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NOTES

United States v. Jamieson: The Role of the Canadian Charter in Canadian Extradition Law

James D. McCann*

Introduction

On November 13, 1986, police arrested Daniel Jamieson in Farmington, Michigan, for selling 273 grams of a cocaine mixture to an undercover officer.1 Charged with cocaine trafficking, Jamieson was released on bail and scheduled for trial in April of 1987.2 When Jamieson failed to appear at his trial, the trial court issued a warrant for his arrest.3 Jamieson had fled to Canada.4 On September 12, 1990, American and Canadian authori-
ties arrested Jamieson where he worked as a bouncer in Montreal, Quebec, on a warrant issued pursuant to proceedings initiated by the United States against Jamieson under the Canadian Extradition Act. Nearly six years of proceedings followed, as Jamieson attempted to halt the extradition process.

Jamieson temporarily succeeded in his second appearance before the Quebec Court of Appeal. In a split decision, a three-judge panel ruled that the Minister of Justice's extradition order violated section 7 of the Canadian Charter of Rights and Freedoms, reasoning that the imposition of a twenty-year minimum prison sentence with no chance of parole upon a first-time drug offender with no criminal record was contrary to "fundamental justice." But Jamieson's success was short-lived. The Supreme Court of Canada rejected this interpretation of section 7, unanimously reversing the Quebec Court of Appeal and dismissing Jamieson's petition for habeas corpus relief. In March of 1996, almost ten years after his initial arrest, Jamieson was returned to Michigan to face trial.

Jamieson presents the question: given Michigan's sentencing regime, what constraints does the Charter place upon the Canadian Minister of Justice's discretionary ability to order Jamieson's extradition? This Note scrutinizes the 1994 Quebec Court of Appeal's Jamieson decision, as well as

8. The Minister of Justice holds a cabinet-level position.
9. CAN. CONST. (Constitution Act, 1982) pt. I (Canadian Charter of Rights and Freedoms) [hereinafter The Charter]. The Charter is similar to the U.S. Constitution's Bill of Rights, protecting against double jeopardy (Charter § 11(h), U.S. CONST. amend. 5), forced self incrimination (Charter § 11(e), U.S. CONST. amend. 5), and cruel or (and) unusual punishment (Charter § 12, U.S. CONST. amend. 8). Section 7 has no literal analog within the Bill of Rights, although it does suggest the jurisprudential doctrine of substantive due process. It reads: "Everyone has the right to life, liberty and the security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice."
10. See Jamieson, 93 C.C.C.3d at 271.
the reversal that followed from the Supreme Court of Canada. Part I examines the general role and rules of extradition, as well as the historical development of extradition arrangements between Canada and the United States. Part II summarizes the rules and mechanisms that govern the extradition of fugitives from Canada to the United States. Part III describes the role of the habeas corpus petition in Canadian extradition proceedings. Part IV conducts an overview of the jurisprudence concerning the Charter and Canadian extradition practice. Part V analyzes Jamieson in light of Parts I, II, III, and IV. The Note concludes that the Supreme Court of Canada correctly decided Jamieson, both as a matter of policy and as a matter of law.

I. The Historical Development of the United States-Canadian Extradition Relationship

A. The Role and Rules of Extradition

Extradition has been defined as "the surrender by one state, at the request of another, of a person who is accused or has been convicted of a crime committed within the jurisdiction of the requesting state." Such a procedure benefits both countries. The state requesting extradition is able to determine the guilt or innocence of an accused lawbreaker and strengthens its law enforcement agencies by reducing the possibility that convicted or suspected criminals might escape capture and prosecution by fleeing to another country. The state extraditing the prisoner prevents itself from becoming a haven for criminals, deters other foreign criminals from seeking protection within its borders, and may benefit from future reciproc-


15. The interest that a state has in trying an accused criminal was stressed by the Supreme Court of Canada in United States v. Cotroni, 48 C.C.C.3d 193, 217 (Can. 1989): "Extradition thus shares one of the basic objectives of all criminal prosecutions: to discover the truth in respect of the charges brought against the accused in a proper hearing."

16. Cf. La Forest, supra note 14, at 15. See also, Worldwide Review of Status of U.S. Extradition Treaties and Mutual Legal Assistance Treaties: Hearing Before House Comm. on Foreign Affairs, 100th Cong. 2 (1987) (statement of Ms. Mary V. Mochary, Deputy Legal Adviser, Dept. of State) "Extradition of such [modern] criminals to a country with criminal charges pending against them becomes an important part of international cooperation in anti-criminal activity." Id.

17. See La Forest, supra note 14, at 15. The fear that Canada might become a safe haven for U.S. criminals was raised in response to Jamieson. Svardson, supra note 5, at A13. "The appeals court decision ... has unleashed concerns that Canada could attract more Americans fleeing their stricter judicial system." Id.

The fear of criminals seeking asylum was a motivating force behind the first Canadian extradition statute, the stated purpose of which was the "apprehending and delivering up of felons [who] seek an asylum in Upper Canada." An Act Respecting the Apprehension of Fugitive Offenders from Foreign Countries, and Delivering Them Up to Justice, 3 Will. 4, ch. 6 (1833) (Eng.), in Sir Edward Clarke, A Treatise Upon The Law of Extradition 93-94 (1903) [hereinafter The Act of 1833].

18. I.A. Shearer, Extradition In International Law 20 (1971).
Finally, as the most likely location of witnesses, evidence, and the people with the strongest interest in trying an alleged criminal, the requesting country is the best place to try the accused. On a purely practical level, some states restrict the extradition of fugitives by requiring reciprocity with the requesting state. Concerns related to reciprocity also underlie many of the substantive prerequisites to extradition embodied in extradition treaties. Nevertheless, human rights issues have occupied a place of increasing prominence in extradition law over the past fifty years. Many common law nations require an extradition treaty with the requesting country before any extradition may take place, barring the surrender of a fugitive to a nation whose political or criminal justice systems do not share such values with the requested country for the conclusion of a treaty. Extradition is also typically refused for "political" offenses and when the person to be extradited would face double jeopardy. States may restrict the extradition of their own nationals and states that do not have the death penalty often place limitations on the extradition of a person facing a possible death sentence.

B. The Developing U.S.-Canadian Extradition Relationship

The United States and Canada have steadily liberalized their extradition


20. See La Forest, supra note 14, at 15.

21. See Shearer, supra note 18, at 31.

22. See infra Part II.B.

23. See Bassiouni, supra note 19, at 7.

24. See Shearer, supra note 18, at 24-28. 18 U.S.C. § 3181 (1994) prohibits the surrender of fugitives to those countries with which the United States has no extradition treaty. The Extradition Act, supra note 6, § 7, permits the extradition of fugitives to countries with which Canada has no extradition treaty, but this has rarely in fact been done. See La Forest, supra note 14, at 17-18.


26. See discussion of the Extradition Treaty infra Part II.C.

27. See id.

28. See Bassiouni, supra note 19, at 457. It has been unsuccessfully contended that the extradition of Canadian citizens from Canada is a constitutionally prohibited violation of the mobility rights guaranteed by section 6 of the Charter. ("Every citizen of Canada has the right to enter, remain in, and leave Canada." The Charter, supra note 9, § 6.) The Supreme Court of Canada has ruled that extradition permissibly violates section 6 under Charter section 1, which subjects Charter rights to "reasonable limits . . . as can be demonstrably justified in a free and democratic society." The Charter, supra note 9, § 1. See United States v. Cotoni, 48 C.C.C.3d 193, 213-22 (Can. 1989). Nevertheless, Canadian courts have not made such explicit use of section 1 when confronting section 7. See Dennis Klinck, The Charter and Substantive Criminal "Justice", 42 U. N.B. (Can.) L.J. 191, 207 (1993).

29. See, e.g., the Extradition Treaty infra Part II.C.
relationship since its formal establishment over two hundred years ago.\(^{30}\) Liberal extradition procedures between these two states are a necessity: both are open and democratic, and travel between their common border is relatively easy. Without an effective mechanism for the return of fugitives fleeing justice, the U.S.-Canadian border would act as a severe impediment to law enforcement.\(^{31}\) The United States and Canada have in fact attempted to meet these needs, making extradition increasingly available and flexible in the face of the increasing ease of cross-border travel.

1. Early History

The Jay Treaty of 1794 provided the first formal agreement governing the extradition of fugitives between the United States and Canada, but only allowed for the extradition of fugitives accused of murder or forgery.\(^{32}\) It expired in 1807.\(^{33}\) Ratified in 1842, the Ashburton-Webster Treaty expanded the list of extradition crimes to include "murder, or assault with intent to commit murder, or Piracy, or arson, or robbery, or Forgery, or the utterance of a forged paper."\(^{34}\) Later conventions heavily modified the Ashburton-Webster Treaty, and significantly expanded its list of extraditable crimes. Conventions to the treaty in 1889,\(^{35}\) 1900,\(^{36}\) 1908,\(^{37}\) 1922,\(^{38}\)

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\(^{30}\) See infra note 31 and accompanying text.

\(^{31}\) For a further discussion of these issues, see infra text accompanying notes 149-58. The United States is responsible for the overwhelming majority of extradition requests received by Canada. From 1985 to November of 1991, the United States directed 361 extradition requests to Canada, while all other countries made only 74 such requests. Out of 350 requests from all states during that period (excluding 1987, for which surrender numbers are not provided), Canada surrendered 183 fugitives. See Commons Debates, 34th Parl., 3rd Sess., 4783 (1991) (Can.) (Mr. Ian Waddell).

\(^{32}\) Treaty of Amity, Commerce, and Navigation (Jay Treaty), Nov. 19, 1794, U.S.-Gr. Brit., art. 27, T.S. No. 105(S) [hereinafter Jay Treaty]. The United States and Great Britain entered into the Jay Treaty after the American Revolutionary War, and the Treaty addressed issues such as the withdrawal of military forces from American and British territories, indemnification, and border resolution. See generally id. See also La Forest, supra note 14, at 2-3 (summarizing historical context of Jay Treaty with respect to extradition).

\(^{33}\) See La Forest, supra note 14, at 2-3

\(^{34}\) Boundary, Slave Trade, and Extradition Treaty (Ashburton-Webster Treaty), Aug. 9, 1842, U.S.-Gr.Brit., T.S. No. 119(S) [hereinafter the Ashburton-Webster Treaty]. In the period between the Jay and Ashburton-Webster Treaties, the United States and Canada continued to surrender fugitives to each other, although not without difficulties. See La Forest, supra note 14, at 3-4; infra text accompanying notes 157-58.

\(^{35}\) Extradition Convention, July 12, 1889, U.S.-U.K., T.S. 139. The Convention also provided fugitives with formal legal protections against the requesting country. Article II incorporated the political offense exception, see infra Part II.C, and article III added the specialty requirement, see infra text accompanying notes 91-93.


\(^{38}\) Supplementary Extradition Convention Between the United States and Great Britain, May 15, 1922, U.S.-U.K., T.S. No. 666.
1925,\textsuperscript{39} and 1951\textsuperscript{40} brought to seventeen the number of crimes for which extradition could take place.

Domestic Canadian law developed on a parallel track. When the Governor of Canada refused to surrender four Canadians wanted in New York State for murder, reasoning that such surrender would violate the Habeas Corpus Act, Upper Canada\textsuperscript{41} responded by passing an Act providing for the surrender of fugitives charged with the commission of certain crimes.\textsuperscript{42} That is, Canada unilaterally enacted a measure to allow it to surrender fugitives to the United States. Similarly, in 1849 Canada suspended an English statute which impeded the efficiency of extradition procedures by requiring judges to wait for a formal requisition from the country requesting extradition before issuing an arrest warrant.\textsuperscript{43}


Prior to the 1971 Treaty,\textsuperscript{44} seven different documents—most negotiated by the United States and Great Britain—defined the U.S.-Canadian extradition relationship.\textsuperscript{45} The purposes of the 1971 Treaty were to facilitate the mutual efforts of the United States and Canada in combatting international crime,\textsuperscript{46} and to modernize U.S.-Canadian extradition relations.\textsuperscript{47}

The 1971 Treaty did provide fugitives with some additional protections, such as the article 6 limitation on the extradition of fugitives facing the death penalty.\textsuperscript{48} Most significantly, however, it redefined the extradition crimes in modern language,\textsuperscript{49} expanded the number of extradition

\textsuperscript{39} Extradition on Account of Crimes or Offenses Against Narcotic Laws, Jan. 8, 1925, U.S.-U.K., T.S. No. 719 [hereinafter 1925 Convention].


\textsuperscript{41} Upper Canada covered the same territory as present-day Ontario. See \textit{Gerald Gall}, \textit{The Canadian Legal System} 51 (1990).

\textsuperscript{42} This was the Act of 1833, \textit{supra} note 17. See \textit{Clarke}, \textit{supra} note 17, at 93; \textit{La Forest}, \textit{supra} note 14, at 3. The Habeas Corpus Act, 31 Car. 2, ch. 1 (1679) (Eng.), granted British subjects certain rights, such as the right not to have soldiers quartered in their homes without their consent. See \textit{id}. Relevant to extradition, chapter II provided British subjects overseas with certain procedural and substantive rights against imprisonment.

\textsuperscript{43} See \textit{La Forest}, \textit{supra} note 14, at 3-4.


\textsuperscript{45} Including the Ashburton-Webster Treaty, as amended by the six subsequent conventions. \textit{See supra} notes 34-40 and accompanying text.

\textsuperscript{46} See S. Rep. No. 94-17 at 1.

\textsuperscript{47} "Modernization of the extradition relations between the United States and Canada is especially important in light of the ease of travel between the two countries." \textit{Id.}

\textsuperscript{48} See \textit{infra} Part II.C.

\textsuperscript{49} This had the effect of expanding the scope of certain extradition crimes. For example, the 1951 Convention, \textit{supra} note 40, included Crime 11B, "[m]aking use of the mails in connection with schemes devised or intended to deceive or defraud the public or for the purpose of obtaining money under false pretenses." The 1971 Treaty, \textit{supra} note 44, replaced "use of the mails" with "use of the mails or other means of communi-
crimes from seventeen to thirty, and added "attempts and conspiracies" to commit any extraditable crime as extradition crimes. That is, the 1971 Treaty cast a much broader, more efficient net than its predecessor.

The 1988 Protocol between the United States and Canada continued the historic trend of further liberalizing the United States-Canadian extradition relationship. Most significantly, it eliminated the requirement that extradition crimes be specifically enumerated, substituting a severity requirement: "Extradition shall be granted for conduct which constitutes an offense punishable by the laws of both Contracting Parties by imprisonment or some other form of detention for a term exceeding one year or any greater punishment." The severity approach makes extradition easier in part because it cannot easily become outdated: it does not limit the class of extradition crimes by reference to static definitions of crimes, but rather by reference to the punishment imposed. Further, it eliminates the possibility that a fugitive who has committed a serious crime might not be extraditable simply because that particular crime is not on the extraditable crimes list.

II. Extradition Between the United States and Canada

The current Extradition Treaty ("Extradition Treaty") is the most liberal extradition arrangement yet between the United States and Canada. Its first article establishes that the United States and Canada are mutually obliged to extradite fugitives who fall within its terms: "Each Contracting Party agrees to extradite to the other, in the circumstances and subject to the conditions described in this Treaty, persons found in its territory...

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50. See 1971 Treaty, supra note 44, sched.
51. See id. art. 2(2). See also S. Rep. No. 94-17 at 1. Earlier treaties had not included attempts or conspiracies as extraditable crimes.
53. See 1971 Treaty, supra note 44, art. 2.
54. 1988 Protocol, supra note 52, art. 1.
55. For example, the 1971 Treaty broadened the extradition crime of mail fraud to include fraud through other forms of communication. See supra note 49. While this particular provision of the 1971 Treaty might not become outdated, new technologies will inevitably create new crimes. Criminals committing these new crimes would be immune to extradition under a listing approach to extradition crimes unless the treaty were further amended. See also COMMONS DEBATES, 34th Parl., 3rd Sess., 4783 (1991) (Can.) (Mr. Ian Waddell) (criticizing the outdated crime schedules of many Canadian extradition treaties). The listing approach went to absurd lengths to be all-inclusive. For example, the "unlawful throwing or application of any corrosive substances at or upon the person of another" was an extraditable crime under the 1971 Treaty. 1971 Treaty, supra note 44, sched.
This Part examines in turn the general procedure of U.S.-Canadian extradition, the substantive requirements for an extradition to proceed, and the recognized exceptions to the general duty of extradition.

A. Extradition Procedure

The Extradition Treaty provides the skeletal procedural framework for extradition. The Extradition Act, however, is the specific mechanism by which fugitives are extradited from Canada. Both the executive and judicial branches of the Canadian government hold essential roles in every extradition, although a “surrender under [an extradition treaty] is primarily an Executive act.”

1. Procedure Under the Extradition Treaty

The Extradition Treaty provides formal and informal extradition procedures. Article 9 of the Treaty defines formal extradition procedures, specifying both the method and content of formal extradition requests. In practice, however, the requesting state often does not make a formal extradition request until after the arrest of the fugitive. Article 11 accounts for an alternative procedure, permitting the requesting country “in case of urgency” to apply for the “provisional arrest” of the fugitive pending a formal article 9 request. In either case, the requesting state must properly

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57. Extradition Treaty, supra note 56, art. 1.
58. Extradition Act, supra note 6.
59. See La Forest, supra note 14, at 28.
60. Schmidt v. The Queen, 39 D.L.R.4th 18, 34 (Can. 1987). The executive is given wide discretion in making extradition decisions, while the judiciary plays a narrowly focused supervisory role. But see Commons Debates, 34th Parl., 3rd Sess., 4816 (1991) (Can.) (Mr. Peter Milliken) (advocating removing the surrender power from the Minister of Justice and vesting it in the courts).
61. Formal extradition requests are to be made through diplomatic channels. See Extradition Treaty, supra note 56, art. 9(1). The Extradition Act, supra note 6, § 20(1), describes the “diplomatic channel,” but this usage has now become obsolete. See La Forest, supra note 14, at 198. Current practice requires that the formal request, the requisition, be delivered by a diplomatic representative of the requesting state to either the Department of Justice or the Department of External Affairs. See id.
62. Article 9(2) of the Extradition Treaty, supra note 56, requires “a description of the person sought, a statement of the facts of the case, the text of the laws of the requesting State describing the offense and prescribing the punishment for the offense, and a statement of the law relating to the limitation of the legal proceedings.” Article 9(3) requires a warrant for the fugitive’s arrest issued by a judge of the requesting state, as well as any evidence that would be necessary in the requesting state for the arrest and committal of the fugitive. In the case of a person already convicted, article 9(4) requires that the request be accompanied by, inter alia, the judgment of conviction.
63. See La Forest, supra note 14, at 123-124.
64. A person arrested under article 11(1) is to be set at liberty if the application specified by article 9 is not received within 60 days of the fugitive’s arrest. Extradition Treaty, supra note 56, art. 11(3). Further, under article 11:

Such application shall contain a description of the person sought, an indication of intention to request the extradition of the person sought and a statement of the existence of a warrant of arrest or a judgment of conviction against that person, and such further information, if any, as would be necessary to justify the issue of a warrant of arrest had the offense been committed, or the person sought been convicted, in the territory of the requested State.
make a formal request, a requisition, before the fugitive may be surrendered.\textsuperscript{65}

2. \textit{Procedure Under the Extradition Act}

The extradition of a fugitive who has fled to Canada proceeds in a series of discrete steps. The requesting state must first obtain a Canadian warrant for the fugitive's arrest. Under section 10(1) of the Extradition Act, a Canadian judge\textsuperscript{66} may issue such a warrant if presented with a foreign warrant or "an information or a complaint,"\textsuperscript{67} and evidence that would be sufficient to justify arresting the fugitive for an act allegedly committed in Canada.\textsuperscript{68}

Upon the fugitive's arrest, a judge conducts an extradition hearing.\textsuperscript{69} The purpose of the extradition hearing is "to determine whether there is sufficient evidence to warrant the fugitive being sent to the foreign country where he is alleged to have committed a crime for which he may be surrendered under the \textit{Extradition Act}," but not to judge the fugitive's guilt or innocence.\textsuperscript{70} The extradition judge "merely [has the authority] to determine whether the relevant crime falls within the appropriate treaty and whether the evidence presented is sufficient to justify the executive surrendering the fugitive."\textsuperscript{71}

In order for the extradition judge to commit the fugitive to prison pending the Minister of Justice's surrender decision, the requirements of section 18(1) of the Extradition Act must be met:

(a) in the case of a fugitive alleged to have been convicted of an extradition crime, if such evidence is produced [by the requesting state] as would, according to the law of Canada . . . prove that the fugitive was so convicted; and

\textit{Id.}

\textsuperscript{65} See \textsc{La Forest}, supra note 14, at 197. \textit{Cf. supra} note 64 (the requirement that a fugitive be set free unless a formal article 9 extradition request is received within 60 days implies that such a request would also be a necessary precondition for extradition); \textit{Extradition Act}, supra note 6, § 25.

\textsuperscript{66} This includes superior and county court judges, as well as extradition commissioners. \textit{See Extradition Act}, supra note 6, § 9(1).

\textsuperscript{67} An information is "[a]n accusation exhibited against a person for some criminal complaint, without an indictment." \textsc{Black's Law Dictionary} 779 (6th ed. 1990). The person presenting the Canadian court with an information need not be an agent of the foreign government, but may be anyone "who would be entitled to institute proceedings if the crime had been committed in Canada." \textsc{La Forest}, supra note 14, at 126-27.

\textsuperscript{68} \textit{See Extradition Act}, supra note 6, § 10(1). Upon issuing the warrant, the judge must "send a report of the fact of the issue of the warrant . . . together with certified copies of the evidence and foreign warrant, information or complaint to the Minister of Justice." \textit{Id.} § 10(2). The Minister is kept informed of the developments of each particular extradition because the Minister has limited powers to cancel a warrant and order the discharge of the fugitive. \textsc{La Forest}, supra note 14, at 129.

\textsuperscript{69} \textit{The Extradition Act}, supra note 6, §§ 13-17, provides the procedural and evidentiary rules for the hearing. The judge conducting the extradition hearing is almost invariably the same judge who issued the arrest warrant. \textsc{La Forest}, supra note 14, at 131. This hearing is also called a "committal hearing." Similarly, judicial committal and extradition orders are the same thing.

\textsuperscript{70} See \textsc{La Forest}, supra note 14, at 141.

\textsuperscript{71} Republic of Argentina v. Mellino, 40 D.L.R.4th 74, 89 (Can. 1987).
(b) in the case of a fugitive accused of an extradition crime, if such evidence is produced [by the requesting state] as would, according to the law of Canada . . . justify the committal of the fugitive for trial, if the crime had been committed in Canada.\textsuperscript{72}

The Canadian courts have established an extremely lenient test for the satisfaction of section 18(1). So long as there is some view of the evidence which would justify a criminal conviction of the fugitive by a reasonable jury, the extradition may take place.\textsuperscript{73} That is, the requesting state must only make out a prima facie case, and defenses that could be raised at trial are ordinarily outside of the extradition judge's jurisdiction.\textsuperscript{74} If the requesting state fails to produce such evidence, the extradition judge must discharge the fugitive.\textsuperscript{75}

Upon committing a fugitive for extradition, the extradition judge must inform the fugitive of his right to apply for habeas corpus relief from the committal order, and transmit a certificate of the committal order and other information to the Minister of Justice.\textsuperscript{76} However, the possibility of obtaining habeas relief from the committal order is probably nonexistent. Because of extradition's largely political nature, Canadian courts have proven extremely reluctant to pre-empt a surrender decision by the Minister of Justice.\textsuperscript{77}

\begin{itemize}
\item \textsuperscript{72} Extradition Act, \textit{supra} note 6, § 18(1). The Extradition Act also provides evidentiary rules for the section 18 inquiry:
\begin{itemize}
\item \textsuperscript{16} Depositions or statements taken in a foreign state on oath, or on solemn affirmation, where affirmation is allowed by the law of that state, and copies of the depositions or statements and foreign certificates of, or judicial documents stating the fact of, conviction may, if duly authenticated, be received in evidence . . .
\item \textsuperscript{17} The documents referred to in section 16 shall be deemed authenticated if authenticated in the manner provided by law, or if
\begin{itemize}
\item \textsuperscript{a} the warrant purports to be signed by, the certificate purports to be certified by, [etc.]. . . a judge, magistrate or officer of the foreign state; and
\item \textsuperscript{b} the documents are authenticated by the oath or solemn affirmation of a witness, or by being sealed with the official seal, [etc.]. . . .
\end{itemize}
\end{itemize}
Extradition Act, \textit{supra} note 6, §§ 16-17. Despite the tortured language of the Act, extradition judges "liberally construe [these provisions] so as to give effect to our international obligations." \textsc{La Forest}, \textit{supra} note 14, at 154. \textit{But see} Commons Debates, 34th Parl., 3rd Sess., 9415 (1992) (Can.) (Mr. George S. Rideout) (criticizing the perceived laxness of extradition evidentiary rules).
\item \textsuperscript{73} See \textsc{La Forest}, \textit{supra} note 14, at 148-150.
\item \textsuperscript{74} See Schmidt v. The Queen, 39 D.L.R.4th 18, 34 (Can. 1987).
\item \textsuperscript{75} See Extradition Act, \textit{supra} note 6, § 18(2).
\item \textsuperscript{76} See id. § 19. \textit{See infra} Part III for substantive issues in habeas attacks upon extradition proceedings.
\item \textsuperscript{77} For example, the \textit{Mellino} court did not even consider the possibility of judicial intervention under the Charter prior to the executive's decision:
\begin{quote}
There may, it is true, conceivably be situations where it would be unjust to surrender a fugitive . . . . These are judgements, however, that are pre-eminently within the authority and competence of the executive to make. The courts, as guardians of the Constitution, on occasion have a useful role to play in reviewing such decisions, but it is obviously an area in which courts must tread with caution.
\end{quote}
Assuming that the committal order survives any habeas petition, the final step in the extradition process is the Minister of Justice's decision to grant or refuse the surrender of the fugitive. Although discretionary, this decision is constrained by operation of the Extradition Act, the Extradition Treaty, and by the Charter. The fugitive may seek habeas corpus relief from a surrender order. However, while the Supreme Court of Canada has repeatedly stated that the Minister's surrender decision is subject to Charter limitations upon habeas review, it has refused to permit the reversal of a single surrender order during the history of the Charter. If the Minister does refuse to surrender the fugitive, that fugitive must be discharged from prison within two months after his committal for surrender.

B. Substantive Requirements for Extradition

Modern treaties typically incorporate certain substantive rules of extradition. Reciprocity is a fundamental basis for these rules, which collectively ensure that a fugitive must be extraditable from both parties to the treaty before he is extraditable from either. Drawing upon these rules, the Extradition Treaty requires double criminality, an extraditable offense, and specialty before an extradition may take place.

Double criminality requires that the act for which the fugitive is to be extradited is a punishable offense in both countries, and is a precondition to extradition under the Extradition Treaty. In Meier and the Queen, the Supreme Court of Canada explained that "the acts alleged must not only be a crime within the requesting state, but must be such that, if the factual situation was reversed, they would be a crime within Canada." Nevertheless, while both states must have criminalized the fugitive's conduct, it need not amount to the same crime.

An extraditable offense, also commonly referred to as "extradition crime," is a crime for which extradition is available. The Extradition Treaty defines extraditable offenses through its severity requirement: the crime charged must be punishable in both countries "by imprisonment or other form of detention for a term exceeding one year or any greater
punishment.\textsuperscript{90} Specialty limits the requesting state to trying the fugitive for only those specific crimes for which surrender took place.\textsuperscript{91} Both the Extradition Treaty\textsuperscript{92} and domestic Canadian law have incorporated the speciality requirement.\textsuperscript{93}

C. Exceptions to the General Rule of Extradition

Extradition "shall not be granted"\textsuperscript{94} under the Treaty if the fugitive faces double jeopardy,\textsuperscript{95} if prosecution is barred by the requesting state's statute of limitations,\textsuperscript{96} or if the offense for which extradition is requested is a political crime.\textsuperscript{97} The requested state may also recommend that the request for extradition be withdrawn, or that surrender be deferred in certain narrow circumstances.\textsuperscript{98} Finally, a catch-all provision establishes that the domestic law of the contracting parties controls in the case of any conflict with Treaty obligations.\textsuperscript{99}

More contentious has been Treaty article 6, which permits the requested state to condition extradition upon the requesting state's agreement not to impose the death penalty when it would not be imposed under the laws of the requested state.\textsuperscript{100} However, the assertion of this right has

\begin{itemize}
\item[90.] Extradition Treaty, supra note 56, art. 2.
\item[91.] See BASSIOUNI, supra note 19, at 359-60.
\item[92.] See Extradition Treaty, supra note 56, art. 12.
\item[93.] See Extradition Act, supra note 6, § 23.
\item[94.] Extradition Treaty, supra note 56, art. 4(1). These are considerations for the Minister of Justice to take into account in making the surrender decision, subject to judicial review through the habeas petition.
\item[95.] See id. art. 4(1). Article 4(1)(i) reads: "When the person whose surrender is sought is being proceeded against, or has been tried and discharged or punished in the territory of the requested State for the offense for which his extradition is requested." See also LA FOREST, supra note 14, at 109-14 (describing Canadian double jeopardy jurisprudence and its relationship to extradition).
\item[96.] See Extradition Treaty, supra note 56, art. 4(1)(ii).
\item[97.] See id. art. 4(1)(iii). However, article 4(2) excludes crimes such as murder and kidnapping from this exception. See id. See also Extradition Act, supra note 6, §§ 15, 21, 22 (codifying the political offense restriction). See generally LA FOREST, supra note 14, at 81-98 (describing history and current status of the political offense exception in Canadian extradition law); BASSIOUNI, supra note 19, ch. 8, § 2.1 (describing political offense exception); SHEARER, supra note 18, ch. 7 (same).
\item[98.] Article 5 concerns fugitives under 18 years of age, and article 7 those fugitives who are being tried or are serving a sentence in the requested country at the time of the extradition request. Extradition Treaty, supra note 56.
\item[99.] The decision to surrender a fugitive "shall be made in accordance with the law of the requested State," and the fugitive "shall have the right to use all remedies and recourses provided by such law." Extradition Treaty, supra note 56, art. 8.
\item[100.] Article 6 reads:

When the offense for which extradition is requested is punishable by death under the laws of the requesting State and the laws of the requested State do no permit such punishment for that offense, extradition may be refused unless the requesting State provides such assurances as the requested State considers sufficient that the death penalty shall not be imposed, or, if imposed, shall not be executed.

Extradition Treaty, supra note 6, art. 6. See also LA FOREST, supra note 14, at 202-09 (describing issue from Canadian legal perspective); BASSIOUNI, supra note 19, at 491-93
\end{itemize}
proved to be the exception rather than the rule. In both Kindler v. Canada and Ng,\textsuperscript{101} the Supreme Court of Canada upheld the unconditional surrender by the Minister of Justice of fugitives facing the death penalty in the United States, despite the Minister's explicit article 6 right to receive assurances from the United States that neither would be put to death.\textsuperscript{102} More recently, however, the same Minister did require such an assurance before surrendering a fugitive wanted for murder to the United States.\textsuperscript{103}

III. The Habeas Corpus Petition

A fugitive may seek review of a committal or surrender order through a writ of habeas corpus.\textsuperscript{104} The right to so challenge a committal order devolves from the Extradition Act,\textsuperscript{105} while the right to challenge a surrender order is established by the Charter.\textsuperscript{106} A court hearing a habeas corpus petition is "ordinarily confined to questions of jurisdiction,"\textsuperscript{107} but the Supreme Court of Canada has held that "a court in habeas corpus proceedings is obviously the court of competent jurisdiction for purposes of s. 24 of the Charter."\textsuperscript{108} That is, it is competent to hear constitutional complaints such as Jamieson's complaint that his surrender violates the section 7 guarantee of fundamental justice. Consequently, an extradition-related habeas petition may have two prongs. The first prong is jurisdictional,

\begin{quote}
(recognizing general phenomena of similar treaty provisions worldwide); Shearer, supra note 18, at 149 (same). Ironically, it was the United States that requested this provision. At the time of the Treaty's negotiation, Canada but not the United State had the death penalty. See Commons Debates, 34th Parl., 3rd Sess., 9421 (1992) (Can.) (Mr. Bill Domm).
\end{quote}


\textsuperscript{102} For a discussion of these cases, see infra notes 137-44 and accompanying text.

\textsuperscript{103} See John F. Burns, Canada Wins U.S. Extradition Deal, N.Y. Times, Feb. 14, 1992, at A3. Lee O'Bomsawin was wanted by Florida for the double murder of his wife and her lover, and faced the possibility of death by electrocution. See id. Then Justice Minister Campbell did not publicly provide any reasons for Canada's first ever assertion of its article 6 rights. See id.

\textsuperscript{104} See generally La Forest, supra note 14, at 180-91 (describing Canadian habeas corpus law as it relates to extradition). Appeals from habeas corpus decisions by either party (the fugitive or the government) are provided for by R.S.C., ch. 53, § 719 (1965) (Can.). "Where a judgement is issued on the return of a writ of habeas corpus ... an appeal therefrom lies to the Court of Appeal, and from a judgement of the Court of Appeal to the Supreme Court of Canada . . . ." Id.

\textsuperscript{105} Cf. La Forest, supra note 14, at 180-91. See Extradition Act, supra note 6, §§ 19(a) and 23. Section 19(a) requires the committing court to notify the fugitive of his right to apply for habeas corpus relief, and section 23 prohibits the surrender of a fugitive until after the decision of the court hearing a habeas petition. And, as in Jamieson, either party to the habeas proceedings may appeal an adverse decision.

\textsuperscript{106} Cf. La Forest, supra note 14, at 180-91. See Republic of Argentina v. Mellino, 40 D.L.R.4th 74, 91-92 (Can. 1987). The Mellino court explains that the right to habeas review of discretionary executive acts such as the surrender decision is established by section 24 of the Charter.

\textsuperscript{107} Mellino, 40 D.L.R.4th at 92.

\textsuperscript{108} Id. Section 24(1) is the Charter's basic remedial provision.
attacking a committal order for failure to comply with statutory or treaty requirements.\textsuperscript{109} The second prong is constitutional, alleging that either the committal or surrender order was constitutionally deficient.\textsuperscript{110}

The timing of a habeas petition is crucial. The *Mellino* court explained:

[A] court must firmly keep in mind that it is in the Executive that the discretion to surrender a fugitive is vested. Consequently, barring obvious or urgent circumstances, the Executive should not be pre-empted... [I]t may be doubted that the courts should ordinarily intervene before the executive has made an order of surrender.\textsuperscript{111}

That is, reviewing courts should rarely grant habeas petitions filed after the committal order but before the Minister of Justice has issued a surrender order. This delay may be rationalized on several grounds. First, the Minister may refuse to surrender the fugitive, making the habeas petition irrelevant. Second, the authority to order an extradition is granted to the Minister by the Extradition Act,\textsuperscript{112} and the courts are reluctant to intrude upon this authority.\textsuperscript{113} Third, the Minister is presumed to be better informed than the courts to make what is largely a foreign affairs and political decision.\textsuperscript{114} The lower courts have generally respected and echoed the *Mellino* court’s command.\textsuperscript{115} Because successful constitutional challenges to the judicial committal order have been practically precluded by the Supreme Court of Canada, the remainder of this Note confines itself to the application for relief from the Minister’s surrender order.

IV. Extradition and the Charter

Writing the majority opinion in *Schmidt v. The Queen*, Supreme Court of Canada Justice La Forest succinctly asserted the ultimate supremacy of the Canadian Charter of Rights and Freedoms in the extradition context: “The pre-eminence of the Constitution must be recognized; the treaty, the extradition hearing in this country and the exercise of the executive discretion to surrender a fugitive must all conform to the requirements of the Charter

\textsuperscript{109} For example, the habeas judge may review whether the requesting state has met its evidentiary burden against the fugitive, or whether the offense charged is an extradition crime. See *La Forest*, supra note 14, at 181. Note, however, that the most significant treaty/statutory requirements are easily satisfied: the requesting state only need advance prima facie evidence, and all crimes punishable by more than one year of imprisonment are extraditable offenses. See *supra* text accompanying notes 73-74, 89-90.


\textsuperscript{111} Republic of Argentina v. Mellino, 40 D.L.R.4th 74, 93 (Can. 1987).

\textsuperscript{112} See *Extradition Act*, supra note 6, § 25.

\textsuperscript{113} See, e.g., supra text accompanying note 111.

\textsuperscript{114} See *Schmidt v. The Queen*, 39 D.L.R.4th 18, 40 (Can. 1987).

Nevertheless, Justice La Forest recognized in United States v. Cotroni that the proper Charter inquiry must also be context sensitive:

[T]he Charter was not enacted in a vacuum and the rights set out therein must be interpreted rationally having regard to the then existing laws and, in the instant case, to the position which Canada occupies in the world and the effective history of the multitude of extradition treaties it has had with other nations.117

These quotations betray a tension between two competing values: the Charter is the supreme law of Canada, but it is also an historical document which must be understood in an historical context. Several basic—if not entirely independent—issues emerge from this tension. How is the Charter relevant to the surrender decision? What sections of the Charter apply to the surrender decision? How does the Charter constrain the surrender decision? What is the proper standard of review under the Charter? The sections that follow explore these issues.

A. The Power of Review

The Canadian courts have recognized that extradition proceedings must conform to constitutional standards.118 The starting point for the constitutional review of extradition proceedings is section 24 of the Charter: "Anyone whose rights or freedoms, as guaranteed by this Charter, have been infringed or denied may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances."119 Because a Canadian court hearing an extradition-related habeas corpus petition is "a court of competent jurisdiction" for Charter purposes, such a court has the power under section 24 to remedy constitutional deficiencies in that extradition.120

Section 32 establishes that Charter guarantees apply against acts by the Canadian government.121 Accepting the plain meaning of section 32, the Supreme Court of Canada ruled in Operation Dismantle v. The Queen that decisions by the federal cabinet fall under Charter section 32(1)(a) and thus are amenable to constitutional review by the courts.122 The Schmidt court explicitly extended section 32 to the case of extradition decisions, ruling 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 (s. 32)."123 The government action subject to Charter scrutiny in Jamieson is the Minister of Justice's surrender decision.

118. See, e.g., Schmidt, 39 D.L.R.4th at 38.
119. The Charter, supra note 9, § 24.
123. Schmidt v. The Queen, 39 D.L.R.4th 18, 36 (Can. 1987). See also La Forest, supra note 14, at 24 (extradition decisions subject to Charter scrutiny).
B. Procedural and Substantive Constraints upon Extradition

The Charter constrains the surrender of a fugitive in two ways. First, it imposes a duty of procedural fairness upon the Minister. However, procedural challenges to extradition proceedings have not amounted to much more than a jurisprudential sideshow. For example, in a fifty-page decision the *Kindler* court rejected Kindler's claimed right to an oral hearing with the Minister in three terse sentences. The Quebec *Jamieson* court addressed and dismissed the entire subject of procedural fairness just as quickly. Neither court cited a single authority.

More significantly, the Charter prohibits any extradition that would be substantively unconstitutional. However, the Supreme Court of Canada has greatly limited the scope of Charter rights that apply to extradition. The *Kindler* court ruled that the section 12 prohibition against cruel or unusual punishment would not apply to the Canadian government's surrender of a fugitive:

> The punishment, if any, to which the fugitive is ultimately subject will be punishment imposed, not by the Government of Canada, but by the foreign state... To apply sec. 12 directly to the act of surrender to a foreign country where a particular penalty may be imposed, is to overshoot the purpose of the guarantee and to cast the net of the Charter broadly in extraterritorial waters.

This restriction on Charter rights has two necessary components. First, limiting the Charter's force to Canadian territory makes it inapplicable to the acts of foreign governments. Second, excluding the surrender decision from the class of government actions that are within the scope of section 12 makes section 12 inapplicable to that action. The *Schmidt* court's conclusion that an extradition proceeding is not subject to the Charter's prohibition against double jeopardy follows the same pattern. Nevertheless

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124. *See La Forest*, supra note 14, at 209-10. The jurisprudential source of this duty is *Nicholson*, 88 D.L.R.3d 671 (Can. 1978). *Nicholson* held that the courts may imply an obligation for the executive to act fairly because Parliament is presumed to not act unfairly. See *id.* at 680-81. In *Nicholson*, the precise issue was whether a Board of Police Commissioners had to provide a dismissed constable with notice and a rationale for his dismissal. See *id.* at 672-73. Although the court did not precisely define “fairness,” the rule that emerged from the case was that certain procedures were guaranteed by this right to fair treatment. See *id.* at 680-81. The court did, however, stress that “executive efficiency and economy should not too readily be sacrificed” for the sake of fairness. *Id.*

125. “I reject Kindler’s submission that he had the right to an oral hearing before the Minister. He was afforded that right at the stage of the judicial hearing. No further oral hearing is required at the second stage of the Minister’s final decision.” *Kindler* v. Canada, 84 D.L.R.4th 438, 497 (Can. 1991) (McLachlin, J).

126. *United States v. Jamieson*, 93 C.C.C.3d 265, 276 (Que. Ct. App. 1994): The detailed reasons set out extensively by the Justice Minister in her letter to Jamieson demonstrate beyond question that her decision was reached after fair and careful consideration. Jamieson has clearly had the benefit of a thorough and equitable decision-making process. From a procedural point of view, there is plainly no issue regarding any violation of s. 7 of the Charter.


the court has also consistently held that the section 7 Charter right to fundamental justice applies to extradition, serving as a restraint on the Minister's surrender decision.\textsuperscript{129}

C. Section 7 and Fundamental Justice

Charter section 7 reads: "Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice."\textsuperscript{130} The Supreme Court of Canada has consistently held that section 7 could bar the surrender of a fugitive,\textsuperscript{131} despite the doctrine against the extraterritorial application of the Charter.\textsuperscript{132} Nevertheless, section 7 has yet to actually prevent an extradition.

1. The Jurisprudential Rhetoric

Justice La Forest comprehensively describes the section 7 inquiry in \textit{Schmidt}:

I have no doubt either that in some circumstances the manner in which the foreign State will deal with the fugitive on surrender, whether that course of conduct is justifiable or not under the law of that country, may be such that it would violate the principles of fundamental justice to surrender an accused under the circumstances . . . . Situations falling far short of [torture] may well arise where the nature of the criminal procedures or penalties in a foreign country sufficiently shocks the conscience as to make a decision to surrender a fugitive for trial there one that breaches the principles of fundamental justice enshrined in s. 7.\textsuperscript{133}

Thus, the treatment faced by a fugitive in the requesting state may so shock some (undefined) conscience as to preclude surrender.\textsuperscript{134} Justice La Forest employs additional rhetorical tools, appealing to "the basic demands of justice"\textsuperscript{135} and the possibility that an extradition is "sufficiently oppressive . . . to warrant refusing surrender."\textsuperscript{136}

In \textit{Kindler v. Canada}, the State of Pennsylvania had convicted Joseph

\textsuperscript{129} See infra text accompanying notes 131-32.
\textsuperscript{130} The Charter, \textit{supra} note 9, § 7.
\textsuperscript{132} The court distinguished section 7 from section 12: "While s. 12 of the Charter may not apply since the acts to which is directed occur outside of Canada, our law of extradition and the Minister's acts pursuant to that law do fall under the Charter and the general guarantees found in s. 7." \textit{Kindler}, 84 D.L.R.4th at 490. That is, section 7 is not limited to checking specific acts in specific contexts (such as the section 12 prohibition against cruel or unusual punishment, which only applies to punishment, see \textit{supra} text accompanying note 127), but rather broadly applies to any act by the Canadian government.
\textsuperscript{134} See infra Part V.C.2 for a discussion of the different consciences that the courts have relied upon.
\textsuperscript{135} \textit{Schmidt}, 39 D.L.R.4th at 40.
\textsuperscript{136} \textit{Id.} at 45.
Kindler of murder and sentenced him to death. Kindler was captured in Canada, and the Minister of Justice offered Kindler for surrender without obtaining assurances that Pennsylvania would not carry out his execution, despite Canada's right under the Extradition Treaty to obtain such assurances. Justice McLachlin was joined by four of the seven justices on the Supreme Court of Canada in ruling that Kindler's surrender did not violate section 7. After quoting Schmidt's "shocks the conscience" language, Justice McLachlin consulted the "Canadian sense of what is fair, right and just." What this actually means to a fugitive is not clear on its face. As Justice Cory said, dissenting:

"[No] matter how vile the killing, Kindler would not be executed in Canada had he committed the murder in this country. Further, Canada has committed itself in the international community to the recognition and support of human dignity and to the abolition of the death penalty. These commitments were not lightly made. They reflect Canadian values and principles." That is, if Kindler's extradition does not "offend the Canadian sense of what is fair, right and just," what would? Justice McLachlin supports her affirmation of the surrender order by arguing that Canadian attitudes towards the death penalty are not clear. She cites "persistent calls to bring back the death penalty," the defeat of a motion in Parliament to reinstate capital punishment by a slim margin, and the "considerable support" shown for the death penalty in public opinion polls. With the "Canadian conscience" split on the unjustness of Kindler's surrender, the court was forced but to decide Kindler on other legal grounds.

137. See Kindler, 84 D.L.R.4th at 485.

138. See id. See also In re Ng Extradition, 84 D.L.R.4th 498 (Can. 1991) (fugitive facing death penalty in California). Ng had only been committed for extradition and had not yet been surrendered, but Canadian Minister of Justice Kim Campbell referred his case to the Supreme Court of Canada to be decided with Kindler. See Commons Debates, 34th Parl., 3rd Sess., 4779 (Can.) (Hon. Kim Campbell).

139. L'Heureux-Dube and Gonthier, JJ., concurred with Justice McLachlin. See Kindler, 84 D.L.R.4th at 452, 455. LaForest, J., wrote a separate opinion but was "substantially in accord with McLachlin, J." Id. at 445.

140. "The question is whether the provision or action in question offends the Canadian sense of what is fair, right and just, bearing in mind the nature of the offense and the penalty, the foreign justice system and considerations of comity and security, and according due latitude to the Minister to balance the conflicting considerations."

Id. at 492. Justice La Forest concurs with this approach to determining the Canadian conscience. See id. at 446-47.

141. Id. at 481.

142. Id. at 493.

143. The vote was 148 to 127. See id. at 493.

144. See id. at 494. Justice La Forest states in his concurrence that "I do not think the courts should determine unacceptability in terms of statistical measurements of approval or disapproval by the public at large, but it is fair to say that they afford some insight into the public values of the community." Id. at 447. That is, he cautiously agrees with McLachlin's approach to determining the public conscience.
2. The Rationales of the Section 7 Inquiry

Despite the court’s rhetorical flourishes, closer inspection of the section 7 jurisprudence reveals a balance "between fairness and efficiency." Showing the proper deference to executive acts of discretion is the weightiest factor in this balance. Justice La Forest stresses the primacy of deference in *Schmidt*:

> [T]he courts must begin with the notion that the Executive must first have determined that the general system for the administration of justice in the foreign country sufficiently corresponds to our concepts of justice to warrant entering into the treaty in the first place, and must have recognized that it too has a duty to ensure that its actions comply with constitutional standards.

Nevertheless, the Supreme Court of Canada has warned against blind judicial deference, and has equipped the lower courts with several reasons to justify a surrender decision. However, these factors tend only to work in one direction—towards legitimizing the surrender order—and the court does not cite any tangible concerns which might support the finding that a surrender order violates section 7.

First, effective crime control requires effective extradition procedures. The long border between the United States and Canada, the ease and rapidity of modern communications and transportation, and the severe illicit drug problem in the United States are all factors contributing to the forced interdependence of United States and Canadian law enforce-

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145. See id. at 490-91.
147. See *Schmidt*, 39 D.L.R.4th at 40.
148. I.e., something more concrete than rhetorical devices like "shocks the conscience." There is one very narrow exception: the *Schmidt* court explicitly recognized that the imposition of torture would violate section 7. See *Schmidt*, 39 D.L.R.4th at 39.

Extradition... has been a major tool of international co-operation in bringing fugitives to justice and combating crime. But for a system of extradition to be effective, reliance must be placed on the initiative and co-operation of law enforcement and judicial and administrative bodies at many levels and in many countries.

See also *Shearer*, *supra* note 18, at 23 (asserting that the viability of instruments of international cooperation for the suppression of crime is "of the utmost importance in the present state of extradition law and practice"); Kellee A. Brown & Sophia A. Muirhead, *Extradition: Divergent Trends in International Cooperation*, 33 Harv. Int’l L.J. 223, 229 n.38, 232, 238 (1992) (stressing the increasing need for international cooperation against international drug trafficking). Although *Jamieson* does not directly involve international drug trafficking, or even significant intrastate drug trafficking, the manner of its resolution is of great importance to law enforcement efforts to stem such trafficking through its effect upon the U.S.-Canadian extradition relationship. More specifically, the *Jamieson* case affected the extradition of thirty seven other suspects caught fleeing to Canada from the United States. See Harmon, *supra* note 12.
To be effective, extradition must be readily available, as reflected in the typically low evidentiary requirements imposed upon the requesting state. Lengthy extradition procedures impede the ability of the requesting state to carry out an effective prosecution and may impede the fugitive's defense. As the court in *Burley* stated: “The [extradition] treaty is based on the assumption that each country should be trusted with the trial of offenses committed within its jurisdiction.” If extradition hearings were to effectively escalate into full-blown criminal trials, extradition would become too unwieldy to serve as an effective means of suppressing crime.

Second, as noted by the *Kindler* court, the fear of becoming a “safe haven” for foreign criminals is one of the primary rationales for extradition: “Given our long undefended common border with the United States, it is not unreasonable for the Minister, in deciding whether to seek the assurance that the death penalty will not be imposed, to consider the danger of encouraging other fugitives to do what Ng and Kindler did.” Historically, this fear was realized when the United States and Britain could not agree upon an enlarged list of extradition crimes under the Ashburton-Webster Treaty. With extradition relations unsettled, Canada became a refuge for American criminals, and five American offenders fled to Canada for each fugitive that left Canada for the United States.

150. As the *Cotroni* court noted: “Because of the facility with which criminals can escape from one country to the other, Canada and the United States have always been in the forefront of the development procedure.” 48 C.C.C.3d at 219. See also *Kindler v. Canada*, 84 D.L.R.4th 438, 487-488 (Can. 1991) (describing unique U.S.-Canadian extradition needs). Crime control was a significant factor in the signing of the 1971 Treaty. See supra text accompanying note 46.

151. In the case of an extradition from Canada, the requesting state need only make out a prima facie case. See supra text accompanying notes 73-74.

152. In a debate concerning amendments to the Extradition Act, Parliamentary Secretary to the Minister for Science Mr. Bill Domm commented on the six year delay in the Ng extradition: “[The families of Ng's victims] were concerned they were never going to be able to try Ng. The witnesses were dying and moving. It had gone on for so long that they were having trouble putting together witnesses for a trial.” *Commons Debates*, 34th Parl., 3rd Sess., 9421 (1992) (Can.). See also *Commons Debates*, 34th Parl., 3rd Sess., 4779 (1991) (Can.) (Hon. Kim Campbell) (“the aging of evidence, the death of witnesses and the inability of prosecutors to keep a case alive” may allow fugitives to evade justice when extradition is long delayed).


154. The *Schmidt* court addressed this issue in the context of affirmative defenses. “[A]n attempt by courts to consider defenses more appropriately dealt with at trial could seriously affect the efficient working of a salutary system devised by states for the mutual surrender of suspected wrongdoers.” *Schmidt*, 39 D.L.R.4th at 35.

155. See supra note 17.

156. *Kindler*, 84 D.L.R.4th at 495. Justice McLachlin responds to dissent objections that this has not been supported by empirical evidence by noting: “It was argued that there was little statistical evidence that criminals routinely cross the border into Canada . . . . What is certain is that this is precisely what happened in the two cases before the court . . . .” Id. at 494-495. The court does not explain how Ng and Kindler escaped into Canada. Given the length and openness of the U.S.-Canadian border, however, crossing over could not be very difficult.

inflow did not cease until Canada passed statutes in 1869 and 1889 expanding the scope of extradition crimes.\textsuperscript{158}

Third, the \textit{Cotroni} court recognized that extradition is a necessary element of justice.\textsuperscript{159} The state where a crime has allegedly been committed has a unique interest in seeing its own laws respected and enforced.\textsuperscript{160} Further, its superior access to evidence and witnesses\textsuperscript{161} increases the likelihood of achieving a just result. While "justice" may sound no less broadly rhetorical than "shocks the conscience," its use here is actually precise. It is the societal interest in having the requesting state determine the fugitive's guilt or innocence in accordance with the laws allegedly violated.\textsuperscript{162}

Fourth, the nature of the requesting state's political and criminal justice systems is also significant in deciding whether a surrender is just within the meaning of section 7, and whether judicial intervention in an extradition order might be warranted.\textsuperscript{163} As the \textit{Kindler} court stated: "In both Pennsylvania and California the legal system is the product of democratic government, and includes the substantial protections of a constitutional rights document which dates back over two centuries."\textsuperscript{164} This factor will always clearly support the surrender of fugitives to the United States.\textsuperscript{165}

Finally, the presence of an extradition treaty with the requesting state supports a showing of deference to the judgment of the executive for two reasons. First, an extradition treaty may obligate the surrender of a fugitive when its terms are met. The Extradition Treaty imposes such a requirement upon the United States and Canada.\textsuperscript{166} Second, the Supreme Court of Canada has held that the very existence of such a treaty is evidence of the fact that the contracting states found each other's criminal justice systems

\begin{itemize}
  \item \textsuperscript{158} See \textit{id}.
  \item \textsuperscript{159} "[The] objectives [of extradition] go beyond that of suppressing crime ... and include bringing fugitives to justice for the proper determination of their guilt or innocence." \textit{United States v. Cotroni}, 48 C.C.C.3d 193, 216-17 (Can. 1989).
  \item \textsuperscript{160} See \textit{supra} note 15 and accompanying text.
  \item \textsuperscript{161} See \textit{supra} text accompanying note 20.
  \item \textsuperscript{162} \textit{Cf. Cotroni}, 48 C.C.C.3d at 216-217.
  \item \textsuperscript{163} "[T]he question is whether the provision or action in question offends the Canadian sense of what is fair, right and just, bearing in mind ... the foreign justice system ... ." \textit{Kindler}, 84 D.L.R.4th at 492.
  \item \textsuperscript{164} \textit{Id.} at 494.
  \item \textsuperscript{165} The court's assumption—that a constitutional democracy will show greater respect for a fugitive's rights than a state which is either undemocratic, lacking constitutional protections for individuals, or both—is almost certainly correct. The political and criminal justice systems of two states seeking to impose identical punishments upon identical fugitives may seem irrelevant to section 7. However, section 7 is not solely focused on punishment, but rather is concerned with the justice or injustice of a surrender given the totality of the circumstances. See \textit{supra} text accompanying note 133.
  \item \textsuperscript{166} "Each Contracting Party agrees to extradite to the other, in the circumstances and subject to the conditions described in this Treaty ... ." The Extradition Treaty, \textit{supra} note 56, art. 1. This obligation has been recognized by the Supreme Court of Canada: "Canada is under an international obligation to surrender a person accused of having committed a crime listed in an extradition treaty if it meets the requirements of the treaty ... ." \textit{Cotroni}, 48 C.C.C.3d at 226.
\end{itemize}
sufficiently acceptable to enter into a binding treaty. 167 Thus, the Extradition Treaty establishes at least a presumption that the Canadian surrender of a fugitive to the United States will not be fundamentally unjust.

D. What Is Fundamental Justice?

*Kindler* provides perhaps the clearest indication as to what does not violate fundamental justice. Despite Canada's near-ban on the death penalty, 168 the fact that Canada has not executed a criminal since 1962, 169 Canada's absolute treaty right to condition Kindler's surrender upon U.S. assurances that he would not be put to death, 170 and the strong possibility that Kindler would be put to death in Pennsylvania, 171 the Supreme Court of Canada ruled that his unconditional surrender would not violate fundamental justice. 172 The court's refusal to prevent Kindler's surrender would seem to preclude the successful invocation of section 7 by almost any fugitive.

V. *United States v. Jamieson*

In *Jamieson*, the Quebec Court of Appeal considered "whether the Minister's decision to surrender [Jamieson] violates the principles of fundamental justice within the meaning of s. 7 of the Canadian Charter of Rights and Freedoms." 173 The court hinged the resolution of this issue on two factors: the manner in which the Minister made the surrender decision, and whether the Minister's decision "respects the governing legal principles and rests on a reasonable appreciation of the relevant facts and circumstances." 174 The court concluded that the surrender order was procedurally sound 175 but nevertheless substantively flawed. 176 Thus, it granted Jamieson's habeas petition and set aside the Minister's surrender order. 177 In reversing, the Supreme Court of Canada simply cited the Quebec panel's dissent. 178 This Part summarizes the procedural posture of *Jamieson*, explains the Quebec court's rationale, criticizes Judge Fish's majority opinion for the Quebec court, and concludes by assessing *Jamieson*'s impact upon Canadian extradition law.

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169. See *Kindler*, 84 D.L.R.4th at 493; Burns, supra note 190, at A4.
170. See *The Extradition Treaty*, supra note 56, art. 6.
171. The jury that convicted Kindler recommended the imposition of the death penalty, but Kindler escaped before sentencing. See *Kindler*, 84 D.L.R.4th at 485.
172. See id. at 496.
174. Id. at 273.
175. See id. at 276. Section 7's procedural character is described at *supra* Part IV.B.
176. See *Jamieson*, 93 C.C.C.3d at 277-86.
177. See id. at 286.
A. Procedural Posture of Jamieson

After Jamieson's arrest in Montreal, Superior Court Judge Ducros conducted an extradition hearing in which he issued a warrant for Jamieson's committal under section 18 of the Extradition Act.\textsuperscript{179} Jamieson then applied for a writ of habeas corpus under section 19 of the Act, arguing \textit{inter alia} that his committal for extradition was in violation of sections 7 and 12 of the Charter.\textsuperscript{180} Superior Court Judge Pinard dismissed this application in \textit{Jamieson v. Warden of Parthenais}.\textsuperscript{181} The Quebec Court of Appeal affirmed this dismissal by a 2-1 vote in \textit{United States v. Jamieson},\textsuperscript{182} and the Supreme Court of Canada declined to hear an appeal.\textsuperscript{183}

After reviewing the record and written submissions, and meeting with Jamieson's counsel, Justice Minister Campbell informed Jamieson that she would surrender him to American authorities for trial.\textsuperscript{184} Jamieson again applied for habeas corpus relief, challenging the Minister's surrender decision under section 7 of the Charter.\textsuperscript{185} Superior Court Judge Maynard rejected this appeal in \textit{United States v. Jamieson}.\textsuperscript{186} Assuming that Jamieson would be sentenced to a twenty year minimum term of imprisonment without parole, Maynard reasoned the conscience of the "average informed Canadian" would not be so shocked as to prohibit Jamieson's surrender.\textsuperscript{187} Maynard also considered such factors deterring drug traffickers from coming to Canada, the non-arbitrariness of the Michigan sentence, the importance of preventing "hard drug" trafficking, and the need to show sufficient deference to the Justice Minister's decision.\textsuperscript{188}

An appeal to the Quebec Court of Appeal followed, with the court finding by a 2-1 margin that section 7 of the Charter barred Jamieson's surrender.\textsuperscript{189} Upon an appeal by the government, however, the Supreme Court of Canada reversed in a ruling noteworthy, at the very least, for its conciseness. In its entirety, it reads: "Essentially, for the reasons given by Baudouin J.A., the appeal is allowed, the judgment of the Court of Appeal is set aside and the decision of the Superior Court dismissing the application for habeas corpus is restored. Appeal allowed."\textsuperscript{190}


\textsuperscript{181} Section 12 of the Charter, supra note 9, prohibits "cruel or unusual" punishment.

\textsuperscript{182} See \textit{Jamieson}, S.C.M. 500-36-000019-912.


\textsuperscript{185} See \textit{Jamieson}, 93 C.C.C.3d at 273-75.

\textsuperscript{186} See id. at 276.


\textsuperscript{188} See id. See supra Part V.C.2 for a criticism of the second Quebec panel majority's use of an "informed" Canadian conscience.

\textsuperscript{189} See \textit{id}. See \textit{supra} Part V.C.2 for a criticism of the second Quebec panel majority's use of an "informed" Canadian conscience.

\textsuperscript{190} United States v. Jamieson, 104 C.C.C.3d 575 (Can. 1996). The Supreme Court of Canada also decided two companion cases with \textit{Jamieson}. Notably, however, in each of those cases the fugitive's habeas appeal had been rejected by the provincial appellate court. See \textit{United States v. Whitley}, 94 C.C.C.3d 99 (Ont. Ct. App. 1994), aff'd d 132 D.L.R.4th 383 (Can. 1996) (holding that the Minister of Justice's decision to surrender the fugitive, a drug "king pin" wanted for the large-scale importation of marijuana from
B. The Jamieson Rationale

The Jamieson majority opinion written by Judge Fish echoes the language of Schmidt and Kindler. The reviewing court "may neither usurp the discretionary authority of the Minister, nor subject foreign legislative choices to Canada's domestic constitutional requirements." Further, the court acknowledges that courts must show deference to the Minister because the Minister must consider issues of comity, reciprocity, treaty obligations, and Canada's security interests. This having been said, the court hardly mentions these issues again, focusing upon the appropriate constitutional standard of review and the harshness of the sentence faced by Jamieson.

1. Section 7 and the Standard of Review

Judge Fish employs the same section 7 rhetorical tools as the Supreme Court of Canada. The surrender of a fugitive violates section 7 if it "shocks the conscience" or is incompatible with "the Canadian sense of what is fair, right and just." Judge Fish refines this section 7 inquiry in light of the section 12 prohibition against cruel or unusual punishment, arguing that "while s. 12 does not in itself provide a sufficient basis for quashing the Minister's action, it is certainly relevant to a determination under s. 7." He concluded that the section 7 and 12 tests are essentially the
same.\textsuperscript{197}

In defining the Canadian conscience, Judge Fish turns to "the average, informed Canadian."\textsuperscript{198} His test, then, is whether the average, informed Canadian would find Jamieson's surrender shocking to their conscience, in light of either the section 7 guarantee of fundamental justice or the section 12 prohibition against cruel or unusual punishment. This test represents the limit of Judge Fish's section 7 analysis.

2. Jamieson's Sentence

For the purposes of his constitutional analysis, Judge Fish argues that Jamieson will receive at least the full twenty-year minimum sentence, with no chance for parole.\textsuperscript{199} He concludes that the Minister's surrender order is unconstitutional solely in light of this sentence:

\begin{quote}
'The situation faced by appellant on a trial in Michigan for trafficking in 273 grams of a mixture containing cocaine would shock the 'average, informed' Canadian and . . . the Minister's decision to surrender appellant for that purpose would offend the "Canadian sense of what is fair, right and just," even bearing in mind the "foreign justice system and considerations of comity and security, and according due latitude to the Minister to balance the conflicting considerations."'\textsuperscript{200}
\end{quote}

In making this conclusion, Judge Fish begins by considering Regina v.
In Smith, the Supreme Court of Canada struck down a minimum seven-year sentence for the importation of narcotics into Canada because its application in some cases might constitute cruel and unusual punishment under section 12 of the Charter. While he concedes that section 12—and thus Smith—is not directly applicable to Jamieson because of the prohibition of extraterritorial application of the Charter, Judge Fish is clearly using Smith as a benchmark for defining the Canadian conscience vis-à-vis Jamieson when he argues that Michigan’s twenty-year minimum sentence would fail constitutional muster if imposed by the Canadian government.

Judge Fish does consider the possibility of a split in public opinion. I acknowledge that there are, in Canada, many people who would not find the situation faced by appellant to be so shocking as to require judicial intervention . . . [but] it is my view that the majority of (though of course not all) reasonably well-informed Canadians would consider that appellant faces a situation in Michigan that shocks the conscience and is simply unacceptable.

He reasons that a majority of Canadians would consider a twenty-year sentence for Jamieson’s crime to be “grossly disproportionate,” “degrading to human dignity,” and severe beyond any “valid social aim.” For this reason, Judge Fish, with Judge Beauregard concurring, granted Jamieson’s habeas petition.

C. Criticism of the Quebec Court’s Decision

Although Judge Fish cites the correct Supreme Court of Canada cases—in particular, Schmidt and Kindler—he ignores them for all but rhetorical purposes. While the Supreme Court of Canada case law does not provide a bright-line rule for the application of section 7 to extradition proceedings, it does prescribe a certain general approach. This section criticizes Judge Fish’s majority opinion in Jamieson for improperly collapsing sections 7 and 12 of the Charter; applying an impermissibly subjective ‘shocks the conscience’ standard; failing to properly defer to the Minister of Justice; and failing to consider the needs of an effective system of extradition.

1. The Collapse of Sections 7 and 12 of the Charter

While section 12 does not directly apply to extradition proceedings, its prohibition of cruel or unusual punishment may inform a proper section 7

202. See Jamieson, 93 C.C.C.3d at 279.
203. See id. The issue of extraterritorial application of the Charter is explained at supra Part IV.B.
204. See Jamieson, 93 C.C.C.3d at 279. Smith was arrested for attempting to import 7.5 ounces of cocaine, while Jamieson was arrested for attempting to sell 10 ounces of cocaine. See id.
205. Id. at 284.
206. Id.
207. See supra text accompanying note 127.
The nature of the punishment faced—its cruelty or unusualness—is one relevant factor in deciding whether the extradition of a fugitive would be fundamentally unjust. While the Supreme Court of Canada has not assigned section 12 a precise weight within this inquiry, Judge Fish certainly exaggerates its importance by failing to give serious consideration to values other than those implicated by section 12. That is, his statement that the sentence faced by Jamieson violates section 7, "even bearing in mind the foreign justice system and considerations of comity and security, and according due latitude to the Minister to balance the conflicting considerations" is as much treatment as he gives those subjects. Given the great weight that the Kindler court gave to considerations of comity and security—even with a man's life at stake—Judge Fish's analysis is inadequate. By ignoring all section 7 values that conflict with the section 12 prohibition of cruel or unusual punishment, he has violated the command of the Kindler court that the courts not "apply sec. 12 directly to the act of surrender."

Additionally, Judge Fish confuses constitutional rhetoric with constitutional law. He states that the "underlying criteria" sections 7 and 12 analyses are "substantially similar." This statement is incorrect. Despite the Canadian courts' use of similar rhetorical devices to describe sections 7 and 12, sections 7 and 12 implicate very different issues. First, they focus upon different objects. Section 12 is solely concerned with the punishment faced by an offender, as in the seven-year minimum sentence in Smith. Section 7 focuses upon the Minister of Justice's exercise of discretion in light of factors including—but not limited to—the severity of punishment faced by the fugitive. Thus, considerations of comity and security are relevant and important to section 7 but not to section 12.

208. See supra note 196 and accompanying text.
209. "[T]he question is whether the provision or action in question offends the Canadian sense of what is fair, right and just, bearing in mind the nature of the offense and the penalty ...." Kindler v. Canada, 84 D.L.R.4th 438, 492 (Can. 1991).
211. For the facts of Kindler, see supra text accompanying note 137-39.
213. This author would argue that constitutional rhetoric is language such as "shocks the conscience" or "the Canadian sense of what is fair, right and just": it does not tell courts how to decide cases, but rather serves as a verbal bridge between the even vaguer language of specific constitutional provisions and the eventual constitutional law. Constitutional law decides cases, or at least describes why a case was decided in a particular manner. In the extradition context it includes factors such as comity, suppression of crime, the penalty faced by the fugitive, etc.—issues that may be scrutinized by the courts with some appearance of objectivity.
214. See Jamieson, 93 C.C.C.3d at 279-280.
215. E.g., "shocks the conscience," "simply unacceptable," etc. There is no intelligible way to distinguish which of these quotes refers to section 7, which to section 12. See supra Part IV.C.1 for a general discussion of the rhetoric of section 7.
216. Discussed at text accompanying supra notes 201-04.
217. See supra Part IV.C.2 and note 196 and accompanying text.
Second, the Supreme Court of Canada has explicitly rejected the notion that there is an equivalence between the systems of criminal justice and extradition:

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

Judge Fish's collapse of section 7 into section 12 ignores these distinctions, and fails to treat Michigan's sentencing regime in the proper manner. That is, Judge Fish failed to treat it as one of several factors relevant to the constitutionality of the Minister's decision.

2. Reliance upon an "Informed" Canadian Conscience

The Kindler court explained the rationale for appealing to the public conscience: "In determining whether . . . the extradition in question is 'simply unacceptable,' the judge must avoid imposing his or her own subjective views on the matter, and seek rather to assess objectively the attitudes of Canadians . . . ." The Jamieson court, however, presents as public opinion its subjective opinion that Jamieson's extradition would be unconscionable.

Kindler cites public opinion polls, "persistent calls to bring back the death penalty," the relatively recent abolition of the death sentence, and close parliamentary votes on the issue as indications of the unclear state of public opinion regarding the death penalty. The only sources that Judge Fish cites to support his argument that Jamieson's extradition is abhorrent to the Canadian conscience are judicial opinions concerning purely domestic criminal issues. But even judicial opinion on the precise issue in Jamieson was evenly divided when Judge Fish wrote his opinion: counting both Quebec Court of Appeal Jamieson decisions, the court has split three to three as to whether Jamieson's extradition violates fundamental justice. As Rothman, J.A., stated for the first panel of the Quebec Court of Appeal:

There are, of course, striking differences between our penalties for these offences and those provided under the laws of Michigan. But even with

218. See Kindler, 84 D.L.R.4th at 488.
219. See id. at 492.
220. See supra text accompanying notes 142-44.
221. See Jamieson, 93 C.C.C.3d at 284 (citing Regina v. Smith, 40 D.L.R.4th 435 (Can. 1987); Regina v. Miller, 70 D.L.R.3d 324 (Can. 1976)).
222. Both decisions were two-to-one. Concurring in United States v. Ross, 93 C.C.C.3d 500 (B.C. Ct. App. 1994), Judge Finch directly addressed Jamieson on these terms: "So in the same case, in the same province, in the same court, there are three judges on each side of the question . . . . When judges hold contrary, but reasoned, views on such a question, I am unable to understand how it can be said that the foreign law is shocking, outrageous, or simply unacceptable."
these differences, I do not believe that the Michigan sentences are so shocking and unjust as to offend the principles of fundamental justice, requiring us to refuse to surrender a fugitive facing trial in that state. 223

Judge Baudoin, dissenting from Judge Fish's majority opinion, goes even further, characterizing Michigan's drug laws as "severe, even very severe" and "the reflection of a repressive philosophy," 224 and the American legal system as "very repressive." 225 Nevertheless, Judge Baudouin concedes that "it is not for me to decide" whether Michigan's law is right or wrong. 226 Judge Fish failed to show such restraint.

The language that Judge Fish uses to describe the Canadian conscience further calls into question his objectivity. He appeals to the "majority of . . . reasonably well-informed Canadians" 227 and the "average, informed Canadian." 228 The Kindler court referred to "attitudes," "the social consensus," "attitudes of Canadians," and "Canadian attitudes," 229 but never qualified its conception of the Canadian conscience with adjectives such as "informed." What Judge Fish means by "informed Canadians" is not clear. What is clear is that "informed Canadians" are not simply "Canadians"—there is a necessary exclusion of opinion. Judge Fish's implicit rejection of some portion of Canadian opinion as uninformed is another indication that Jamieson is an opinion motivated by the personal morality of a judge—precisely what Kindler sought to avoid. 230

3. The Failure to Properly Defer to the Minister

Justice Minister Campbell cited the following rationales as relevant to her decision to order Jamieson's surrender: 231 Jamieson's offense was "planned and calculated and involved a hard drug;" drug trafficking is a "very serious problem" in North America; the United States and Michigan Constitutions provide their own protections against cruel or unusual punishments; 232 the administration of criminal justice in the United States suf-

Id. at 554.

223. United States v. Jamieson, 73 C.C.C.3d 460, 469 (Que. Ct. App. 1992). Of course, the first panel was not scrutinizing the Minister's surrender order, but Jamieson's committal (see supra text accompanying notes 112-15 for the relevance of this distinction to Charter jurisprudence), and this statement by the first Jamieson panel is pure dicta. Nevertheless, it seems as reasonable an assessment of the "Canadian conscience" as any other.

224. Jamieson, 93 C.C.C.3d at 268.

225. Id. at 270.

226. See id. at 269.

227. Jamieson, 93 C.C.C.3d at 284

228. Id. at 286.


230. See id. at 492.

231. This explanation for Jamieson's surrender is contained in a letter from the Minister of Justice to Jamieson explaining her surrender decision. See Jamieson, 93 C.C.C.3d at 273-75.

232. The nature of the legal system of the requesting country, the nature of its political system, and the legal protections available to the fugitive upon his surrender all have been relevant to the Supreme Court of Canada's extradition decisions. See supra Part IV.C.2.
iciently reflects Canadian concepts of justice to warrant the maintenance of the current extradition Treaty;\(^{233}\) Jamieson will have the opportunity to argue for a downward departure from the twenty-year minimum sentence;\(^{234}\) Michigan's legislature is democratically elected; the imposition of such a stiff sentence is in response to Michigan's drug problems, which are much more serious than Canada's; Canada is a party to multilateral conventions that enhance "Canada's commitment to extradite those charged with drug offenses;"\(^{235}\) and finally, Canada could become a safe haven for those charged with crimes similar to Jamieson's if it refused to extradite Jamieson. The proper role of the Jamieson court was to determine whether the Justice Minister's decision to surrender Jamieson was adequately justified by these rationales.\(^{236}\)

The Jamieson court's response to the Minister's explanations is essentially limited to:

The more difficult question is whether extradition violates Jamieson's substantive right, under s. 7, not to be deprived of his liberty except in accordance with the principles of fundamental justice. And that question fails to be determined in accordance with the criteria established by the Supreme Court of Canada in the cases referred to both by the Minister in her letter to appellant and the trial judge in his reasons for judgment.\(^{237}\)

However, the factors for which the Minister evidences a concern—detering fugitive criminals from seeking refuge in Canada, the needs of an efficient system of extradition, respect for the differences of other state's criminal justice system, and Canada's international obligations—are precisely among the "criteria established by the Supreme Court of Canada" for deciding a section 7 extradition inquiry.\(^{238}\) Further, the Supreme Court of Canada has consistently stressed the need for judicial deference to executive extradition orders.\(^{239}\) The Jamieson decision respects neither the general need for deference, nor the other criteria established by the court as relevant to the section 7 inquiry.

This deference, however, is not to be absolute. The surrender of a fugitive would be unconstitutional under section 7 if it were known that the fugitive would be subject to torture upon his return to the requesting

\(^{233}\) See also Commons Debates, 34th Parl., 3rd Sess., 4781 (Can.) (Mr. George S. Rideout), 4811 (Mrs. Beryl Gaffney), 4812 (Mr. Russell MacLellan) (1991) (generally expressing approval with the U.S. justice system in the context of a proposed bill to simplify Canadian extradition procedures).

\(^{234}\) However, a downward departure is extremely unlikely. See supra note 199.


\(^{236}\) As Judge Fish himself stated, "The role of the judiciary is confined to a review of the executive decision for the sole purpose of ensuring its compliance with Canadian constitutional standards." Jamieson, 93 C.C.C.3d at 277.

\(^{237}\) Id. (punctuation omitted).

\(^{238}\) See supra Part IV.C.2.

\(^{239}\) See supra note 77.
Such a result would not be affected by the countervailing concern of deferring to the Minister. Nevertheless, the court reviewing a surrender order in that hypothetical case should not simply state that deference is irrelevant to the section 7 inquiry, as the Jamieson court did. Rather, deference is always relevant, even if outweighed by humanitarian concerns: it simply reflects the fact that extradition is primarily a political act.

4. The Failure to Consider the Needs of an Effective Extradition System

The value of extradition as a tool of crime control and a deterrent to fugitive criminals depends upon how well the extradition process works. Over two hundred years of extradition history between the United States and Canada have witnessed the institution of more and more liberal extradition mechanisms. A key element of the current system is that the requesting country need only make out a prima facie case that the fugitive is extraditable for the extradition to take place. The Schmidt court described the role of the courts in the course of extradition proceedings:

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, including such matters as giving proper weight to the evidence and adequate consideration of available defenses and the dictates of due process generally.

Thus, extradition hearings are not to be transformed into full-blown criminal trials. The Quebec court’s Jamieson approach, however, ignored Schmidt and would create unique legal and evidentiary difficulties for the extradition system. Kindler provides a telling contrast. Justice Cory, dissenting in Kindler, argued that “[t]he death penalty is per se a cruel and unusual punishment.” From Justice Cory’s perspective, the Minister of Justice simply cannot constitutionally surrender a fugitive who may be put to death. Application of the rule in Jamieson, however, does not provide a clear dichotomy between permissible and impermissible extraditions. Rather, it stands for the “rule” that it is unconstitutional to surrender a first-time

241. See id. at 39-40.
242. See supra note 77 and text accompanying supra note 146.
243. See supra text accompanying note 149-58.
244. See supra Part I.B.
245. See supra text accompanying notes 73-74.
246. Schmidt, 39 D.L.R.4th at 41. See also COMMONS DEBATES, 34th Parl., 3rd Sess., 4813 (1991) (Can.) (Mr. Russell MacLellan):
   We have an extradition agreement with the United States. That is the irony. We trust the United States and it trusts us to treat cross-border refugees in a very responsible manner. Yet we were keeping these two men [Kindler and Ng] for six years. They were going from one appeal to the other . . . .
247. The Supreme Court of Canada has stressed the difference between extradition and criminal proceedings. See supra text accompanying note 219.
248. Kindler, 84 D.L.R.4th at 481. See also supra text accompanying note 141.
drug offender who faces a twenty-year minimum prison sentence with no chance of parole for trafficking in ten ounces of cocaine.

Had the Kindler court adopted Justice Cory’s view, the issue faced by a habeas court in a Kindler-like situation would simply be whether the fugitive faces the death penalty. *Jamieson*, however, produces a judicial quagmire. It requires the resolution of issues such as the sentence faced by the fugitive, the fugitive’s criminal history, the reprehensibility of the fugitive’s crime, and the likelihood that the sentencing court will depart downwards from the minimum statutory punishment. This certainly cannot be reconciled with the *Schmidt* command that Canadian judges trust foreign courts to give the fugitive a fair trial.249 Further, nothing in *Jamieson* suggests any answer to the question: would Jamieson’s extradition still “shock the Canadian conscience” if he faced a minimum sentence of only fifteen, ten, or five years for the same crime?

In fact, close to one-half of the *Jamieson* majority’s analysis involved determining when a Michigan judge may depart downwards from the statutory minimum sentence.250 This sort of searching inquiry into foreign law is far beyond both the capability and the legal role of judges hearing habeas petitions to surrender orders. There have always been qualitative differences distinguishing those cases where extradition may be refused—political offenses,251 torture,252 double jeopardy253—from cases like *Jamieson*, where the constitutionality of the surrender order depends upon a series of factual and legal determinations that may be more complicated than those involved in the actual criminal trial.254

D. Canadian Extradition Law After *Jamieson*

Given its extradition jurisprudence, and particularly *Kindler*, the Supreme Court of Canada’s decision to permit Jamieson’s extradition came as no surprise. It was, in fact, predictable. This Note has argued that the court’s decision to permit Kindler’s extradition practically precludes a successful section 7 habeas petition from a surrender order.255 The court’s cursory

249. See *Schmidt*, 39 D.L.R.4th at 41.

250. See *Jamieson*, 93 C.C.C.3d at 280-84. That Canadian courts cannot adequately understand the sentencing laws of fifty-one United States jurisdictions is apparent from the fact that the *Jamieson* court never even addresses the possibility that corrections officers often have means other than parole for significantly shortening the actual time served by inmates, such as “good time” awards.

251. See supra Part II.C.

252. The Supreme Court of Canada has explicitly recognized this as a situation which would make a surrender order unconstitutional under section 7 of the Charter. See *Schmidt*, 39 D.L.R.4th at 39.

253. See supra Part II.C.

254. A criminal court must make a factual determination and then apply the criminal law to those facts. In a case like *Jamieson*, the habeas court must roughly estimate this outcome so that it may predict the punishment likely faced by the fugitive, and it must do this under a body of foreign law and without the benefit of any of the witnesses or evidence that would be present in a trial court. Then it must make a further decision: is this hypothetical punishment grounds for constitutionally overriding a surrender order by the executive?

255. See supra Part IV.C.
(it did not even hear oral arguments from the government, the appealing party),\textsuperscript{256} unanimous disposition of \textit{Jamieson} indicates that this is now a closed issue. In an opinion only thirty-nine words in length, the court simply adopted the lower court’s dissent as a rationale;\textsuperscript{257} its earlier extradition decisions had at least produced the sort of rhetorical flourishes that might give an appellant hope.\textsuperscript{258} After \textit{Jamieson}, only the most extraordinary circumstances could produce a successful section 7 habeas appeal from an extradition order, such as where a fugitive faces torture upon surrender.\textsuperscript{259} Besides the possibility of a reversal of \textit{Kindler},\textsuperscript{260} which itself would have no direct relevance to cases not involving the death penalty,\textsuperscript{261} section 7 of the Charter has become irrelevant to Canadian extradition law.

\textbf{Conclusion}

As a policy matter, the Supreme Court of Canada correctly decided \textit{Jamieson}. Unreversed, the Quebec court’s decision would have severely hampered law enforcement efforts, particularly along the U.S.-Canadian border. It would have encouraged the flight of American criminals into Canada, providing them with at least the hope for immunity from serious U.S. criminal prosecution. The Quebec court’s visceral constitutional test would have provided these same criminals, once captured, with enough legal ammunition to wage a series of lengthy habeas corpus battles. Finally, it would have crippled the ability of the Canadian executive to fulfill Canada’s treaty obligations, threatening the foundation of effective extradition relations, reciprocity.

\textit{Jamieson} is also important as an affirmation of the sovereign authority of the law. The Quebec court’s decision is not unusual in its exploitation of broad constitutional language, and its ultimately transparent substitution of judicial morality for that language. Not coincidentally, such exploitation provides the courts with enormous power: the power to almost arbitrarily define and redefine a constitution in the course of subjecting laws or government action to constitutional review. By sharply rejecting this approach, the Supreme Court of Canada has reasserted the authority of the law over its interpreters.

\textsuperscript{256} The author personally observed the proceedings.


\textsuperscript{258} See supra Part IV.C.1.

\textsuperscript{259} Cf. supra text accompanying note 133. Of course, it is unimaginable that the Canadian Minister of Justice would surrender such a fugitive. It is also highly unlikely that Canada would have an extradition treaty with a country that tortures criminals.

\textsuperscript{260} Such a possibility is not entirely unlikely: \textit{Kindler} was decided by a five-to-four vote. See \textit{Kindler v. Canada}, 84 D.L.R.4th 498 (Can. 1991).

\textsuperscript{261} Cf. supra text accompanying notes 248-54 (arguing that the death penalty would present different and discrete issues to a court on a habeas appeal than would non-death penalty punishments).