Extradition and Trial Delays: Recent Developments (and Lessons?) From Canada

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SUMÁRIO

Introduction

Extradition—the formal rendition of criminal fugitives between states[1]—is an indispensable part of the cooperative machinery that underpins the international community's ongoing battle against transnational crime. The regime of transnational criminal law that emerged during the 20th century[2] has always had, as a core policy imperative, the need to ensure that offenders face criminal prosecution before domestic courts which have jurisdiction over their crimes, and which therefore require jurisdiction over their persons. As crimes and criminals cross borders, so too must the law enforcement tools that enable their apprehension, and extradition is one of the foremost tools that facilitate prosecutions.

However, even decades ago it was already described as being "fashionable"[3] to acknowledge the potential issues arising from the need to: make extradition efficient and effective, on one hand; and on the other hand, ensure that the human rights of accused persons are protected and not violated by the manner in which either the requesting state or the requested state execute their extradition processes. As extradition is a law enforcement process, administered by the state, it clearly implicates the civil/procedural rights of people targeted by investigations. The parameters of how human rights are engaged in the extradition process, and in international criminal cooperation generally, are less clear and have generated controversy.[4] It is therefore not uncommon to encounter literature[5] and case law[6] on how various human rights and rights-related obligations

1 A more complete definition is "the formal rendition of a criminal fugitive from a state that has custody (the requested state) to a state that wishes either to prosecute or, if the fugitive has already been convicted of an offence, to impose a penal sentence (the requesting state)" (Robert J. Currie & Joseph Rikhof, *International & Transnational Criminal Law*, 2nd ed (Toronto: Irwin, 2013) at 478).

2 See generally Neil Boister, *An Introduction to Transnational Criminal Law*, 2nd ed (Oxford University Press, 2018). Though it is worth noting that extradition is one of the most ancient forms of international cooperation, having emerged as early as ancient Egyptian times: Ivan A. Shearer, *Extradition in International Law* (Ocean Publications, 1971) at 5.

3 C. van den Wyngaert, "Applying the European Convention on Human Rights to Extradition: Opening Pandora's Box?" (1990) 39 ICLQ 757 at 757.

4 R.J. Currie, "The Protection of Human Rights in Transnational Criminal Law" in Neil Boister & Robert J. Currie, eds, *Routledge Handbook of Transnational Criminal Law (Routledge, 2015) 27*

5 J. Dugard & C. van den Wyngaert, "Reconciling Extradition with Human Rights" (1998) 92 AJIL 187; V.P. Nanda, "Bases for Refusing International Extradition Requests: Capital Punishment and Torture" (1999) 23 Fordham Int'l L J 1369; Joanna Harrington, "The Role for Human Rights Obligations in Canadian Extradition Law" [2005] 43 CYBIL 45

6 The classic case is *Soering v. United Kingdom* (1989) 11 EHRR 439 (ECtHR); and see *Kindler v. Canada*, Comm No 470/1991, UN Doc CCPR/C/48/D/470/1991 (1993) (UN Hum Rts Committee); *United States v. Burns*, [2001] 1 SCR 283 (Sup Ct of Canada).

are impacted by extradition, for example the right to life (in death penalty cases),[7] the prohibition against transfer to torture,[8] and so on.

A procedural rights issue that gets less attention vis-à-vis extradition is the right of an accused person to receive a fair trial within a reasonable time. Extradition is well-known to be a time-consuming process and often has impacts, minor or major, on the ability of the state to complete prosecution in a timely manner. These impacts in turn engage interesting questions, in particular what the duties of a state are in actively pursuing extradition and how delays in the process might factor into determination of whether the right is being respected.

The modest goal of this article is to examine how this issue has played out recently in the courts of a single state, Canada. Canada is party to major international human rights instruments,[9] has a constitutionalized human rights code in the form of the *Canadian Charter of Rights and Freedoms*,[10] and has a robust extradition practice based on a number of bilateral and multilateral treaty relationships.[11] Accordingly, it is our hope that survey and analysis of how Canadian law has responded to the interaction between extradition and the right to trial within a reasonable time will be of interest, and potentially instructive, as an example of state practice under international human rights law and of the kinds of practical considerations that can arise.

The Right to Trial Within a Reasonable Time

a) International Human Rights Law

A tired but true old maxim is that "justice delayed is justice denied", and the obvious good sense of this truism is reflected in the fact that trial within a reasonable time is a feature of all of the major international human rights regimes. Of primary concern here is the ICCPR, to which Canada is a party along with

7 Bharat Malkani, "The Obligation to Refrain from Assisting the Use of the Death Penalty" (2013) 62 ICLQ 523.

8 J.G. Johnston, "The Risk of Torture as a Basis for Refusing Extradition and the Use of Diplomatic Assurances to Protect Against Torture After 9/11" (2011) 11 ICLR 1.

9 Most relevant here is the fact that Canada is party to the *International Covenant on Civil and Political Rights* (1966) 999 UNTS 171 (ICCPR). A complete list of human rights treaties to which Canada is party can be found on the Government of Canada website, at the following URL: < https://www.canada.ca/en/canadian-heritage/services/canada-united-nations-system/treaties.html >.

10 *Charter of Rights and Freedoms*, Part 1 of the *Constitution Act*, 1982, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11 [*Charter*].

11 See generally Seth Weinstein & Nancy Dennison, *Prosecuting and Defending Extradition Cases* (Emond Montgomery, 2017); Gary Botting, *Canadian Extradition Law Practice*, 5th ed (LexisNexis, 2015).

the majority of states in the world.[12] Article 14(3)(c) of the treaty provides that, "In the determination of any criminal charge", individuals have the right "to be tried without undue delay."[13] Similarly, the *European Convention on Human Rights* guarantees criminal trials "within a reasonable time",[14] with identical wording in article 47 of the *Charter of Fundamental Rights of the European Union*,[15] article 7 of the *African Charter on Human and Peoples' Rights*,[16] and articles 7(5) and 8(1) of the *American Convention on Human Rights*.[17]

The right to trial within a reasonable time is of fairly ancient origin, dating back as early as the *Magna Carta*, and has been referred to as "a basic component of civilized legal systems".[18] In all of the human rights instruments it is contextually included as part of an overall package of fair trial rights, and the policy rationale which underpins it is quite clear. As Bassiouni notes, it "limits infringements on personal freedom caused by pretrial and trial detention", is "crucial to the guarantee of a fair trial because undue delays may cause the loss of evidence or the fading of the memories of the witnesses," and "seeks to minimise the emotional strain on the accused caused by pending criminal proceedings".[19] As regards article 14(3)(c) of the ICCPR specifically, the UN Human Rights Committee has stated:

> The right of the accused to be tried without undue delay, provided for by article 14, paragraph 3 (c), is not only designed to avoid keeping persons too long in a state of uncertainty about their fate and, if held in detention during the period of the trial, to ensure that such deprivation of liberty does not last longer than necessary

12 The ratification status of the ICCPR (which as of October 2018 had 172 parties) can be found on the website of the United Nations High Commissioner on Human Rights, at the following URL: < http://indicators.ohchr.org/ >.

13 This "without undue delay" formulation also appears in the Statute of the International Criminal Tribunal for the Former Yugoslavia (art. 21(4)(c)), the Statute of the International Criminal Tribunal for Rwanda (art. 20(4)(c)) and the Rome Statute of the International Criminal Court (art. 67(1)(c)). See Brian Farrell, "The Right to a Speedy Trial Before International Criminal Tribunals" (2003) 19 South African J Hum Rts 98.

14 ETS No 5 (1950). This protection actually encompasses both civil and criminal trials, though it is dealt with differently as regards each; see Frédéric Edel, *Human rights files no. 16: The length of civil and criminal proceedings in the case law of the European Court of Human Rights, 2nd ed (Council of Europe Publishing, 2007).*

15 Official Journal of the European Union, C 326 (26 October 2012).

16 OAU Doc CAB/LEG/67/3, rev. 5 (27 June 1981).

17 OASTS No 36 (22 November 1969).

18 Frank Addario and Megan Savard, "The Fast and the Furious 11(b): Is the Speedy Trial a Dying Franchise?" (2017) 36 Adv. J. 20.

19 M. Cherif Bassiouni, "Human Rights in the Context of Criminal Justice: Identifying International Procedural Protections and Equivalent Protections in National Constitutions" (1999) 3 Duke J Comp & Int'l L 235 at 285.

> in the circumstances of the specific case, but also to serve the interests of justice. What is reasonable has to be assessed in the circumstances of each case, taking into account mainly the complexity of the case, the conduct of the accused, and the manner in which the matter was dealt with by the administrative and judicial authorities. In cases where the accused are denied bail by the court, they must be tried as expeditiously as possible. This guarantee relates not only to the time between the formal charging of the accused and the time by which a trial should commence, but also the time until the final judgement on appeal. All stages, whether in first instance or on appeal must take place "without undue delay".[20]

It is, of course, the responsibility of the state, via its criminal prosecution and judicial systems, to ensure that the right is upheld, and at least under the ICCPR the burden of proof is on the state to justify delay, particularly on the basis of the complexity of the case.[21] However, it is clear that a determination of whether a trial has proceeded within a reasonable time can consider the conduct of the accused person. The Human Rights Committee, for example, has examined whether an accused's decision to change lawyers contributed unnecessarily to the delay,[22] and in one case held that the accused's deliberate evasion of the authorities meant that most of the delay was not attributable to the state.[23] Similarly, the European Court of Human Rights incorporates the accused's conduct as part of its overall consideration of how delay impacts upon the "reasonableness" of the time the prosecution consumed.[24] It has noted that while there is no obligation on the accused to cooperate with the authorities to advance the prosecution or to avoid any of the resources provided to him/her under the national law, a "determination to be obstructive" can count against him/her,[25] as can other kind of delays including failure or lateness of filing pleadings, absconding from the jurisdiction, failure to appear, bogus filings, etc.[26] The upshot, then, is that unnecessary delay by the accused does not count against the state, in terms of how long the clock of delay has run. As will be explored below, this is

20 UN Human Rights Committee, *General Comment No 32, UN Doc CCPR/C/GC/32 (2007), para. 35.*

21 Smantser v. Belarus, UN Doc No CCPR/C/94/D/1178/2003 (2008).

22 M. and B. Hill v. Spain, UN Doc A/52/40 (1997), para. 12.4.

23 Pavlovna Smirnova v. Russian Federation, UN Doc No C/81/D/712/1996 (1996).

24 Case of Kemmache v. France, judgment of 27 November 1991, Series A, No. 218, p. 20, para. 50; Frydlender v. France [GC], 27 June 2000, §43.

25 Case of Yagci and Sargin v. Turkey, judgment of 8 June 1995, Series A, No. 319-A, p. 21, para. 66.

26 Edel, above note 14 at 51-57.

an important factor in Canadian proceedings, and with particular regard to extradition has produced interesting results.

b) Canadian Law

Paragraph 11(b) of the *Charter* states that "any person charged with an offence has the right […] to be tried within a reasonable time", which is indeed similar to the protections offered by the *International Covenant on Civil and Political Rights* or the *American Bill of Rights*.[27] Some would argue that this paragraph of the *Charter* is highly misunderstood and that it has few defenders,[28] and it has certainly been the locus of much procedural and constitutional wrangling since the introduction of the *Charter* in 1982.

The framework to be applied to determine if this right has been violated has received constant attention from the Supreme Court of Canada over the years since 1986, when the Court first considered this provision.[29] Without reviewing all the decisions from the Supreme Court on this matter, three major periods can be identified and detailed. First, some general considerations must be addressed.[30]

As per the text of the provision, for the protection to be engaged the individual must be charged with an offence, meaning that an information has been sworn against him or that a direct indictment has been laid.[31] Furthermore, the term "offence" has been interpreted to mean "public offences involving punitive sanctions" [32]. This means that the right to be tried within a reasonable time does not apply to all court proceedings.[33]

The first period in the Supreme Court literature on this question starts with *Mills*, *Rahey*[34], and *Conway*[35]. While the Court was not unanimous on this matter,

27 Only one year after the Charter was adopted, the Canadian protection against unreasonable delay was deemed to be similar to the American one, with some minor differences, most notably because the pre-indictment delay can be considered in the United States, but not in Canada. Walter S. Tarnopolsky, "The New Canadian Charter of Rights and Freedoms as Compared and Contrasted with the American Bill of Rights" (1983) 5 Hum. Rts. Q. 227, at 240.

28 Frank Addario and Megan Savard, "The Fast and the Furious 11(b): Is the Speedy Trial a Dying Franchise?", (2017) 36 Adv. J. No. 1 20.

29 *R. v. Mills*, [1986] 1 S.C.R. 863 [hereinafter *Mills*].

30 See also Steve Coughlan and Robert J. Currie, "Sections 9, 10 and 11 of the Canadian Charter" (2013) 62 S.C.L.R. (2d) 143, at 184-187, for a pre-*Jordan* account.

31 *R. v. Kalanj*, [1989] 1 S.C.R. 1594.

32 *R. v. Wigglesworth*, [1987] 2 S.C.R. 541, at 554.

33 Couglan and Currie, *above*, note 30, at 185-186.

34 *R. v. Rahey*, [1987] 1 S.C.R. 588 [hereinafter *Rahey*].

35 *R. v. Conway*, [1989] 1 S.C.R. 1659 [hereinafter *Conway*].

the principles were eventually harmonized in *Smith*[36]. In that decision, after having discussed issues about jurisdiction, the Supreme Court confirmed that a fifteen-month delay between the laying of the charge and the beginning of the preliminary inquiry was unreasonable. To reach this conclusion, the Court used a four-step analysis that considered, "(1) the length of the delay; (2) the reason for the delay, including limits on institutional resources and the inherent time requirements of the case; (3) waiver of time periods; and (4) prejudice to the accused."[37] One year later, in *Askov*[38], the Court was somewhat divided again on this matter, most notably on the question of the societal interest of seeing trials held within a reasonable time. The Court also suggested that a six to eight months guideline, from committal to the start of the trial, "might be deemed to be the outside limit of what is reasonable".[39]

The *Smith* test was later modified, or rather refined, in *Morin*[40], which marks the start of the second period of the Supreme Court's analysis of paragraph 11(b) of the *Charter*. In *Morin*, the Court confirmed that society had indeed an interest, albeit secondary, "in seeing that the least fortunate of its citizens who are accused of crimes are treated humanely and fairly, [and that] trials held promptly enjoy the confidence of the public".[41] The Court also recognized that the interests of the accused will sometime clash with the societal interest in law enforcement, most importantly in case of serious crimes[42].

Although the *Smith* test was preserved in its essence by *Morin*, some corrections were implemented by the Court, mainly because the *Askov* guidelines had caused some serious problems in the criminal court system. The test was thus modified and required the balancing of four factors: "(1) the length of the delay; (2) waiver of time periods; (3) the reasons for the delay, including (a) inherent time requirements of the case, (b) actions of the accused, (c) actions of the Crown,[43] (d) limits on institutional resources, and (e) other reasons for delay; and (4) prejudice to the accused."[44] While the application of the test remained discretionary, the Supreme Court definitely aimed to harmonize the various court decisions on this subject. Furthermore, the *Askov* guidelines were modified and changed to a

36 *R. v. Smith*, [1989] 2 S.C.R. 1120 [hereinafter *Smith*].

37 *Smith*, *ibid*., at 1131.

38 *R. v. Askov*, [1990] 2 S.C.R. 1199 [hereinafter *Askov*].

39 *Ibid*., at 1240.

40 *R. v. Morin*, [1992] 1 S.C.R. 771 [hereinafter *Morin*].

41 *Morin*, *above*, note 40, at 786.

42 *Ibid.*, at 787.

43 In Canada, as in the British system, both the federal and provincial prosecution services are referred to as "the Crown".

44 *Morin*, above note 40, at 787-788.

period between eight and ten months for provincial courts[45]. However, the Court did stress the importance that these guidelines are flexible and to be adapted to the circumstances of the various provinces and regions in Canada[46].

Some seventeen years after *Morin*, the Supreme Court once again addressed the issue of unreasonable delays in *Godin*[47]. In *Godin*, the Supreme Court unanimously held that prejudice could be inferred from the delay and that Justice Sopinka had been right to state in *Morin* that "[t]he longer the delay the more likely that such an inference will be drawn".[48] While *Godin* did not modify the applicable test, it attempted to shift the attitude towards prejudice in a manner favourable to the accused.[49]

More recently, amid rising dissatisfaction with delays in criminal cases, a complete overhaul of the parameters to be applied was set out by the Supreme Court in *Jordan*[50], which marks the start of the third and last period in the Supreme Court's analysis of paragraph 11(b) of the *Charter*. The majority in *Jordan* noted that the application of the *Morin* framework had caused some major problems in the criminal justice system "contributing to a culture of delay and complacency towards it".[51] Indeed, the criminal justice system had been plagued by inefficient and unnecessary procedure, causing some major delays in the system, but also a general sentiment that these delays were inevitable and justifiable. The majority also found that the existing framework was too unpredictable and that the treatment of the prejudice aspect of the test was confusing. Thus, a new approach was put forward.

This new framework is based on a presumptive ceiling of 18 months for provincial courts and 30 months for superior courts. This delay represents the total delay from the laying of the charge to the actual or anticipated end of trial, minus the defence delay (which is composed of the delay waiver by the defence and any delay caused solely by the defence in an illegitimate way[52]). If this delay exceeds the presumptive ceiling, the Crown will bear the onus of proving that the delay is nonetheless reasonable by establishing the presence of exceptional

45 *Ibid.*, at 799. In Canada, even though all criminal law is federal, jurisdiction over criminal offences is divided between the provincial courts (which are constituted by the provinces) and the superior courts (which are constituted by the federal government but administered by the provinces). A more narrow range of more serious offences, including all jury trials, are held in the superior courts.

46 *Id*., at 799-800.

47 *R. v. Godin*, [2009] 2 S.C.R. 3 [hereinafter *Godin*].

48 *Ibid*., at par. 31, citing *Morin*, *above*, note 40, at 801.

49 Coughlan and Currie, *above*, note 30, at 193.

50 *R. v. Jordan*, [2016] 1 S.C.R. 631.

51 *Ibid*., at para. 29.

52 *Id*., at para. 61-65.

circumstances[53], which could arise from a "discrete event" like an extradition proceeding[54] or from a particularly complex case[55]. *A contrario*, if the delay is less than the presumptive ceiling and the accused still believes it is unreasonable, he will need to establish that fact. He will be able to do so by proving that he tried to expedite the procedures and that the case should not have taken so long.[56] Finally, *Jordan* also created a transitional exceptional circumstance[57], "intended to blunt the impact of the new time limits and account for reasonable reliance on the previous delay jurisprudence".[58]

By establishing a presumptive ceiling, the *Jordan* framework permanently installs the question of prejudice into the analysis, as prejudice "informs the setting of the presumptive ceiling".[59] Thus, once the ceiling is contravened, it is fair to presume that the accused's rights, notably his liberty and security rights, were infringed. The *Jordan* framework has had major consequences across Canada[60], and has been used in many cases where stays of proceedings were ordered[61]. However, in the long term, it is hoped that *Jordan* will have reduced overall delays, resulting in fewer stays under paragraph 11(b).[62]

The importance of the mentality change intended to be wrought by *Jordan* was further stressed in *Cody*[63], where the Court tried to put critiques of the *Jordan* framework to rest[64]. The Court, unanimously this time, refused to modify

53 *Id*., at para. 48.

54 *Id*., at para. 72 and 81.

55 *Id.,* at para. 71.

56 *Id*., at para. 49.

57 *Id.*, at para. 95-102. See also *R. v. Williamson*, [2016] 1 S.C.R. 741 (rendered at the same time as *Jordan* and providing an application of the transitional exceptional circumstance).

58 Matthew R. Gourlay, "After Jordan: The Fate of the Speedy Trial and Prospects for Systemic Reform" (2017) 36 Adv. J. 22, at para. 16.

59 *Jordan*, *above*, note 51, at para. 54.

60 It is said that about 6% of all charges completed in provincial court and 15% of all charges completed in superior court in 2015/2016 are over the presumptive ceiling established in *Jordan*. While this statistic does not necessarily mean that a stay of proceeding was granted or even requested, it does show that the criminal justice system will need to adapt to the *Jordan* framework. Ashley Maxwell, Canadian Centre for Justice Statistics, Statistics Canada, "Adult criminal court processing times, Canada, 2015/2016" (February 2018). ISSN 1209-6393.

61 For an application of *Jordan* in the province of Quebec see: Laura Ellyson, "Revue jurisprudentielle : les suites de l'arrêt *Jordan* au Québec", *Repères*, June 2017, EYB2017REP2253. For an application in the province of Ontario, see: Cristin Schmitz, "'Robust' approach to timely trials, says defence lawyer" (2016) The Lawyers Weekly, Vol. 36, No. 22. See also Judge Wayne Gorman, "R. v. Jordan: Its Effect on Cases Already in the System" (2017) 64 C.L.Q. 240, for a list of cases applying the *Jordan* framework.

62 Steve Coughlan, "Early Patterns in the New Section 11(b) Framework" (2016) 32 CR-ART 386, at 3.

63 *R. v. Cody*, [2017] 1 S.C.R. 659.

64 And indeed, the *Jordan* framework was extensively critiqued. See *inter alia* Leonid Sirota, "Was the Supreme Court Right to Change the Law on the Right to a Speedy Trial" (2017) 26 Const. F. 1.

the *Jordan* framework, stating that a Supreme Court precedent cannot be lightly discarded or overruled[65]. *Cody* also brought some additional considerations about defence delay,[66] most notably that not every delay caused by the defence must be deducted under this component[67]. Effectively, an accused has the right to make full answer and defence, which allows him to take legitimate action to respond to the charges laid against him. The only defence delay that is deductible is that which: "(1) is solely or directly caused by the accused person; and (2) flows from defence action that is illegitimate insomuch as it is not taken to respond to the charges."[68] The determination of what consists a legitimate action, or inaction, is a highly discretionary decision to be made by the first instance judge, whose finding is deserving of deference upon appellate review.[69] The Court in *Cody* also stresses the importance of the proposition that "[d]efence counsel may still pursue all available substantive and procedural means to defend their client. What defence counsel are not permitted to do is to engage in illegitimate conduct and then have it count towards the *Jordan* ceiling".[70]

Since *Cody*, it seems that the efforts have been focused on applying the new framework to the criminal justice system and on resolving the issues that arose from its application[71] including, among others, the classification of the delay caused by the decision rendering process[72] or different strategies to render the criminal justice system more efficient[73].

65 *Id.*, at para. 3, citing *Canada (Attorney General) v. Bedford*, [2013] 3 S.C.R. 1101, at para. 38 and *Carter v. Canada (Attorney General)*, [2015] 1 S.C.R. 331, at para. 44.

66 Christopher Sherrin, "*R. v. Cody*: What does *Cody* add to *Jordan*?" (2017) 37 CR-ART 289.

67 *Cody*, *above*, note 63, at para. 29.

68 *Ibid*., at para 30.

69 *Ibid.*, at para. 31.

70 *Ibid.*, at para. 34.

71 See on this subject: Steve Coughlan, "Patterns in the *Jordan* Case Law One Year after *Cody*" (2018) 42 CR (7th) 342 and Christopher Sherrin, "Understanding and Applying the New Approach to Charter Claims of Unreasonable Delay" (2017) 22 Can. Crim. L. Rev. 1.

72 Oliver Fitzgerald, "*Jordan* and Classifying Decision Delay: A Need for Guidance", (2017) 40 CR-ART 72.

73 Chris de Sa, "Understanding *R. v. Jordan*: A New Era for 11(b)", (2017) ADGN/RP-255, at para. 17; Gourlay, *above*, note 58, at para. 27 and following; Coughlan, *above*, note 62; Addario and Savard, *above*, note 28, at 3.

Extradition in Canadian Law

A brief word should be said about Canadian extradition law.[74] Canada tends to administer its inter-state extradition relations by way of bilateral treaty, though it is also party to a number of criminal suppression conventions that contain extradition obligations, as well as to "reciprocal" arrangements with foreign states (typically Commonwealth countries).[75] The treaty obligations are implemented, and the law administered, under the *Extradition Act*,[76] which is a complete code of law and procedure.

While the bulk of extradition law in Canada involves extraditing individuals from Canada, most relevant here is the issue of extradition to Canada. The determination to seek extradition is made by prosecutors at either the provincial or federal level, and requests are made with the assistance and through the office of the International Assistance Group (IAG), a specialized department of the federal department of Justice which acts as the delegate of the powers of the Minister of Justice in extradition matters. Pursuant to Part 3 of the *Extradition Act*, the IAG is empowered to communicate with the authorities of foreign states from which Canada seeks extradition and make formal diplomatic requests for surrender of individuals. That said, Canadian police and prosecutors do communicate with their foreign counterparts via informal networks, as is increasingly typical in international practice, and references in the case law to what information was known, obtained (or failed to be obtained) by "the Crown" may mask a complex network of intra- and inter-governmental information gathering and exchange.

Extradition in s. 11(b) Proceedings

a) The "*Prince* Principles"

Relative to the overall amount of criminal litigation in Canada, extradition is an infrequent process. Canada extradites individuals to foreign states far more frequently than it seeks extradition, and the 11(b) cases involving extradition are by no means numerous; the decisions revealed by our research are mostly from 2000 or later. Nonetheless, there is an interesting body of case law that has developed, which both pre- and post-dates the Supreme Court's *Jordan* framework.

74 See generally Currie & Rikhof, above note 1, c. 9; Weinstein, above note 11; Botting, above note 11.

75 Justice Canada, "Extradition Requests by Canada", online: < https://www.justice.gc.ca/eng/cj-jp/emla-eej/bycan-parcan.html >.

76 S.C. 1999, c. 18.

In the recent case of *R. v. Prince*,[77] Justice Suhail Akhtar of the Ontario Superior Court of Justice heard and dismissed a defence motion for a stay of proceedings under s. 11(b) due to Crown delay. The decision is unremarkable except for two features: first, it is one of the reasonably unusual cases where an extradition process figured into the 11(b) analysis; and second, Justice Akhtar surveyed some of the relevant case law and produced a tidy 4-point distillation of the relevant considerations when extradition is considered in the 11(b) context, as follows:

> The authorities disclose a set of principles that must be adhered to in analysing the existence of a legitimate s. 11(b) violation. First, there is no obligation on an accused person who has left the jurisdiction to surrender themselves to the authorities or otherwise facilitate their return to Canada. Second, if the authorities are fully aware of an accused's location outside Canada, it is incumbent upon them to act as expeditiously as possible to bring the accused to trial. Third, if an accused person deliberately flees the jurisdiction and makes attempts to conceal his whereabouts or otherwise frustrate the Crown's ability to extradite him or her their actions are counted as defence delay in the s. 11(b) context. Fourth, where delay is caused by the need to extradite an accused, this may constitute a discrete event: *Jordan*, at paras. 72, 81.[78]

We will use this list as the focal point of our discussion below, tracing how these principles are or are not reflected in the case law, even though there might be subsets of criteria that we encounter in the case law, and even though we might not agree entirely with them as "principles". As a prefatory point, it is worth recalling the questions that *Jordan* compels in these cases involving extradition, and to which the Prince principles are geared: in adding up the period of delay (usually measured in months), what kinds of conduct are counted against the Crown? What kinds of delay will be attributed to the defence and thus subtracted from the Crown's total? And what situations are properly treated as "discrete events", out of the Crown's control and thus not counted as part of the delay?

77 2018 ONSC 3033.

78 *Ibid*., at para 34.

b) Principle 1: Accused Need Not Surrender or Facilitate His/Her Own Return

The first principle is well exemplified in *R. v. MacIntosh*[79]. In this decision, the Nova Scotia Court of Appeal stressed the importance of the fact that "there is no duty on an accused to bring him or herself to trial".

In *MacIntosh*, the accused had moved to India before charges were laid against him and was not made aware of their existence until a few years later. When he was indeed made aware of the charges, he informed the police officer in charge of his file that he had no intention of returning to Canada. Eventually, the accused was extradited some twelve years after the charges were laid, after a lengthy extradition process.

The Court of Appeal concluded that the trial judge had made a mistake by deciding that the accused had the responsibility of coming back to Canada and that he could not hold the Crown responsible for the delay, having caused it himself. To reach this conclusion, the Court of Appeal relied on the decision *R. v. Beason*[80] and most importantly on *Askov*, where Justice Cory wrote: "[it must be remembered that it is the duty of the Crown to bring the accused to trial. It is the Crown which is responsible for the provision of facilities and staff to see that the accused persons are tried in a reasonable time."[81] Contrary to what happened in *R. v. R.E.M.*[82], the accused in *MacIntosh* did not seek to avoid prosecution by moving out of the country. Thus, he was not responsible for the delay and a stay of proceedings was warranted in his case.[83]

The Court in *MacIntosh* held that the inaction of the accused can only be relevant on the prejudice aspect of the 11b) inquiry[84]. However, this is less relevant now because of the new *Jordan* framework that does not rely on actual prejudice, rather on a presumption of prejudice.

c) Principles 2 & 3: Crown Must Seek Accused's Return… Unless Accused Has Fled or is Avoiding Capture

In a way, the second of the *Prince* principles is a corollary of the first: since it is the duty of the state to bring people to trial and to ensure that happens within

79 *R. v. MacIntosh*, 2011 NSCA 111, affirmed 2013 SCC 23 [hereinafter *MacIntosh*].

80 *R. v. Beason* (1983), 7 C.C.C. (3d) 20, [1983] O.J. No. 3151 (Ont. C.A.).

81 *Askov*, *above*, note 38, at 1225.

82 *R. v. R.E.M.*, 2007 BCCA 154.

83 See also *R. v. Singleton*, 2014 BCCA 232, at para. 77.

84 *MacIntosh*, *above*, note 79, at para. 50.

a reasonable time, then logically the Crown must seek extradition or make other attempts to facilitate the accused's return. Yet Justice Akhtar's precise wording ("if the authorities are fully aware of an accused's location outside Canada, it is incumbent upon them to act as expeditiously as possible to bring the accused to trial") correctly reflects the fact that this duty is not absolute, but rather must simply be exercised with a degree of diligence. If the Crown has proceeded with reasonable dispatch, then the extradition phase of a case is either treated as a "discrete event" and as neutral, or can be used by the Crown to justify any time by which the presumptive ceiling has been exceeded.

A finding that extradition-related delays were "unreasonable" stems from situations where the Crown either unreasonably did not pursue extradition, or failed to do so in a reasonable manner. *R. v. Arsenault*[85] is a good example of the former kind of case, which typically results in a stay being granted. The accused moved from Canada to South Korea for work purposes, at a time when he was (unbeknownst to him) under investigation. He was there for nearly eight years, until the government of Canada revoked his passport (at the request of the police) and he returned to Canada, where he was immediately arrested. The record was clear that despite knowing where the accused was the Crown never sought extradition, and the failure to do so was primarily based on speculation by the police that the accused might return on his own accord or would be deported from South Korea.[86] Even the decision to revoke his passport was only made after seven years had passed. All of this showed lack of reasonable diligence on the part of the Crown. The court pointedly noted that even though the accused became aware towards the end of the period that a warrant had been issued for his arrest, he was under no obligation to return.

Similarly, in *R. v. Gill*[87] the accused had moved to India in 2003 and was charged in 2004. Aside from recording the arrest warrant in the Canadian Police Information Centre database, the Crown took no action until the accused returned to Canada for family business in 2013, when he was arrested. The court attributed the entire delay to the Crown's inaction: despite there being a Canada-India extradition treaty, and despite the fact that the Crown knew exactly where the accused was located and was in touch with the Indian authorities, no effort had been made to have him extradited. Nor did they even revoke his passport, which he renewed twice during the decade he was in India.

In *R. v. Lee*,[88] by contrast, the police pursued a strategy of attempting to convince the accused to return to Canada from Mexico of her own accord rather

85 2013 ONSC 5675.

86 *Ibid*., paras. 28-33.

87 2014 BCPC 208.

88 2015 SKCA 53.

than seeking extradition, and the Court of Appeal found this to be a reasonable approach. This finding rested on the combination of several facts, in particular that: the police did not know where in Mexico the accused was located and she refused to disclose this; despite knowing of the charges against her she made many demands of the Crown and the police over the course of several months of communication; and she continually hinted that she would be returning to Canada of her own accord. In such a case, the Court noted, "the Crown must exercise reasonable diligence, but it does not need to undertake immediate extradition proceedings once a person is charged with an offence."[89]

The facts of cases where the Crown did seek extradition but proceeded "unreasonably", with a lack of diligence, tend to reflect mostly bureaucratic inertia and delay, sometimes verging on apparent incompetence. *MacIntosh*[90] is the most notorious of these in Canadian history. Over a decade's worth of delay in the extradition process led to the accused's convictions for sexual assault against children being vacated by the Nova Scotia Court of Appeal, on the basis that the trial judge should have granted the accused's motion for a stay under s. 11(b). A stay in the face of such heinous charges led to a significant public uproar that sparked internal governmental inquiries; in the end, reports were released by both the government of the province of Nova Scotia[91] and the government of Canada[92] that detailed delays in the process even beyond what had been found in the case itself. The picture painted in the Court of Appeal's judgment and in the government reports is not flattering to any of the Crown actors involved. The Crown knew exactly where the accused was, at all relevant times, yet inexplicably delayed extradition for years. The accused traveled freely to and from Canada. The reviews of the process display periods of inertia, lack of knowledge and unexplained delay, including an oddly unsuccessful attempt to revoke the accused's passport.[93]

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89 *Ibid*., at para. 57.

90 Above note 79.

91 Public Prosecution Service of Nova Scotia, *Report to the Attorney General of Nova Scotia: The Prosecution of Ernest Fenwick MacIntosh (2013), available online at: < https://novascotia.ca/pps/publications/Report-to-Attorney-General-re-Ernest-Fenwick-MacIntosh-Prosecution.pdf >.*

92 Justice Canada, *Federal Involvement in the Case of Ernest Fenwick MacIntosh (2013), available online at: < https://www.justice.gc.ca/eng/rp-pr/other-autre/macintosh/index.html > Both government reports refer to an internal inquiry that was done by the Royal Canadian Mounted Police (RCMP) regarding its involvement in the case, but that report does not appear to have been made public.*

93 As a postscript, after his case was stayed, MacIntosh left Canada for Asia again, only to be tried and imprisoned in Nepal for sexual abuse of young boys. He served approximately half of his 7-year sentence, at which point he was released (reportedly due to age and illness) and is thought to have returned to Canada: Nancy King, "Strait area man convicted of sexually assaulting boy released from Nepalese prison," *Chronicle Herald (1 October 2018), online: < https://www.thechronicleherald.ca/news/local/strait-area-man-convicted-of-sexually-assaulting-boy-released-from-nepalese-prison-246013/ >.*

In *R. v. Barra and Govindia*,[94] Crown inaction on drafting affidavits required for extradition resulted in 4 months of an 11-month period being treated as unreasonable delay. The motions judge held that periods of time had gone by where drafting was simply not being done, and for which there was no explanation offered by the Crown. However, the 4-month delay was not sufficient to render the Crown's overall delay "unreasonable" and the stay was not granted.

Some cases, however, demonstrate that there are limits on how far the courts will expect the Crown to go in its attempts to engage extradition. In *R. v. Singleton*[95] the British Columbia Court of Appeal reviewed Canadian and U.S. case law, including *MacIntosh*, and explained the standard of diligence expected of the Crown as follows:

> while the state has an obligation to act with reasonable diligence to bring an accused who is outside of Canada to trial within a reasonable time, whether that obligation has been met is to be determined contextually, considering the investigative avenues available to the police force or investigating agency involved. When an accused is in a foreign country from which he or she can be extradited and his or her whereabouts are known, Canadian prosecution officials are obligated to pursue extradition in a reasonable and timely manner. If they fail to do so then, as in *MacIntosh*, the ensuing delay will be attributed to the Crown.[96]

In *Singleton* the accused, an American, had returned to the U.S. before charges were laid against him in Canada. After the accused was charged in 1997, a new police officer was assigned to the investigation and this officer spent several months on the case in 1998, determining that the accused was connected to a town in Texas. Local authorities indicated that the accused had been in that town but had left for parts unknown, and the Canadian police officer turned his attention to another case, for four years. Returning to the Singleton case in late 2002, he found a reference to the accused's sister in existing file materials and managed to find her through an internet search; she provided information about the whereabouts of the accused, who had been living openly under his own name in Kansas. An extradition request took eight months to draft and was sent a month later.

94 2017 ONSC 6008.

95 Above note 83.

96 *Ibid*., at para. 96.

At trial after his extradition (and more procedural wrangling), the accused unsuccessfully applied for a stay under 11(b), based chiefly on the four-year gap in the investigation between 1998 and 2002. The Court of Appeal held that the trial judge had erred in attributing this time to the accused on the basis that he did not voluntarily return to Canada to face the charges, applying *Prince* principle #1, discussed above. However, the issue was what was required of the Crown "when an accused is outside of Canada and his or her whereabouts are unknown".[97] Here, the Court held, the police having learned in 1998 that the accused had left the Texas town and with no idea where he had gone, it was reasonable to suspend the investigation: "Attempting to locate someone in a country as vast as the United States without any idea of where to look is akin to trying to find the proverbial needle in a haystack."[98] The police had no "leads" until the investigator spoke to the sister in 2002, and it was only at this time they had any idea where to look, after which they proceeded with reasonable diligence to have him extradited.

There is certainly some force to the point that in a situation where the police have exhausted their current evidence and cannot practically obtain any new "leads", a period of inactivity may be reasonable. *Singleton* is dubious on its facts, however, in that the investigator had information about the accused's sister in 1998 but did not follow it up until 2002. The officer testified that "the RCMP computer system available to him in 1998 did not permit Internet searches. He was not asked when such searches could be conducted on that system", seemingly to explain why he did not seek out the sister in 1998. This is faintly ridiculous, given that as most Canadian adults would recall, "Internet searches" were widely available in 1998 – to university students, administrative assistants, lawyers, library patrons and even criminals. The Court of Appeal strained this point even further by remarking, "there is no evidence as to when the information that led Sergeant Quenneville to [the sister] became accessible on the Internet,"[99] suggesting that the burden of proof was in fact on the accused to establish that this constituted lack of diligence.[100] One is left with the impression that the Crown is given an extremely generous amount of leeway.

A similar approach is seen in *Prince*[101] itself where the accused, who was being investigated by Toronto police, went to Jamaica in June 2014, prompting the Crown to charge him and issue an arrest warrant in September 2014. In June 2015 Jamaican authorities contacted Canadian authorities, indicating that

97 *Ibid*., at para. 78.

98 *Ibid*., at para. 99.

99 *Ibid*., at para. 102.

100 *Ibid*., at para. 101.

101 Above note 77.

the accused was in Jamaica and that they were prepared to arrest him on the Canadian warrant. Extradition proceedings ended when the accused voluntarily returned to Canada for trial.

On his 11(b) motion, the accused argued that the September 2014-June 2015 period amounted to unreasonable delay, given that the accused was known to be in Jamaica (which is, one might remark parenthetically, not a huge country). Justice Akhtar accepted what is in our view a somewhat lame Crown argument, to the effect that the investigating officer "knew that the applicant had travelled to Montego Bay but did not know if he was still in Jamaica or if he had travelled elsewhere", and that the accused was known to sometimes travel between Canada and Jamaica, which added to the uncertainty.[102] It seems only reasonable that the Crown might nonetheless have made some inquiries with Jamaican authorities – particularly since those same authorities a) clearly knew about the Canadian arrest warrant, and b) eventually contacted the Crown to flag the accused's presence.

Justice Akhtar based his finding on the perfectly reasonable proposition that "[t]he police have a limited budget and resources. Imposing an obligation that would require them to conduct international searches for an accused who has gone missing is both impractical and undesirable", in support of which he cited *Singleton*.[103] The police, he ruled, "did not know how or where to find the applicant".[104] Yet the alleged impracticability of seeking out the accused in *Prince* seems even more dubious than in *Singleton*; "conducting international searches" might very well have been an unreasonable burden for the Crown, but surely a phone call to Jamaican authorities to at least attempt to locate a particular individual *who was known to have gone there* would not have been too onerous. If it was possible that he had left Jamaica for Canada, a simple passport check would have revealed this.

As the third *Prince* principle suggests, the judicial tone of sympathy towards Crown interests warms up completely in cases where the accused has fled the jurisdiction to avoid criminal proceedings or "makes attempts to conceal his whereabouts or otherwise frustrate the Crown's ability to extradite him or her".[105] These cases are interesting because their results appear to turn on judicial findings regarding the accused's subjective intention to actually evade prosecution. Intuitively, this makes a certain amount of sense, since it is this kind of delay that cannot reasonably be said to the be fault of the Crown; so long as the Crown is proceeding with reasonable diligence, then delay caused by the accused's

102 *Ibid*., at para. 40.

103 *Ibid*., at paras. 41-42.

104 *Ibid*., at para. 40.

105 *Prince, above note 77.*

deliberate actions cannot be said to be the responsibility of the state. As Justice Sopinka wrote in *Morin*, "(a)ction or non-action by the accused which is inconsistent with a desire for a timely trial is something that the court must consider."[106] The devil, of course, is in the details of the cases.

R. c. Terk[107] is a fairly clean application of this principle. Aware that he was under investigation for fraud, Terk returned to his home country of Israel. He was charged some months after but an extradition request foundered because Israel does not extradite its citizens. Years later, he returned to Canada and was eventually arrested. The Court of Appeal dismissed Terk's 11(b) motion on the basis that he had fled Canada to escape prosecution. It rejected his suggestion that the delay was attributable to the Crown because they should, instead of attempting extradition, have tried to convince him to return voluntarily:

> Imposing such an obligation would certainly not be without consequences; we could even imagine cases where the accused, informed by telephone, letter or otherwise, about charges against him in Canada, would take advantage of this to move or change his identity, thereby rendering any future extradition proceedings much less effective.[108]

A similar case is *R. v. White*[109] where the accused fled to the U.S. in 1986, when he became aware he was being investigated for tax evasion, a non-extraditable offence (with which he was charged in 1987). With the help of various U.S. agencies, the Canadian police eventually tracked the accused's location to California, though this was not until 1989. At that point he was charged with fraud and extradition was sought and completed. The Court of Appeal rejected his argument that the delay from 1987 to 1989 should be attributed to the Crown, holding:

> Because White knew charges were outstanding against him yet refused to return to Canada, tell the Crown where he was or even contact the Crown through a third party, the delay must be attributable to him unless the Crown knew his whereabouts and deliberately delayed apprehending him or did not diligently bring

106 *Morin, above note 40 at 24.*

107 2011 QCCA 390.

108 *Ibid*., at para. 43.

109 (1997), 114 C.C.C. (3d) 225 (Ont. C.A.), leave ref'd [1997] 3 S.C.R. xv.

> him to trial: see *U.S. v. Deleon*. The evidence before the trial judge reasonably supported his findings that the Crown had taken reasonable steps to find White and that the Crown did not know where White lived until late March 1989.[110]

The result in *White* seems logical, particularly because the Crown proceeded with diligence and White himself had clearly left Canada to avoid prosecution on the original tax evasion charges, which caused the delay stemming from the efforts to find him.[111] Yet, by emphasizing (albeit in *obiter dicta*) White's refusal to return or to be in touch with the Crown, the Court appears to be undermining the first of the *Prince* principles, that the accused is under no duty to bring himself to trial. The suggestion that he should – for some reason – facilitate his own prosecution flies in the face of basic *Charter* values and human rights precepts: it is the task of the prosecution to arrest the accused. While some effect can reasonably be given to deliberate evasion by the accused, focusing on his lack of proactive cooperation with a government trying to imprison him seems to prejudice the analysis.

R. v. James[112] is even more troubling. Wanted for murder, the accused had fled to the U.S. illegally and ended up being imprisoned there for an unrelated crime. The officer in charge of his case was preoccupied with another investigation and paid only occasional attention to the James matter, and this lack of attention was amplified when the officer learned that James was imprisoned in the U.S. and would not be released for some years. He did not seek legal advice from Crown lawyers about the possibility of having James temporarily extradited for trial. The trial judge, while describing the officer's conduct as "not reasonable and…not duly diligent",[113] declined to give any weight whatsoever to the years of delay that resulted. The fact that the accused had left Canada to avoid being arrested overwhelmed the analysis.

In *R. v. R.E.M.*,[114] the accused was a U.S. national who in 1988 was charged with sexual assault in British Columbia. He returned to his home in Everett, in the state of Washington, U.S. (which geographically is located immediately below the province of British Columbia) and, relying on a lawyer's advice to the effect that he would probably not be extradited, remained there. Beyond not returning to British Columbia, he did not hide or evade attention. In the years after, several

110 *Ibid*., at 240 (emphasis in original).

111 See also *R. C. Jean*, 2017 QCCS 4894.

112 2008 CanLII 78104 (Ontario Sup Ct).

113 *Ibid*., (no pinpoint available, case report is online only and has no paragraph numbers).

114 2004 BCSC 987, aff'd 2007 BCCA 154.

more complainants came forward alleging they had been assaulted by the accused, and in 1995 the investigating officer wrote to the IAG and requested that extradition be pursued. However, nothing was done until 2002, when an extradition request was made and the accused was extradited in 2003.

This made for a 16-year delay between the laying of the charge and the beginning of trial, and the accused applied for a dismissal under 11(b). The trial judge was unsympathetic, oddly holding that "[i]t is true that the Canadian authorities should have been more diligent in having him extradited but failure to do that on an expedited basis is not the reason for the delay."[115] Rather, "it was the accused who decided to flee from Canada to avoid prosecution for these offences….it is evident that the accused has shown a lack of concern with the pace of litigation. In fact, it is fair to say that by his actions in fleeing the jurisdiction of the court he has encouraged the delay."[116] So far as the failure by the Crown to pursue extradition for 14 years, with no explanation and in a situation where the accused's address in the U.S. could easily have been obtained,[117] the trial judge simply described it as "puzzling"[118] but essentially irrelevant.

Most recently, the case of *R. v. Burke*[119] presented an interesting combination of the factors being discussed here. The accused had been charged with sexual offences in 1986 but fled to the U.S., explicitly to avoid prosecution.[120] He committed unrelated offences there and in 1988 was sentenced to 52 years in prison. In 2000 Canadian authorities were informed that Burke would be eligible for parole in 2013. At this time, the Canada-U.S. extradition treaty did not permit "temporary surrender", under which an accused imprisoned in the requested state can be temporarily surrendered for trial in the requesting state, then sent back to the requested state to finish his sentence. A temporary surrender provision was inserted into the treaty in 2003, but the Crown did not seek the accused's extradition. He was paroled in 2015 and deported to Canada, at which point he was arrested on the original charges.

The accused argued that the 12.5 year failure of the Crown to seek extradition once the treaty amendment came into effect was unreasonable and led to a breach of s. 11(b). While the argument was successful before the trial judge, the Court of Appeal reversed this decision. Without any real analysis of the facts, the Court simply held that because Burke had fled Canada to avoid prosecution,

115 *Ibid*., at para. 36.

116 *Ibid*., at para. 76.

117 *Ibid*., at para. 9.

118 *Ibid*., at para. 73.

119 2018 ONCA 594.

120 *Ibid*., at para. 11.

this amounted to "illegitimate defence delay", which did not count against the Crown. It remarked: "[the delay] was caused directly by the respondent, whose actions were not taken to respond to the charges, but were intended to frustrate them."[121]

In our view, a problem with cases like *James*, *R.E.M.* and *Burke* (and, at least in *obiter*, *White*) is that where an accused has absconded or attempted to evade capture, this seems automatically to absolve the Crown of its obligation to pursue prosecution with diligence and dispatch. Recall the statement of the British Columbia Court of Appeal in *Singleton*: "When an accused is in a foreign country from which he or she can be extradited and his or her whereabouts are known, Canadian prosecution officials are obligated to pursue extradition in a reasonable and timely manner."[122] Does this obligation of diligence end just because the accused has absconded? *Burke* certainly suggests so, since for 12.5 years the Crown knew exactly where Burke was located and could easily have had him extradited, but simply chose not to do so. There was nothing "reasonable" or "timely" about the post-2003 delay. *James* and *R.E.M.* are only slightly less stark.

Yet, as noted in the above discussion of *White*, this appears to undermine the first of the *Prince* principles, that it is the duty of the Crown to pursue prosecution; the accused is not required to help the Crown prosecute him. The Crown either has this duty or it does not; and bringing in the second of the *Prince* principles, it is illogical to say that the Crown has a duty of diligence *unless* the accused is making it more difficult, at which point the Crown has a "get out of 11(b) free" card to play.

This is not to say that the accused should suffer no consequences when he displays, as the Supreme Court put it in *Cody*, "marked inefficiency or marked indifference toward delay".[123] In principle, as the Court of Appeal noted in *Burke*, "the defence is not allowed to 'engage in illegitimate conduct and then have it count towards the *Jordan* ceiling'."[124] An accused should wear the chains he forges by deliberately dragging out the process through absconding or evasion. This is a familiar principle in the criminal law of many states, including Canada, where the *Criminal Code* explicitly provides that where an accused absconds during his trial, this may continue in his absence.[125]

121 *Ibid*., at para. 12.

122 Above note 77.

123 *Cody, above note 63 at para. 32 [check].*

124 *Burke, above note 119 at para. 10.*

125 *Criminal Code*, RSC 1985 c. C-46, s. 475.

However, the reasoning in the *Burke*-type cases is dangerous because it ignores an important underpinning of the right to trial within a reasonable time. As the Human Rights Committee has noted, one of the goals of the right is "to serve the interests of justice".[126] The duty of the state is not just to ensure that there is a trial *someday*, but to get the trial going as early as possible so that with the passage of time evidence does not decay, witness memories do not fade, documents are not lost or destroyed, etc. In *Burke* itself there was simply no reason for the accused to moulder in a U.S. prison while the Crown's case against him atrophied. Permitting the Crown to put the case on the backburner in cases where this is not necessary undercuts two important public interests: 1) ensuring that individuals get fair treatment in the criminal process; and 2) ensuring that the public receives trials that are more likely to be successfully adjudicated on their merits, and not hamstrung by the various problems that come with trying to prosecute offences many years after the investigation concludes.

There is a final, if indirect, public policy justification for keeping the analytical emphasis on the state's duty to proceed expeditiously. In these kinds of cases, one of the primary facts is that the Crown is aware that a person accused in Canada of (what is usually) a serious crime is at large in a foreign state. In light of cases like *James* (serial child sexual abuser) and *Burke* (convicted murderer), it is worth giving consideration to the protection of the public in that foreign state as well.[127] This would not be so much a matter of constitutional duty but of comity between states in the fight against transnational crime. Indeed, the Supreme Court of Canada[128] and the Ontario Court of Appeal[129] have suggested that this sort of comity is a powerful legal principle in matter relating to the exercise of Canada's criminal jurisdiction.

Thus, we suggest that the third *Prince* principle is mis-cast, since the focus should be on whether the Crown was exercising reasonable diligence. It could be re-stated as follows: if an accused person deliberately flees the jurisdiction and makes attempts to conceal his whereabouts or otherwise frustrate the Crown's ability to extradite him or her, their actions are counted as defence delay, so long as the Crown continues to exercise reasonable diligence in its pursuit of the accused. This would allow for decisions like *Terk* and *White*, where the accused's actions actually prevented the Crown from acting more quickly, but deter situations like *James*, *R.E.M.* and *Burke*, where the Crown *unnecessarily* abandoned its pursuit of the case for periods of time.

126 Lumanog and Santos v. The Philippines, UN Doc CCPR/C/92/D/1466/2006 (2008).

127 We owe this observation to Donna L. Davis.

128 *Libman v. The Queen, [1985] 2 SCR 178.*

129 2009 ONCA 151, leave to appeal to the SCC granted but abandoned, [2009] SCCA No. 186.

d) Principle 4: Delay Caused by Need to Extradite is a "Discrete Event"

As previously mentioned, *Jordan* specifically mentions that the extradition process itself qualifies as a discrete event, thus justifying a delay that otherwise would be unreasonable.[130] To some extent, this must stem from the fact that once the extradition request is in the hands of the requested state, the Canadian authorities have no control, which prevents this period from being attributed to the Crown.[131] This makes sense and reflects long-settled law that the *Charter* cannot apply to the actions of foreign authorities.[132]

However, there is one controversy remaining on this matter. As noted above, in *R. v. Barra and Govindia*[133], the Court held that a 19-month extradition process in the case of the accused Barra was a discrete event, except for a 4-month portion which was attributed to the Crown on the basis that it had failed to demonstrate that it had proceeded with reasonable diligence in the extradition process. While the Court mentions that "it is not the duty of this Court to micro-manage the dates and every response time for [the extradition period]"[134], it still deducted the periods where the Crown was not actively pursuing extradition.

On the contrary, the Court in *Prince* stated that the *Jordan* framework – with its global approach that does not focus on qualifying specific periods of the delay – prevents the courts from dissecting the delay to determine if a faster extradition was possible.[135] Thus, the Court disagreed with *Barra* and concluded that the entire extradition process qualifies as a discrete event, *inter alia* because it is not clear what period of time would be deemed reasonable in the extradition context.[136]

Considering both decisions were rendered after *Jordan* and that they both come from the same level of court, it is difficult at this point in time to evaluate which argument will prevail. However, what is certain is that a delay caused by an extradition proceeding, whether partially or totally, will qualify as an exceptional circumstance under the *Jordan* framework.

130 *Jordan, above*, note 50, at para. 72 and 81.

131 *R. v. Murphy*, 2002 CanLII 54039 (NL SC).

132 *R. v. Harrer, [1995] 3 SCR 562; R. v. Terry, [1996] 2 SCR 207.*

133 *R. v. Barra and Govindia*, 2017 ONSC 6008.

134 *Ibid.*, at para. 62.

135 *Prince*, *above*, note 77, at para. 54.

136 *Ibid*., at para. 56.

Conclusion

As the above description indicates, as far as being an exemplar of state practice under the ICCPR, the manner in which Canada is administering the right to trial within a reasonable time is fairly consistent with the overall parameters set by the Human Rights Committee. Authorities are required to ensure, with reasonable diligence, that the period between charge and trial does not stretch on unnecessarily. This protects the interests of the individual but also serves important public policy goals.

Assessing what is a "reasonable" time is a very contextual and fact-specific exercise, and it is driven by the conduct of both the state and the individual. Practically speaking, this highlights the importance of a robust regime of evidentiary disclosure to the accused by the state, since the question of reasonability cannot be assessed by the courts in a vacuum. Factual parsing is key to properly assessing delay.

As trite as it sounds, it is important to remember that this is a human right, and therefore the analytical starting point is the duty of the state to administer the criminal process appropriately and in a fair manner. As has been discussed here, this is where Canadian law falls down in some places, since there has been a tendency on the courts to relax the Crown's obligation of diligence completely where the accused has deliberately attempted to frustrate a police investigation by fleeing the country and/or evading the police. It is possible, and indeed appropriate, to hold the accused to account for these actions, as he should not be able to manufacture delay and then have this held against the Crown. However, it is against the entire policy basis of the right itself to allow this to relieve the state of its duty of diligent pursuit. As we have argued, the balance can be struck in a way that provides accountability for the accused's actions but ensures the state does not allow the prosecution to atrophy unnecessarily.