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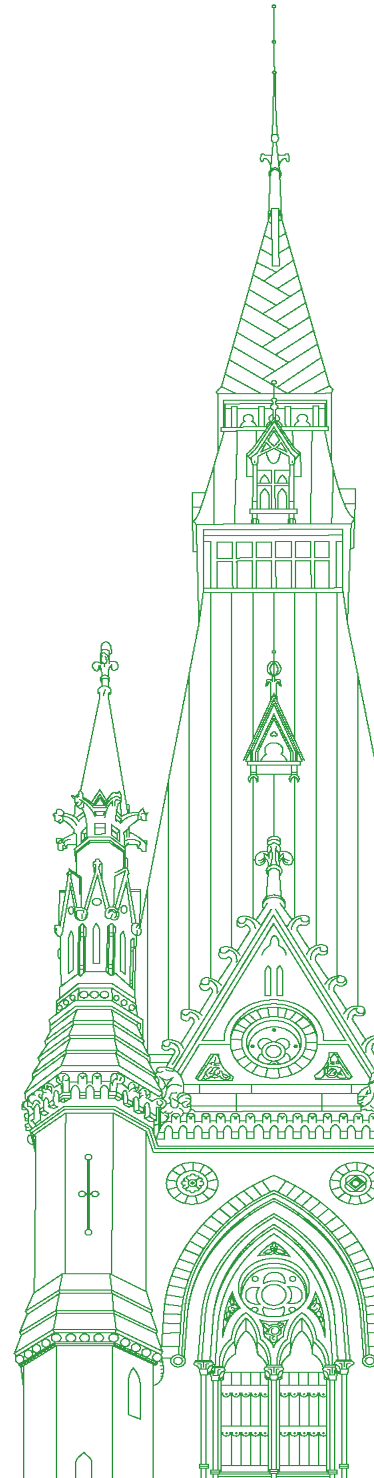

Chair: Mr. Randeep Sarai

Standing Committee on Justice and Human Rights

Wednesday, February 1, 2023

● (1635)

[*English*]

The Chair (Mr. Randeep Sarai (Surrey Centre, Lib.)): I call this meeting to order.

Welcome to meeting number 46 of the House of Commons Standing Committee on Justice and Human Rights.

Pursuant to Standing Order 108(2) and the motion adopted on January 30, 2023, the committee is beginning its study on extradition law reform.

Today's meeting is taking place in a hybrid format, pursuant to the order of June 23, 2022. Members are attending in person in the room and remotely using the Zoom application.

I'd like to make a few comments for the benefit of the witnesses and members. I won't go into the Zoom function, because I think it's only the members who are on. I'll just show you my time cards. When you're about 30 seconds away, I'll raise this card. When you're out of time, I'll raise the red card. I'm hoping you'll adhere to this, so that I don't have to cut you off. I will do the same thing with all members.

As a simple reminder for anyone who hasn't selected their translation, please select the appropriate translation, either on your mobile device or in the committee room.

To begin our study, for the first hour of the meeting, we welcome officials from the Department of Justice. We have Ms. Janet Henchey, director general and senior general counsel of the international assistance group in the national litigation sector, and Erin McKey, director and general counsel of the criminal law policy section.

Welcome. You have 10 minutes to make your opening remarks.

[*Translation*]

Mr. Rhéal Fortin (Rivière-du-Nord, BQ): Mr. Chair.

Were all the sound checks conducted successfully?

I was told there were issues on my end earlier.

Have they been fixed?

[*English*]

The Chair: They were able to interpret you right now. I was able to get your interpretation. I'm hoping that you can get interpretation from everyone else.

[*Translation*]

Mr. Rhéal Fortin: Yes, the interpretation is coming through.

I gather, then, that the testing was done and that everything is satisfactory. Is that correct?

[*English*]

The Chair: Can everyone here in person get interpretation?

I'm confirming, Monsieur Fortin, that everyone here is getting interpretation.

[*Translation*]

Mr. Rhéal Fortin: Thank you, Mr. Chair.

[*English*]

The Chair: Thank you.

The floor is yours.

Ms. Janet Henchey (Director General and Senior General Counsel, International Assistance Group, National Litigation Sector, Department of Justice): Thank you.

Good afternoon. My name is Janet Henchey. As it was mentioned, I am the director general of the international assistance group at the Department of Justice, known as the IAG. The IAG is responsible for managing all requests for extradition to and from Canada on behalf of the Minister of Justice.

I am joined this afternoon by my colleague Erin McKey, who is the director and general counsel within the criminal law policy section of the Department of Justice. We'd like to thank you for inviting us to speak to you this afternoon about Canada's current law of extradition.

Extradition is the process by which an accused or convicted person located in one country is surrendered to another country, pursuant to a request by an extradition partner, to face trial or the imposition or enforcement of a sentence. Extradition is an important tool of international co-operation used by Canadian and foreign police and prosecutors to fight serious crime domestically and at a global level. Extradition proceedings are subject to different rules than criminal trials are and do not mirror trial processes, as it's recognized that the trial will take place in the jurisdiction that is seeking extradition.

A new Extradition Act was introduced in Canada on May 5, 1998, and received royal assent on June 17, 1999. It constituted a significant overhaul of the law governing extradition in Canada.

Then minister of justice Anne McLellan, speaking to the Standing Committee on Justice and Human Rights, characterized the reforms brought forward by former Bill C-40 as “important” and long “overdue”, and responding to criticisms that Canada was not an “effective partner in the fight against international criminality” due to our then-antiquated extradition laws.

She described the proposed law as creating “a uniform extradition procedure that will apply to all requests for extradition and provides procedural and human rights safeguards for the persons sought”, noting in particular that it would set out clearly, for the very first time, “a minister's responsibilities and duties to ensure that the human rights and fair treatment of the fugitive will be safeguarded in the other state upon the fugitive's return for trial or to undergo sentence.”

● (1640)

[*Translation*]

Extradition law in Canada is currently governed by the Extradition Act, which was passed in 1999. The Minister of Justice is responsible for implementing Canada's extradition agreements and administering the Extradition Act.

The lawyers in the international assistance group, or IAG, at the Department of Justice, are in charge of carrying out most of the responsibilities assigned to the minister under the act.

The Supreme Court of Canada has upheld the constitutionality of the Extradition Act since its enactment in 1999, as well as the constitutionality of the surrender of persons sought for extradition under the act in various circumstances.

[*English*]

The Extradition Act is a complete code that governs an extradition request from its receipt until its conclusion. We have provided you with an infographic that outlines the various stages of the extradition process within Canada. I hope you have it. I will take a few minutes to describe that process for you.

Pursuant to the Extradition Act, Canada may only extradite to an extradition partner. This is defined as a state or entity with which Canada has a bilateral extradition treaty, is a party to an applicable multilateral treaty or whose name is listed in the schedule to the Extradition Act.

Canada has 51 bilateral extradition treaty partners, and there are 34 designated partners identified in the Extradition Act. Canada is also party to several multilateral conventions containing provisions on extradition.

At the outset, it's important to be aware that extradition agreements are reciprocal in nature. They provide a mechanism for Canada to make requests for extradition to its partners, and in turn, to execute requests on their behalf. Reciprocity is a key feature of extradition, as is the principle of international comity, meaning the mutual respect that partners have for the differences that may exist between their respective laws and judicial systems.

When a state makes an extradition request, it is the law of the country receiving the request that governs.

[*Translation*]

Canada's extradition process has three phases. First, the Authority to Proceed is issued. In this phase, the IAG determines whether to authorize extradition proceedings before a Canadian court. Second, the extradition hearing is held. This is also known as the judicial phase of the extradition process. Third and finally is the ministerial phase, in which the Minister of Justice decides whether the person sought for extradition will be surrendered to the requesting state.

[*English*]

When a formal extradition request is received, it is reviewed by the IAG to determine if it meets the requirements of the Extradition Act and the applicable treaty.

In assessing whether an authority to proceed should issue, the IAG will check that the request concerns extraditable conduct within the meaning of section 3 of the act. This means the party seeking extradition is an extradition partner as defined in the act; the person is being sought by the extradition partner for prosecution or for the imposition or enforcement of a criminal sentence; subject to a relevant extradition agreement, the foreign offence in respect of which the extradition is requested is punishable under the law of the extradition partner by imprisonment of a maximum term of two years or more; and finally, and perhaps most importantly, the alleged criminal conduct of the person, had it occurred in Canada, would have constituted a criminal offence in Canada, which is known as the principle of double criminality.

The authority to proceed, if issued, authorizes the commencement of extradition proceedings before a superior court judge in the province in which the person sought for extradition is located. At the hearing, the requested state is represented by counsel for the Attorney General of Canada in the region where the person is located. The person sought is entitled to be represented by counsel of their choice. If the person cannot afford counsel, they may apply for legal aid.

● (1645)

[*Translation*]

At the extradition hearing, the extradition judge determines whether the person sought will be committed into custody to await extradition on the basis of the evidence provided by the requesting state. The judge determines whether the evidence presented by the Attorney General of Canada on behalf of the requesting state would be sufficient to commit the person for trial in Canada if the act had occurred here. As I said, this is known as the double criminality requirement.

If the judge is satisfied that the evidence meets the requirement, the judge orders the committal of the person into custody while the Minister of Justice makes a decision regarding the person's surrender. If the judge does not order the committal of the person sought for extradition, the judge orders that the person be discharged.

[*English*]

At the committal phase, counsel for the person sought may bring various motions, raise objections, seek additional time to prepare, etc. If the judge orders the person committed for extradition, the case returns to the Minister of Justice, who must personally determine whether to order the person surrendered to the requesting state. Counsel for the person sought for extradition may choose to make written and confidential submissions to the minister to assist the minister in making a decision on surrender. The minister's decision must balance the interests of the person sought for extradition against Canada's international treaty obligations.

The Extradition Act sets out a series of mandatory and discretionary grounds for refusal to surrender.

Mandatory grounds of refusal are if the surrender would be unjust or oppressive; if the request was made with the intention of prosecuting or punishing the person sought on the basis of enumerated grounds of discrimination such as race, religion or ethnic origin; if the prosecution is barred by prescription or exceeds the limitation period; or if the conduct is considered to be a political offence.

Discretionary grounds may include if the person was less than 18 years old at the time of the offence; if the conduct did not occur on the territory of the extradition partner; or if the person has already been convicted of the offence in Canada, which is the principle of double jeopardy.

The minister must also be satisfied that surrender would not be contrary to the charter.

[*Translation*]

The person sought for extradition has a right to appeal the order of committal, and if the surrender is ordered, the person can request a judicial review of the minister's order to surrender.

If the court of appeal upholds the judge's and the minister's decisions, the person sought may seek leave to appeal these decisions to the Supreme Court of Canada.

[*English*]

Each individual case is assessed on its own merits, in accordance with Canadian law and the Canadian Charter of Rights and Freedoms.

I didn't go over my time with that introduction, and we would be happy to answer any questions you may have about the process.

The Chair: That was actually 30 seconds under time, which was excellent, so I thank you.

In the first round of questioning, I'll go to Mr. Moore for six minutes.

Hon. Rob Moore (Fundy Royal, CPC): Thank you, Mr. Chair.

Thank you to the witnesses for appearing here today on this study.

Can you comment on the decision of the Supreme Court in the Burns-Rafay ruling, wherein Canada had to seek assurances from a foreign jurisdiction that an individual in Canada would not receive the death penalty, should they be convicted of the offence they committed in a foreign jurisdiction? A lot of time has passed since that decision, and it impacted that decision, of course.

How often has that ruling come into play with respect to requests for extradition from Canada, since that time?

● (1650)

Ms. Janet Henchey: I can't give you an exact number, but I could—

Hon. Rob Moore: Does it happen over here?

Ms. Janet Henchey: It happens fairly frequently.

As you can imagine, our biggest extradition partner is the United States, because they're our only neighbour and they have the death penalty. Whenever they make a request where the death penalty is a possible sentence, we require a death penalty assurance and we receive one. It's very commonly provided. We also get requests from other countries with the death penalty, and we've never experienced any resistance to providing us with an assurance.

As you can imagine, of all the assurances we can get, it's the easiest one to monitor. We've never had a situation where it wasn't respected.

Hon. Rob Moore: What other assurances go into that decision-making process? When you're looking at an extradition request, what are some of the high-line things you're looking for, and do those vary? I think you said that we have a number of extradition agreements with over 30 countries.

Ms. Janet Henchey: We have 51 extradition treaties, and we have designated partners listed in the act.

Hon. Rob Moore: What other assurances would typically be requested?

Ms. Janet Henchey: We seek assurances only where extradition would be otherwise unsafe. The minister needs to make a determination about whether he should be ordering extradition at all. Sometimes, he determines it's not appropriate to extradite in a particular circumstance. Sometimes, it's possible to overcome the problems you might face in the requesting state through assurances. It doesn't happen very often, other than a death penalty assurance. The death penalty assurance is our most frequently sought assurance.

Very infrequently, we are in a situation where we might need to seek an assurance with respect to access to consular services for a Canadian citizen being extradited somewhere we aren't as familiar with. Sometimes, we ask for assurances with respect to a person being held in a particular prison, when our country has issues with some prisons or we have information that one prison is safer than another. Sometimes, we have assurances that our consular officials will be allowed to monitor a trial taking place in another country.

However, it's pretty unusual to ask for those assurances. There are only a handful of cases I can think of—other than death penalty cases—where we have sought assurances.

Hon. Rob Moore: Since that decision was made, have you ever seen an instance where there was, in this day and age of mobility, a “race to the border” scenario? That's where someone—aware of the assurances we demand, as a country, before extradition is allowed—is making an effort to get back into Canada for that purpose.

Ms. Janet Henchey: To avoid their trial in a particular country, in order to get assurances from us.... I am sure it has happened. I can't tell you that I have any particular cases in mind. Our border with the United States is so easily crossed that I'm sure there have been circumstances where someone came back to hopefully avoid prosecution and, in the end, had the benefit of assurances.

Hon. Rob Moore: When you're looking at the extradition treaties we have in place now, how often are they reassessed? What would trigger a reassessment of those treaties or are they reassessed very often?

Ms. Janet Henchey: As a starting point, although I've listed a large number of treaties, many of them have not been used in a long time.

We have frequent treaty partners, such as the United States, the U.K., Australia, France and some of the western European countries. Those are the most frequent countries that seek extradition from Canada and where we seek extradition from them.

We have some treaties that we haven't used in a long time. Those would be the treaties we would potentially want to reconsider.

Until recently, we haven't had the mandate to renegotiate or renew old treaties. It's only in the last three or four years that we have been provided with funding and the mandate to look at our treaty network, renegotiate where we think it's appropriate and look to negotiating new treaties where we are missing them.

● (1655)

Hon. Rob Moore: Thank you.

The Chair: Thank you, Mr. Moore.

Next, I'll go over to Ms. Brière for six minutes.

[*Translation*]

Mrs. Élisabeth Brière (Sherbrooke, Lib.): Thank you, Mr. Chair.

Thank you to our witnesses today. I also appreciate the diagram they provided.

I'm going to pick up where Mr. Moore left off.

Given what's happening in the world when it comes to cybercrime, the war and what have you, do you think it's necessary to revisit the treaties so they reflect the reality of today?

[*English*]

Ms. Janet Henchey: I apologize. My interpretation isn't working, but I think I understood the question, which is whether I think it's necessary to revise some of our treaties.

Yes, some of them could use amendments because the law has changed over time as well. There are things missing from some of our older treaties that we can't do because they're not provided for. For example, many years ago it was the practice to list the offences that were covered by an extradition treaty. As time passes, new offences come into play that didn't exist, say, 30 years ago. In those treaties that have the listed offences, we cannot extradite for anything that isn't listed in the treaty.

More modern treaties will have a provision that allows for any offence of a certain severity to fall under the treaty. That is a much more flexible approach to the negotiation of a treaty.

Yes, we do think it's worthwhile to look at those old treaties and update them.

[*Translation*]

Mrs. Élisabeth Brière: Thank you.

You brought up double criminality. Would you mind explaining that concept a bit more?

[*English*]

Ms. Janet Henchey: Double criminality is really a fundamental base of extradition. The principle is that we will not extradite to, and other countries will not extradite to us, unless we're satisfied that whatever the person is charged with in that country would also be a crime in our country.

That is assessed in Canada under something called a conduct test, which means that we look at the evidence that has been provided to us about the crime and we ask this question: If we had that same evidence of conduct in Canada, would a criminal offence arise from that conduct?

The approach is flexible because it takes into account the fact that the way an offence is characterized in one country might be different. If you say the offence is called “this”, we might not call it the same thing, but it might still be a criminal offence here. By looking at the conduct rather than the name of the offence, we have a lot more flexibility.

[*Translation*]

Mrs. Élisabeth Brière: You also brought up evidence. As you mentioned, extradition is a very specific judicial process. Extradition proceedings are not the same as criminal proceedings under Canada's court justice system. The same is true of evidence. The usual rules and procedures of evidence do not apply.

Can you talk more about that?

Does it involve some sort of evidentiary record?

[*English*]

Ms. Janet Henchey: That's right. It is a little bit different from what you'd see in a criminal trial. What's used for evidence is something called a record of the case. The record of the case summarizes the evidence in the foreign country. It will indicate that this witness will say one thing, and that witness will say the other thing.

Instead of putting forward actual witnesses—because they're far away and maybe they don't speak the language of the proceeding in Canada—their evidence is summarized and then the record of the case is certified, usually by the prosecutor who's putting it together. This says that he is satisfied with its accuracy and that evidence is available for trial at the time, if the person is surrendered. The rationale behind it is that it's too complicated to bring in witnesses from other countries.

At one point prior to the current legislation, affidavit evidence was provided, but we discovered that a lot of countries don't even understand the concept of an affidavit, which is a sworn statement from a witness. This approach has proven to be more effective in allowing other countries to understand how to provide us with evidence.

[*Translation*]

Mrs. Élisabeth Brière: Now that we know things can be done virtually—with Zoom and the like—perhaps the rules could be changed to allow witnesses from other countries to testify.

● (1700)

[*English*]

Ms. Janet Henchey: I can't really respond to that.

There are also, of course, time changes and language differences. I think it would be complicated, but that's not for me to consider.

[*Translation*]

Mrs. Élisabeth Brière: Given the double criminality and evidence principles, do you think the individual's rights are recognized and adequately protected?

[*English*]

Ms. Janet Henchey: As I mentioned in my introduction, there are a lot of provisions in the legislation to address the rights of the individual. The whole concept behind the Extradition Act is the importance of balancing the rights of the individual against the interests of the requesting state to have them brought there for prosecution.

Yes, there are a lot of provisions that allow for the rights of the person to be protected. They can make arguments before the extradition judge. They can make arguments before the Minister of Justice.

There are no restrictions, for example, to what can be said to the Minister of Justice, so they can bring forward concerns about their health, concerns about the treatment they will get in the foreign state, concerns about treatment in prison or concerns about the length of their sentence. There is pretty much nothing they can't raise before the minister, and the minister will consider and issue written reasons for his assessment of what they have said.

That, then, goes before the court, if they choose to bring a judicial review. Everything that happens is either before a judge or before the minister and then can be appealed before the court or judicially reviewed. Then there is the opportunity to go before the Supreme Court to seek leave if they are unsatisfied with the outcome of the appeal.

There are lots of opportunities to recognize the rights of the individual.

The Chair: Thank you, Ms. Henchey.

Thank you, Ms. Brière.

Next we'll go to Monsieur Fortin for six minutes.

[*Translation*]

Mr. Rhéal Fortin: Thank you, Mr. Chair.

Good afternoon, Ms. Henchey.

As I understand it, an important phase of the process is determining whether the crime of which the individual is accused is also considered a crime in Canada. A hearing can be held to determine—

[*English*]

The Chair: I'm sorry, Monsieur Fortin. There is no translation. I'm just going to check if there is a problem with their hearing you or if there is a channel issue.

Just pause for a minute, and I'll reset your time.

Do you want to say something, and we'll just see if translation is okay? Maybe the interpreters can call the clerk on any issue.

[*Translation*]

Mr. Rhéal Fortin: I hope that the interpreters can hear me clearly and are able to interpret what I'm saying. I'm using House equipment, so in theory, they should be able to hear me clearly.

[*English*]

The Chair: Monsieur Fortin, they're saying that they are not able to interpret for online participation, as the sound quality is not there. I don't know how we're going to wrestle with this. I will maybe go to you in a subsequent round.

If you're okay with that, I'll go to Mr. Garrison while they figure it out.

[*Translation*]

Mr. Rhéal Fortin: I have a point of order, Mr. Chair.

Forgive me, but as you know, we feel strongly that bilingualism needs to be respected and that it be possible to use both official languages to take part in parliamentary proceedings. After all, Canada is a bilingual country, in theory. With all due respect, Mr. Chair, I would ask that you suspend the meeting right now if our comments can't be interpreted.

[*English*]

The Chair: Can you move your mike up a little bit?

Is that helpful to the interpreters? No.

[*Translation*]

Mr. Rhéal Fortin: In that case, I don't know where the problem is coming from. If there's anything I can do on my end, I will do so gladly. If not, the issue may have to do with the House equipment.

[*English*]

The Chair: Mr. Fortin, the problem they're having is apparently with the sound quality from your end. I know you've done everything right, but that limits their ability to translate.

While they figure it out, I'm just going to ask if I can go to Mr. Garrison and then I'll come back to you. Hopefully we can resolve this in the next six minutes, if you're okay with that.

● (1705)

[*Translation*]

Mr. Rhéal Fortin: My issue is that I don't agree with continuing the meeting while we are having interpretation problems. I'm not the only French speaker. Not only are there others around the table, but there are also francophones following today's proceedings. A problem with interpretation hurts more than just me. It hurts all francophones. If I didn't get an opportunity to speak with the witnesses during today's meeting, we would have a democracy problem on our hands.

With all due respect, Mr. Chair, I am again asking you to suspend the meeting until the interpretation problem has been fixed.

The Clerk of the Committee (Mr. Jean-François Lafleur): Good afternoon, Mr. Fortin.

We are going to try to get the problem fixed. Mr. Sarai is asking me whether we can continue the meeting in the meantime and give you back the floor to ask your questions once the problem has been fixed.

Mr. Rhéal Fortin: I just explained why I have a problem with that. I don't know whether you're able to hear me, but I said that carrying on with the meeting was disrespectful to the other francophones as well. I'm not the only French speaker taking part in today's proceedings. If it's not possible to interpret our comments, that is a problem of democracy. Furthermore, it puts the interpreters' hearing at risk. I wouldn't want to cause anyone any harm. I realize that an interpreter already had to go to hospital because of acoustic shock.

Again, I am asking that the meeting be suspended until the problem with the interpretation has been fixed.

Ms. Lena Metlege Diab (Halifax West, Lib.): Are the interpreters able to interpret what I am saying when I speak French?

I'm being told that they are. That means the problem isn't here, in the room, Mr. Fortin. They seem to think that it's an issue with your headset.

Mr. Rhéal Fortin: I'm using the headset and Surface device provided to me by the House of Commons. I'm using only House equipment, and I've never had a problem before. As you know, we met via Zoom for two years, and there was never an issue with the equipment. If my device is defective, they will have to send me a new one.

I'm not a computer technician, so I won't attempt to diagnose the problem, but I can tell you that I'm doing what I've been told to do, as we are all asked to do when participating virtually.

[*English*]

The Chair: Monsieur Fortin, I'm going to suspend for a few minutes while they resolve this.

● (1705)

_____________________(Pause)_____________________

● (1735)

The Chair: I call the meeting back to order and resume the meeting only to advise you that we will be adjourning, as we have not been able to resolve this interpretation issue. We will have to reschedule the subsequent witnesses. We will, perhaps, have to reschedule the current witnesses as well. Maybe it will be for a shorter period of time—half an hour—to get in the round of questions that remained for them. We will figure that out.

I'm sorry about that. It's a first for me. Apparently, it's a first for the clerk as well. Hopefully, we will get this situation resolved for the next time.

Thank you to the witnesses.

If the other witnesses are listening, I sincerely apologize. You have had to wait on Zoom or online for this. You are also dismissed.

Thank you.

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