

Federal Prosecution Service Deskbook
Part VIII
INTERNATIONAL ASSISTANCE
Chapter 40

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40 THE ROLE OF THE MINISTER OF JUSTICE IN EXTRADITION

40.1 Purpose of the Policy

The purpose of this chapter is to give an overview of the extradition process in Canada, and to generally describe the responsibilities of the Minister of Justice and Attorney General of Canada in that process, and how they are carried out. Responsibilities which require a more detailed description, are dealt with in subsequent chapters.¹

40.2 Extradition from Canada

40.2.1 Introduction

Extradition is the surrender by one state or entity at the request of another state or entity of a person who is wanted for prosecution for, or has been convicted of, a crime committed within the jurisdiction of the requesting state or entity.

Extradition in Canada is governed by the terms of the new *Extradition Act*². The Parliamentary summary of the legislation describes it as “[creating] a comprehensive scheme, consistent with modern legal principles and recent international developments”. The *Act* repealed the former *Extradition Act* and the *Fugitive Offenders Act*.

The Minister of Justice is responsible for the implementation of extradition agreements, the administration of the *Act* and responding to requests under the *Act*. In addition, the Minister's agreement is required for the Minister of Foreign Affairs to conclude a specific agreement or modify the schedule of extradition partners designated pursuant to s. 9.

1 See Part VIII, Chapter 41, “Extradition: Provisional Arrest” and Chapter 42, “Extradition of Canadian Citizens for Acts which Could be Prosecuted in Canada”.

2 S.C. 1999, c. 18, which came into force June 17, 1999.

The *Act* provides for the surrender of persons to "extradition partners". An extradition partner is defined by s. 2 of the *Act* to include both a state or entity (such as international tribunals) with which Canada has an extradition agreement through bilateral or multilateral agreement, which is generally designated, or with which Canada has entered into a specific agreement. The names of those partners which have been generally designated pursuant to s. 9 of the *Act* are set out in a schedule to the *Act*.

Extradition involves the surrender of persons to or from Canada. The process of extradition from a state or entity to Canada will not be examined in detail in this chapter. Ministerial participation is generally limited to making the original request to the state or entity upon the request of the competent Canadian prosecutorial or correctional service authority.

40.2.2 The Role of the International Assistance Group (IAG)

Extradition requests and requests for provisional arrest are received by officials in the International Assistance Group ("IAG") at headquarters. When a request for extradition is addressed to Canada, whether through the diplomatic channel or, as is current practice, directly between ministries of justice, the role of the IAG is:

- (a) to ensure that the request and its supporting documents comply with the treaty and the *Act* and satisfy all legal requirements;
- (b) to seek additional information or evidence if necessary;
- (c) to issue the required authorizations to the Attorney General on behalf of the Minister of Justice (ss. 12 and 15), in an appropriate case;
- (d) to transmit the relevant documents to the regional office of the Department of Justice whose counsel will seek, on behalf of the requesting partner, the issuance of a committal order and act in the related proceedings.

Once the request and supporting documents are reviewed by the IAG and forwarded to the relevant regional office of the Department of Justice, departmental counsel is appointed to act on behalf of the requesting partner during the judicial phase of the proceedings. If counsel requires further information or evidence from the requesting partner, such requests will be transmitted by the IAG.

40.2.3 The Judicial Phase

The first phase of the process is called the "judicial phase". The judicial phase includes various functions, such as issuing process for the person to appear in court, the consideration of bail, determining the place of the hearing, and conducting the extradition hearing. The judicial phase takes place only if the Minister, in response to a request for provisional arrest by an extradition partner: 1) authorizes the Attorney General to apply for a provisional arrest warrant³; or, 2) having received an extradition request, issues an authority to proceed⁴ authorizing the Attorney General to apply to a court for an order for committal for the Canadian offences set out in the authority to proceed.

A person may consent in writing before a judge to be returned to the requesting partner without further proceedings or to be committed to await the decision of the Minister or to be surrendered pursuant to a Minister's order.

Upon committing the person to custody to await the Minister's decision on surrender, the judge issues a report and transmits it along with all other materials to the Minister. The judge may also order that things seized at the time of the arrest of the person be transferred to the requesting partner at the time of the surrender.

The Supreme Court of Canada held in *U.S.A. v. McVey*⁵ that the role of the extradition judge was confined to a consideration of the sufficiency of the evidence, and that it excluded any "policing" of the treaty requirements which were ruled to be within the exclusive jurisdiction of the Minister. The

3 Pursuant to s. 12 of the *Act*.

4 Pursuant to s. 15 of the *Act*.

5 [1992] 3 S.C.R. 475.

legislation grants various powers to the judge which are relevant to the limited purposes of the judicial phase.

Thus, the role of the court in this phase is ultimately to examine the evidence produced by the requesting partner and determine whether it is sufficient to warrant committal. The Minister of Justice, on the other hand, considers whether or not the person sought should be surrendered to the requesting partner.

40.2.4 The Statutory Role of the Minister of Justice

If the person sought is committed for surrender by the extradition judge, then in the second or "executive phase", the Minister of Justice decides whether the person sought should be surrendered to the requesting partner in accordance with the applicable treaty, the legislation and the *Charter*. The Supreme Court of Canada confirmed in November 1992 in *Idziak v. Minister of Justice*⁶ that the second phase of the decision making process is political in nature.

The Court said (at p. 659):

Parliament chose to give discretionary authority to the Minister of Justice. It is the Minister who must consider the good faith and honour of this country in its relations with other States.

Under section 40 of the *Act*, the Minister of Justice is empowered to personally order the surrender of the person sought:

The Minister of Justice, may, within a period of ninety days... of a person's committal personally order... the person be surrendered to the... partner.

Section 43 of the *Act* provides that a person committed for surrender has thirty days from the date of committal to make submissions to the Minister of Justice in relation to the issue of surrender.

6 [1992] 3 S.C.R. 631.

A person may choose not to exercise this right and either make no submissions or request that the surrender take place immediately. In the latter case, the person is usually prepared to be surrendered but seeks formal surrender to obtain the protections of the rule of specialty⁷ and the rule against re-extradition to a third state. In these cases, the IAG will provide the Minister with a summary of the case to consider in making the decision on surrender.

If the person has claimed Convention refugee status pursuant to the *Immigration Act*, the Minister must consult with the minister responsible for this *Act* prior to deciding on surrender⁸. The issuance of an authority to proceed for an offence punishable by 10 years imprisonment or more suspends the refugee status determination procedure. In addition, where the Minister orders surrender for such an offence, the order is deemed to be a decision that the person is not a Convention refugee.

40.3 Submissions to the Minister of Justice

40.3.1 The Departmental Brief

When submissions are made, the IAG prepares a brief of the case for the Minister's consideration.

The brief will normally include:

- (a) a description of the extradition request, charges in the requesting partner, and the circumstances of the offence and offender;
- (b) a history of the proceedings in the judicial phase attaching relevant documents such as the judgement of the extradition judge, the judge's report and any notice of appeal;

⁷ This rule limits his or her liability for prosecution in the requesting jurisdiction to those offences for which extradition was granted.

⁸ As required by s. 40(2) of the *Act*.

- (c) a summary of the submissions made by the person sought or counsel attaching copies of those submissions;
- (d) a summary of any other information relevant to the decision of the Minister and any relevant document.

The brief is disclosed to counsel for the person sought who is given an opportunity to provide comments. Any comments that counsel makes regarding the brief are included in the package of materials sent to the Minister for consideration when deciding whether to order surrender.

40.3.2 Legal Advice to the Minister of Justice

In a separate document, IAG counsel provides the Minister with a legal opinion and advice on the case. This document is not disclosed to counsel for the person sought and the Supreme Court of Canada recognised in *Idziak* that it constitutes privileged legal advice for the Minister⁹.

Of importance is the division of personnel at the two stages of the extradition process. In *Idziak* counsel for the person sought argued that because of the conflicting roles of the Minister in the two stages there was a reasonable apprehension of bias in the extradition process. In rejecting this argument the Supreme Court commented favourably on the division of personnel within the Department of Justice between counsel who appears on behalf of the requesting partner at the judicial phase and counsel who advises the Minister during the executive phase. Thus, the IAG counsel who advises the Minister is someone who has not been involved in the judicial phase.

40.4 Order of surrender and appeals

The Minister's decision on surrender must be made within ninety days of the committal order with the possibility of an additional sixty day extension where submissions are made. These statutory limits apply whether or not there is an appeal from committal pending with a court of appeal unless the Minister chooses to delay the surrender decision pending resolution of that appeal. The

⁹ See also *R. v. Shimose*, [1999] 1 S.C.R. 565.

legislation provides for the hearing of the appeal from committal and review of the Minister's decision simultaneously by a court of appeal. When the Minister decides to defer the decision on surrender until after an appeal, the decision on surrender must be made within forty-five days of the appeal decision if the committal is upheld.

The Minister's decision to order surrender is reviewable in the court of appeal of the province in which the person sought was committed for extradition.

If the person is serving a sentence in Canada, the Minister may:

- (a) order immediate surrender; or
- (b) order that surrender take place at a time specified by the Minister notwithstanding that sentence; or
- (c) order that the person be temporarily surrendered to the requesting partner upon being assured that the person will remain in custody and will be returned to Canada at the specified time.

If the person has been temporarily surrendered and returned to Canada, the person may be finally surrendered at the time specified by the Minister to serve the sentence imposed in the requesting partner. If the person is charged in Canada, the Minister may also order that surrender proceed notwithstanding the pending prosecution. Such orders by the Minister prevail over other orders.

Before the court of appeal, one counsel will represent the Minister and the requesting partner and argue all issues, unless on the facts of the particular case, there will be a difference in the positions to be advanced by the Minister and the requesting partner or if it would not be appropriate for other reasons.

If the Minister of Justice decides to surrender a person and signs the surrender order accordingly, the person has thirty days to file an application for judicial review of the decision. If neither an appeal nor an application for judicial review is filed, the person must be removed from Canada within forty-five days of the date of signature of the surrender order. If the Minister denies surrender, the person is discharged.

If an appeal is filed, no steps will be taken to surrender the person until that appeal is determined. If the appellate court dismisses the appeal from committal or review of the Minister's decision, there remains no matter pending before a court and the person must be removed within forty-five days of that dismissal. As there is no right to appeal to the Supreme Court of Canada-- only the possibility of an application for leave-- the person must be removed from Canada within the forty-five day period even though the statutory time for filing an application for leave to appeal has not expired. However, once a matter is dismissed by an appeal court the person is advised directly or through counsel that he or she has thirty days in which to file an application for leave to appeal or the person will be removed from Canada. If an application for leave to appeal is filed in the Supreme Court of Canada, surrender will be delayed until proceedings have been completed.

40.5 Orders for Transit

Pursuant to s. 74 of the *Act*, the Minister may consent to the transit through Canada of a person surrendered by one state or entity to another. To that end the Minister may impose appropriate conditions and authorize the entry into Canada of a person who would otherwise be inadmissible under the *Immigration Act*.

40.6 Extradition to Canada

The Minister of Justice is also the authority through which requests for extradition made by Canada are submitted to foreign states. The Minister will request extradition only at the behest of the competent Canadian prosecution or corrections authority. The role of the Minister is performed by IAG counsel. The Minister may authorize agents of the foreign state or entity to bring the person surrendered to Canada in custody and to deliver this person to the appropriate Canadian authorities.