discussed *supra* notes 145-147 and accompanying text; *Caro-Payan*, (Ont. D.C. Feb. 18, 1988) (unreported), discussed *supra* notes 148-158 and accompanying text; *Meredith*, No. 500-27-0004092-872 (Que. S.C. Sept. 4, 1987) (unreported), discussed *supra* notes 168-169 and accompanying text.

172. 1976 Extradition Treaty, Canada-United States, art. IX, 27 U.S.T. 983, Can T.S. No. 3 (emphasis added).

173. Extradition Act, 1989, ch. 33, § 18.

174. 1976 Extradition Treaty, Canada-United States, art. XII, 27 U.S.T. 983, Can. T.S. No. 3.

adopted by the *McVey* court.<sup>175</sup> However, if a rigid, technical interpretation is to be made of Article 2 (1) of the Treaty, it would result in complex difficulties concerning criminal conduct. Several questions have arisen over the last decade with respect to whether double criminality may be achieved when dealing with foreign legislation that has no exact Canadian counterpart.

To use current examples, would offenses under the United States' laws such as RICO<sup>176</sup> and CCE<sup>177</sup> find equivalents under Canadian criminal law? Assume the 1976 Treaty is strictly interpreted and extradition could only take place for "forgery." If the conduct in the U.S. would not be prosecuted as "forgery" under the U.S. Code and other legislation, would this result in a violation of the specialty principle? The British Columbia Supreme Court, in the *habeas corpus* application in *In re McVey*,<sup>178</sup> held that the specialty principle would indeed be violated. Again, this type of analysis would seem to be artificial and defeat the purpose of the Treaty. The cornerstone of the Treaty is reciprocity and recognition by both states of the fact that the alleged conduct is criminal. To put up these technical roadblocks hobbles the efficacy of the whole process. Additionally, it should be noted that when Canada extradites for an offense listed in the Treaty, the requesting state may well be prosecuting under a different technical name. However, the emphasis always remains upon the conduct for which the extradition was granted; unrelated offenses allegedly committed before the extradition was granted are not included. As Mr. Justice La Forest stated in *Parisien v. The Queen*,<sup>179</sup> a state to which a request for extradition is presented is under no obligation to surrender the fugitive for prosecution in the requesting state "for behaviour not considered criminal in the requested state."<sup>180</sup> This is the basic principle upon which the process is founded, as expressed in the maxim *nulla poena sine lege*, - "no punishment without law."

In the case of *Sudar v. United States*,<sup>181</sup> the Ontario High Court held that extradition on charges of racketeering and conspiracy to racketeer could take place. It based this holding on the following rationale:

175. See *supra* notes 140-147 and accompanying text.

176. Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. §§ 1961-1968 (1962).

177. Continuing Criminal Enterprise Act, 21 U.S.C. § 848(b) (1970).

178. 30 B.C.L.R. 2d 197 (1988).

179. [1988] 1 S.C.R. 950.

180. *Id.* at 956-57.

181. 39 N.R. 433 (1981).

[T]he only real substantive components of the indictment against Sudar for the purposes of extradition are the conspiracy . . . and the activities of murder, threats to murder etc. There is no doubt as to the criminality of these activities and of any conspiracy in relation thereto. They are recognized as such the world over.<sup>182</sup>

This appears to be an approach based upon conduct rather than denomination.<sup>183</sup> It was not necessary to find that the acts charged in the United States were also set forth in the Treaty. The basic problem is whether the extradition is granted for the offenses as named under the United States statute, or whether extradition is granted by the extradition court because the offenses are considered criminal in Canada. If the result is that the crimes are those articulated by the court, then any prosecution in the United States under a special statute would violate the principle of specialty. Canada extradited for the criminal conduct involved - conspiracy, murder, threats of murder, arson and extortion. All of these offenses are listed in the Treaty. However, Sudar was indicted in the United States and eventually prosecuted under RICO.

A similar situation arose in the Australian case of *Riley v. Commonwealth*,<sup>184</sup> in which the fugitives were sought by the United States for the offence of continuing criminal enterprise (CCE) under 21 U.S.C. § 848.<sup>185</sup> The fugitives were involved in a series of offenses regarding importation and possession for the purpose of distributing a narcotic.<sup>186</sup> The Australian court addressed the issue of whether CCE was an extraditable offense under the 1976 Treaty between Australia and the United States.<sup>187</sup> The schedule of offences appended to the Treaty had no CCE offense. However, the court assessed whether the

182. *Id.*

183. For a criticism of the *Sudar* decision, see Bernholz, Bernholz & Herman, *International Extradition in Drug Cases*, 10 N.C.J. INT'L L. AND COMM. REG. 353 (1985), in which the authors argue that "the determination whether [CCE] . . . is recognized as punishable in the requested state must be made with reference to CCE as a whole and not its separate parts. Extradition is sought, granted or denied on the basis of the overall crime." *Id.* at 36. The authors also suggest that "[w]hen the elements of CCE are combined, it is clear that the offence is an exclusive genus of United States criminal law. Because it is not punishable in foreign countries, it cannot satisfy double criminality, and thus, does not qualify as an extraditable offence." *Id.*

184. 60 A.L.J.R. 106 (Austl. 1985).

185. Continuing Criminal Enterprise Act, 21 U.S.C. § 848 (1970).

186. *Riley*, 60 A.L.J.R. 106.

187. 1976 Extradition Treaty, Australia-United States, 27 U.S.T. 957, TIAS 8234.

acts composing the CCE offense would be considered criminal in Australia if committed there. The court found that the conduct would have been criminal if committed in Australia, and concluded that the CCE offense was extraditable, even though an exact parallel did not exist under Australian law.<sup>188</sup> As to the issue of double criminality, the court reasoned that "because at least one act which formed an element of the offence of continuing enterprise, or an equivalent act, would have constituted an offence against a law . . . if it had occurred in New South Wales, the offence itself is an extradition crime."<sup>189</sup>

In the British case *United States v. McCaffery*,<sup>190</sup> the United States sought extradition for federal offenses which consisted of using wire, radio, or television to transmit communications for fraudulent purposes in interstate or foreign commerce and of knowing transportation of a stolen security in interstate or foreign commerce. The House of Lords had to address the issue that there was no English equivalent to the charges. Following the decision in *Nielsen*,<sup>191</sup> the court held that the offense was extraditable and applied the test enunciated in *Nielsen*, which stated that what must be considered "was whether the *conduct* of the accused, if it had been committed in England, would have constituted a crime falling within one or more descriptions in that list."<sup>192</sup>

In *Hagerman v. United States*,<sup>193</sup> CCE was once again under review. This particular crime is unknown to Canadian law. Mr. Justice McKenzie held that the intent of Article 2(3) of the 1976 Extradition Act was to create a new extradition crime category if it "fits the description of possessing as a substantial element a listed federal offence or one listed under art. 2(3) . . ."<sup>194</sup> The thrust of the judgment seems to be that Article 2(3) was aimed at giving greater scope for extraditable crimes "even though they might possess the purely American characteristic of requiring transporting, transportation, the use of the mails in interstate facilities."<sup>195</sup> What Mr. Justice McKenzie sought was (1) an offense against the federal law of the United States; and (2) a substantial element of that offense must be one of the of-

188. *Riley*, 60 A.L.J.R. at 106.

189. *Id.* at 109.

190. [1984] 2 All E.R. 570.

191. [1984] 2 All E.R. 81. See *supra* notes 53-64 and accompanying text for a discussion of *Nielsen*.

192. *McCaffery*, [1984] 2 All E.R. at 573; see *Nielsen*, 2 [1984] All E.R. at 573.

193. 44 C.C.C. 3d 157 (1988).

194. *Id.* at 162.

195. *Id.*

fenses listed in the schedule to the Treaty.<sup>196</sup>

## V. DOUBLE CRIMINALITY AND DUALITY OF JURISDICTIONAL BASES

One issue still to be addressed is the impact of assertions through domestic law of extraterritorial jurisdiction over criminal offenses and how this interacts with double criminality. As emphasized earlier, it is essential that the requested state views the offense for which extradition is sought as extraditable.<sup>197</sup> Here, the principles of jurisdiction over the offense are crucial.<sup>198</sup> If an extradition treaty provides for crimes which are considered extraditable crimes if committed within the requesting state's jurisdiction, then, as La Forest stated, "[g]enerally . . . it seems best to interpret jurisdiction generously. This is in fact what has happened. In practice whether the term 'territory' or 'jurisdiction' is used in the Treaty, jurisdiction has been broadly construed."<sup>199</sup>

This matter of double criminality and extraterritoriality has become increasingly important as crime has become more transnational in nature. Many of Canada's more recent extradition treaties provide that when the offense for which extradition is sought was committed outside of the territory of the requesting state, the requested state shall have the power to grant extradition if the laws of the requested state also provide for jurisdiction in similar circumstances.<sup>200</sup> Other treaties go further and provide that even when the requested state does not use

196. *Id.* at 165. The scheduled offense does not have to be identical to the U.S. federal law that forms a substantial element. *Id.*

197. See *supra* notes 101-104 and accompanying text for the discussion on extraterritoriality and the 1989 British *Extradition Act*.

198. For an in depth analysis of this issue, see S.A. WILLIAMS & J.G. CASTEL, *CANADIAN CRIMINAL LAW: INTERNATIONAL AND TRANSNATIONAL ASPECTS*, chs. 1-5 (1981); see also van den Wyngaert, *Double Criminality as a Requirement to Jurisdiction*, in *DOUBLE CRIMINALITY: STUDIES IN INTERNATIONAL CRIMINAL LAW* 43, 46 (N. Jareborg ed. 1989).

199. G.V. LA FOREST, *supra* note 138, at 45.

200. See e.g., 1976 Extradition Treaty, Canada-United States, art. III, § 3, 27 U.S.T. 983, Can. T.S. No. 3; Extradition Treaty between Canada and India, art II, February 6, 1987; Treaty of Extradition between Canada and the United Mexican States, art XI, § 2, January 24, 1990; Extradition Treaty between Canada and the Republic of the Philippines, November 7, 1989; (no extradition without duality of jurisdictional basis).

a similar extraterritorial basis, extradition may be granted.<sup>201</sup>

One of Canada's newest treaties with the United Mexican States also provides specifically for the use of the active nationality basis of jurisdiction.<sup>202</sup> The 1988 Treaty between Canada and France is worded differently. It states in Article 6(1) that extradition may not be refused if the offense for which extradition is sought was committed in whole or in part in the territory of the requested state or elsewhere subject to its jurisdiction.<sup>203</sup> Moreover, Article 6(2) stipulates that extradition "*may not be refused* when the offense was committed outside the territory of the requesting state *unless* the legislation of the requested state does not authorize prosecution of the same offence . . . in corresponding circumstances."<sup>204</sup>

Similarly, the *European Convention on Extradition* provides in Article 7(2) that extradition may be refused, even though the offense is extraditable under the Convention, if the offense was committed other than in the territory of the requesting state and the requested state does not utilize a similar extraterritorial basis of jurisdiction.<sup>205</sup> Clearly, where both requested and requesting states utilize the same extraterritorial basis of jurisdiction over the offense, no problem is presented. The difficulty arises when the jurisdictional basis is not recognized by the requested state.<sup>206</sup> In such a case, unless the treaty provides specifically for extradition, double criminality will not be satisfied and extradition will be refused.<sup>207</sup> One concern underlying this limitation is that a requesting state may seek extradition of a national of the requested state on a "theory of liability that the requested state finds troubling."<sup>208</sup>

An interesting case dealing with the interface between double

201. See Protocol Amending the Treaty on Extradition between the United States and Canada, art. III. This protocol is not yet in force.

202. Treaty of Extradition between Canada and the United Mexican States, January 24, 1990.

203. Extradition Treaty between the Government of Canada and the Government of the Republic of France, art VI, § 1, Nov. 17, 1988.

204. *Id.* at art. VI, § 2 (emphasis added).

205. European Convention on Extradition, 1957, art. VII, § 2, E.T.S. No. 24.

206. See Blakesley, *A Conceptual Framework for Extradition and Jurisdiction over Extraterritorial Crimes*, 4 UTAH L. REV. 685, 744 (1984). The author labels this a "special use" of double criminality.

207. The United States recognizes this "special use" of double criminality. *Id.*

208. M. Tigar, *The Extradition Requirement of Double Criminality in Complex Cases: Illustrating the Rationale of Extradition 14* (December 1989) (unpublished paper presented at Conference on Extradition, Siracusa, Sicily).

criminality and basis of jurisdiction is *France v. Moghadam*,<sup>209</sup> in which France sought the extradition of Moghadam, a United States resident, for complicity in an agreement to import heroin into France. The court addressed the subject of double criminality and extraterritoriality and determined on the facts of the case "that the exercise of extraterritorial jurisdiction [by the United States] over Moghadam (under analagous circumstances) would be unreasonable. Hence the requirements of dual criminality are not met . . . . [T]he extraterritorial exercise of jurisdiction must be reasonable."<sup>210</sup>

A commentator has argued that "[o]ne reason for prohibiting prosecution of those who have never physically entered the forum state is that legal remedies differ, and that such differences lead us to doubt whether an accused acted with enough knowledge, intent or desire to make inculcation reasonable."<sup>211</sup> Many states with whom Canada has extradition arrangements use the active nationality basis and it seems to be "in the interests of justice" and also in the interests of Canada to extradite in these circumstances to the state of nationality of the fugitive.<sup>212</sup>

In this era of increasing transnational and international crime, where a state's citizens may be victims of criminal offenses organized abroad, such as fraud or drug smuggling, it is reasonable and appropriate to bring a more relaxed view to this jurisdictional question. As long as the conduct can be considered criminal if committed in the requested state, then this should be sufficient. The duality of jurisdictional bases should not be paramount.<sup>213</sup>

The only caveat would be that such extraterritorial jurisdiction should be in accordance with international law.<sup>214</sup> Reciprocity on a strict basis would thwart the efficacy of the extradition process. As Canada's criminal jurisdiction is fairly conservative, based to the greatest extent on the territorial principle contained in section 6(2) of the Criminal Code,<sup>215</sup> unless specifically extended by other sections of the

209. 617 F. Supp. 777 (N.D. Cal. 1985).

210. *Id.* at 786-87.

211. M. Tigar, *supra* note 208, at 15.

212. *See* REPORT, *supra* note 43, at 18; *see also* section 2(3) of the new British *Extradition Act*, discussed *supra* notes 99-104 and accompanying text.

213. *See* REPORT, *supra* note 43, at 17.

214. *Id.* at 18.

215. Criminal Code of Canada, R.S.C. ch. C-46, § (6)(2) (19\_\_\_\_). *See* Libman v. The Queen, [1985] 2 S.C.R. 178 for an interpretation of section 6(2) of the Criminal Code.

Code or other Act of Parliament, Canada would be unduly limiting the possibility of extradition, even where the actual conduct is viewed as criminal and where there is a sufficiency of evidence. It does not seem that Canada views the use by other states of other bases of jurisdiction, such as active nationality, as being untenable or unjust. Indeed, in some limited circumstances concerning international crimes, *stricto sensu*, such as hijacking, hostage-taking, attacks on internationally protected persons and war crimes, Canada now utilizes this approach.<sup>216</sup>

## VI. THE FUTURE: A NEW CANADIAN EXTRADITION ACT AND A REFORMULATION OF DOUBLE CRIMINALITY

In the early sections of this article, the basic distinction between extradition to "foreign" states and rendition to Commonwealth states was mentioned.<sup>217</sup> Rendition under the Canadian *Fugitive Offenders Act*<sup>218</sup> is based upon Britain's now long repealed 1881 *Fugitive Offenders Act*.<sup>219</sup> Extradition is dealt with under the *Extradition Act*,<sup>220</sup> as supplemented or amended by bilateral treaties.<sup>221</sup> As this article is devoted to the principle of double criminality, it is beyond its scope to consider all of the differences between the two Acts and how they could be melded into one composite approach. It would also be beyond the present article to canvass all the views on whether rendition merits treatment separate from extradition. The last section has three purposes: (1) to detail succinctly the basic reasoning between different treatment of fugitives under the two schemes; (2) to analyze the Canadian Charter of Rights arguments that a fugitive under the present *Fugitive Offenders Act* could raise if treated differently; and (3) to make some suggestions based on the comparisons drawn above for a new composite Act.

The *Fugitive Offenders Act* imposes few of the traditional extradi-

216. See Criminal Code of Canada, C.R.S. ch. C-46, §§ 7(3), (3.1), (3.5), (3.7), (3.71) (19\_\_\_).

217. See *supra* Part II.

218. Fugitive Offenders Act, R.S.C. ch. F-32 (1985).

219. Fugitive Offenders Act, 1881, 44 & 45 Vict., ch. 69, replaced by Fugitive Offenders Act, 1967, ch. 68, and Extradition Act, 1989, ch. 33. La Forest points out that "[t]he repeal of the British Act by Great Britain in 1967 has no effect in Canada because of the Statute of Westminster." See G.V. LA FOREST, *supra* note 138, at 153 n.1.

220. Extradition Act, R.S.C. ch. E-23 (1985).

221. *Id.* at § 3.



tion law safeguards, such as the specialty principle or the double criminality requirement. There are no treaties and no list of offenses appended to the Act itself. The omission of these formal safeguards clearly illustrates the differing principles and assumptions upon which intra-Commonwealth rendition was conceived and has operated. Since Canada was originally a part of the British Empire, it appeared that rigid extradition formality was unnecessary. Although a fugitive might be surrendered from one part of the Empire to another, he or she never officially left the jurisdiction of the highest appellate court, the Judicial Committee of the Privy Council.<sup>222</sup>

Some earlier court decisions clearly reflect this rationale. In *In re Harrison*,<sup>223</sup> the court commented that "[i]t is quite obvious that some additional care ought to be taken in the case of extraditing persons to foreign countries than in facilitating criminal proceedings in the various parts of the Empire, to which alone the Fugitive Offenders Act applies."<sup>224</sup> The New Zealand Supreme Court expressed a similar opinion in *Ex parte Lillywhite*,<sup>225</sup> where Justice Stout argued as follows:

At common law there was thought to be an asylum for foreign offenders; and it is only by virtue of treaties that foreign offenders are given up. The rendition of an offender against the Crown from one portion of the possessions of the Crown to another portion should, it seems to me, be differently viewed.<sup>226</sup>

Bearing in mind the change from Empire to Commonwealth and the resulting change in constitutional status of the member countries, many questions arose as to whether the *Fugitive Offenders Act* was appropriate and whether it still applied to all Commonwealth states.<sup>227</sup> Another aspect of international life that cannot be ignored is that there has been a diminution of shared political and social objectives of the member states. The overall complexion of the Commonwealth has dras-

222. See O'Higgins, *Recent Practice under the Fugitive Offenders Act*, 1965 CRIM. L. REV. 133.

223. 25 B.C.R. 433 (1918).

224. *Id.* at 437.

225. 19 N.Z.L.R. 502 (1901).

226. *Id.* at 505.

227. The current Canadian *Fugitive Offenders Act* applies to any part of Her Majesty's Realms and Territories. See *Fugitive Offenders Act*, R.S.C. ch. F-32 §§ 2 & 3 (1985). If this is correctly interpreted as meaning those countries that recognize the Queen as the head of state, there are a number of Commonwealth countries to which rendition is not possible.

tically changed since 1881. The constituent members are not aligned on all issues, and certainly Great Britain no longer exercises dominion and control. For most of the countries, appeal to the Privy Council no longer exists.

In 1966 a Commonwealth Conference was held in London, England, and the problems concerning rendition were discussed. Following this meeting, the United Kingdom enacted a new *Fugitive Offenders Act*,<sup>228</sup> as did several other Commonwealth states, excluding Canada. The 1967 Act provided that intra-Commonwealth rendition would be conducted basically in the same manner as extradition, including such safeguards as double criminality.

Concerning double criminality and the lack thereof in the Canadian *Fugitive Offenders Act* as it still exists, G.V. La Forest made the following statement:

The act charged need not be an offence in Canada, let alone punishable by imprisonment with hard labour [see s. 4]. That is what makes the situations described above so difficult. The question whether a man should be surrendered from Canada should depend primarily on the seriousness with which the crime is regarded here, not in the foreign country. When the British Statute on which the Canadian Act is modelled was passed, the British Government could control the punishment inflicted for offences by virtue of disallowing and reserving colonial legislation as well as by statute of the Imperial Parliament. That situation is now largely of the past.<sup>229</sup>

Section 17 of the present Canadian *Fugitive Offenders Act* provides for situations where rendition may be refused because it would be unjust.<sup>230</sup> However, as La Forest suggests, "that section . . . should not be expected to bear the whole burden of what *has now become an obsolete and defective piece of legislation*."<sup>231</sup>

In 1978, Bill S-9 was introduced in Canada to bring into operation a new *Fugitive Offenders Act*.<sup>232</sup> It provided for rendition for crimes falling within a schedule of offenses appended to it. This schedule and

228. Fugitive Offenders Act, 1967, ch. 68.

229. G.V. LA FOREST, *supra* note 138, at 157 (footnotes omitted).

230. Fugitive Offenders Act, R.S.C. ch. F-32 § 17 (1985).

231. G.V. LA FOREST, *supra* note 17, at 157 (emphasis added); *see also id.* at 166-69.

232. 30th Parliament, 4th Sess. 1978-79.

the one belonging to the proposed amended *Extradition Act* were to be the same. The idea of "returnable offence," mentioned in section 2(1) of Bill S-9, in effect established a double criminality requirement. This legislation would have brought Canada into line with the United Kingdom and other Commonwealth countries such as Australia. Unfortunately, it died on the order paper. However, in 1981 two writers commenting on the demise of Bill S-9 stated that "[w]ithout a doubt a new bill will be introduced soon which will cover the same ground. This may be done in the same form as the previous attempt or it is suggested the present system of extradition and rendition may be combined in one statute."<sup>233</sup>

Ten years later, in 1991, it is clear that Canada's extradition and rendition laws are still in need of change. It is equally clear that the changing international climate dictates that the same basic approach to extradition should be taken with respect to all countries, Commonwealth or otherwise. As for the double criminality requirement, the Law Reform Commission of Canada mentioned in 1984 that there are two Acts which, "for 'extradition' purposes, hold that the conduct in question must amount to a criminal offence under the law of both the requesting state and Canada, [but] do not make this a requirement for 'rendition' where an offence against the requesting state law suffices."<sup>234</sup>

The same Working Paper made the following observation:

[W]e have seen enough to convince us of the need to modernize our statutes concerning these subjects. However, before that can be done, the federal government will have to seek answers to questions such as . . . Does Canada need two Acts? Would not one suffice? Is there any longer a need to differentiate between "extradition" and "rendition?"<sup>235</sup>

Finally, the Law Reform Commission recommended that "the *Extradition Act* and *Fugitive Offenders Act* be amended to provide for uniformity of treatment of persons under both Acts."<sup>236</sup>

The *Charter of Rights* has since 1982 played a large part in as-

233. S.A. WILLIAMS & J.G. CASTEL, *supra* note 198, at 341.

234. WORKING PAPER 37, LAW REFORM COMMISSION OF CANADA, EXTRATERRITORIAL JURISDICTION 136 (1984).

235. *Id.* at 137.

236. *Id.* at 137.

sessing Canada's extradition legislation, but this is not the place to recount this case law history. Nevertheless, based on what has already been said on the need to treat fugitives in the rendition process in the same way as fugitives in the extradition process, many sections of the Charter clearly apply.<sup>237</sup>

Separate and apart from the issue of modernizing the rendition and extradition processes by amalgamating them within one statute, there is the question of whether right now the *Fugitive Offenders Act* violates the Charter of Rights by not allowing for the principle of double criminality. Are fugitive offenders being denied fundamental justice and being subjected to inequality before and under the law? Why should X, being surrendered to Great Britain, not have the same safeguards as Y, being extradited to the United States or Germany?

It is far from surprising that such a Charter argument was raised in the case of *The Queen v. Taylor*.<sup>238</sup> Taylor argued, *inter alia*, that under the *Fugitive Offenders Act* his Charter Rights - guaranteed by sections 7 and 15<sup>239</sup> - had been violated, in that the offense for which the requesting state asked for his rendition was not be an offense under Canadian Criminal law, as contrasted with the double criminality safeguard of the current *Extradition Act*. Mr. Justice Scullion held that there was no such breach of his rights under the Charter "so fundamental as to cause [him] to declare the [*Fugitive Offenders Act*] or parts thereof of no force and effect under section 52 of the Charter."<sup>240</sup>

Based on the foregoing analysis, including Justice La Forest statement that the *Fugitive Offenders Act* is "an obsolete and defective piece of legislation,"<sup>241</sup> it is remarkable that Mr. Justice Scullion in 1988 was able to come to the conclusion that there is no need for the same safeguards in rendition as in extradition. To illustrate this, he refers to the need for safeguards when extraditing to a country where the laws and judicial system are fundamentally different, as opposed to rendition to a Commonwealth country sharing "a great deal in that

237. See Part I, Constitution Act, 1982, which is Schedule B, Canada Act 1982 (U.K.), ch. 11. § VII (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); § XV (equality before and under the law; equal protection and equal benefit of the law without discrimination) (1982).

238. (1988) [Ont. Prov. Ct.].

239. See *supra* note 237.

240. *Taylor*, (1988) [Ont. Prov. Ct.] at 10.

241. G.V. LA FOREST, *supra* note 138, at 157; see also *R. v. Governor of Brixton Prison, ex parte Rush*, [1969] 1 W.L.R. 165.

common legal and political heritage."<sup>242</sup>

Although in the nineteenth and early twentieth centuries this may have been true, it is submitted that it is not so today, as evidenced by the perceived need for the safeguards in the 1967 Commonwealth Scheme. However, Mr. Justice Scullion seems to be unaware that Canada stands in almost splendid isolation in clinging to the nineteenth century approach to rendition. As *Aronson* indicated,<sup>243</sup> Canada would not get the same treatment from Great Britain if the shoe was on the other foot! Although the Commonwealth Law Ministers have recently considered a modification of the Rendition Scheme of 1967, the concentration appears to be on the *prima facie* case question, not on double criminality.

In conclusion, it is submitted that a new Canadian Extradition Act should be drafted that would combine extradition and rendition. The present scheme of two separate statutes no longer fits modern realities. The time is ripe for reform. Without addressing the issue of whether treaties should be entered into with Commonwealth countries as with other foreign states, or whether they may simply be designated, the section listing crimes that are extraditable should utilize the conduct approach,<sup>244</sup> coupled with a minimum punishability requirement. This revision would allow for a more flexible approach and yet still offer the fugitive the appropriate safeguards that are necessary.

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242. *Taylor*, (1988) [Ont. Prov. Ct.].

243. *See supra* notes 70-77 for a discussion of the *Aronson* case.

244. *See supra* notes 65-79, 110-127, 129-173.