NOVA SCOTIA COURT OF APPEAL
Citation: ***R. v. MacIntosh***, 2008 NSCA 124

Date: 20081222
Docket: CAC 298018
Registry: Halifax

Between:

Ernest Fenwick MacIntosh

Appellant

v.

Her Majesty the Queen

Respondent

Restriction on publication: **pursuant to 486.4(1) of the Criminal Code of Canada**

Judges: MacDonald, C.J.N.S.; Cromwell and Fichaud, JJ.A.

Appeal Heard: December 10, 2008, in Halifax, Nova Scotia

Held: Appeal dismissed per reasons for judgment of Cromwell, J.A.; MacDonald, C.J.N.S. and Fichaud, J.A. concurring.

Counsel: Brian P. Casey and Jan C. Murray for the appellant
Peter P. Rosinski, for the respondent

486.4 (1) Subject to subsection (2), the presiding judge or justice may make an order directing that any information that could identify the complainant or a witness shall not be published in any document or broadcast or transmitted in any way, in proceedings in respect of

(a) any of the following offences:

(i) an offence under section 151, 152, 153, 153.1, 155, 159, 160, 162, 163.1, 170, 171, 172, 172.1, 173, 210, 211, 212, 213, 271, 272, 273, 279.01, 279.02, 279.03, 346 or 347,

(ii) an offence under section 144 (rape), 145 (attempt to commit rape), 149 (indecent assault on female), 156 (indecent assault on male) or 245 (common assault) or subsection 246(1) (assault with intent) of the Criminal Code, chapter C-34 of the Revised Statutes of Canada, 1970, as it read immediately before January 4, 1983, or

(iii) an offence under subsection 146(1) (sexual intercourse with a female under 14) or (2) (sexual intercourse with a female between 14 and 16) or section 151 (seduction of a female between 16 and 18), 153 (sexual intercourse with step-daughter), 155 (buggery or bestiality), 157 (gross indecency), 166 (parent or guardian procuring defilement) or 167 (householder permitting defilement) of the Criminal Code, chapter C-34 of the Revised Statutes of Canada, 1970, as it read immediately before January 1, 1988;

Reasons for judgment:

I. INTRODUCTION:

[1] At Canada's request, India extradited the appellant to face trial for various sexual offences. These charges were to be the subject of a preliminary inquiry, but the appellant applied to Edwards, J. in the Supreme Court for an order prohibiting the provincial court from going ahead with the preliminary inquiry. The appellant's application for prohibition was dismissed and he appeals.

[2] The appeal is based on two arguments that failed before Edwards, J. The appellant's first point is based on the principle of specialty. This is a principle of extradition law to the effect that the appellant can only be tried here for the offences for which he was extradited. The appellant claims that his extradition was neither sought nor granted with respect to several of the charges he is now facing and that he therefore cannot be tried for them. As his second point, the appellant submits that Canada's request for extradition deprived him of his liberty in a way that did not respect the principles of fundamental justice and, therefore, contravened s. 7 of the **Canadian Charter of Rights and Freedoms**, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act, 1982* (U.K.), 1982. c. 11. He asks that the charges be stayed as a remedy for this **Charter** breach.

[3] In my view, both of these arguments fail. The appellant has not shown that the prosecution offends the principle of specialty or that Canada's extradition request failed to observe the principles of fundamental justice. I would dismiss the appeal.

II. ISSUES AND STANDARD OF REVIEW:

[4] The six grounds of appeal relate to two main points:

1. Does the prosecution of the appellant in Canada offend the principle of "speciality"?
2. Did Canada's request to India for extradition offend the appellant's rights under s. 7 of the **Charter**?

[5] Both issues raise questions of law for which the standard of review is correctness.

III. OVERVIEW OF THE FACTS:

[6] The appellant is charged with 43 sexual offences in the 1970s involving nine complainants. The 43 counts are set out in three informations, one sworn in 1995 and the other two in 2001.

[7] After the informations were sworn and arrest warrants issued for the appellant, the Nova Scotia prosecutor corresponded with the International Assistance Group in the Federal Department of Justice concerning the appellant's extradition from India where, it seems, he had been living for some time. The correspondence we have in the record covers the period between late 1998 (after the first information was sworn in 1995) and the spring of 2006 (about five years after the second and third informations were sworn).

[8] In July of 2006, Canada requested the appellant's extradition from India. The Certificate of Authentication which Canada forwarded to India indicated that the appellant was wanted to stand trial in Canada on 43 counts of indecent assault and gross indecency. All three of the informations setting out these 43 charges were attached to the request. According to the Indian extradition warrant, India requested the Additional Chief Metropolitan Magistrate to inquire into the extradition request and, after review of the inquiry report of the Magistrate "... decided that it would be lawful and expedient if [the appellant] is extradited to face the criminal charges in Canada."

[9] India surrendered the appellant to Canadian authorities who transported him back to Canada where he was scheduled to face a preliminary inquiry with respect to the 43 charges. He applied to Edwards, J. in the Supreme Court for an order of prohibition to prevent the preliminary inquiry from proceeding. The appellant's application was dismissed and he appeals.

IV. ANALYSIS:

[10] As noted, the appellant makes two main arguments, the first concerning the extradition principle of speciality and the second relating to the **Charter**. I will address each in turn.

A. Speciality:

1. Introduction:

[11] According to the principle of speciality, the appellant cannot be prosecuted in Canada for any offences committed before his surrender for extradition by India other than those offences for which he was extradited. This principle is not in dispute. It is also not in dispute that if the prosecution offends the speciality principle, prohibition may be an appropriate remedy to stop a preliminary inquiry in the provincial court dealing with charges. The appellant's submission is the prosecution offends the specialty principle and should be prohibited because Canada neither requested nor obtained extradition for all of the charges he now faces.

[12] I cannot accept this argument. In my view, Edwards, J. was correct to hold that there was no ambiguity about whether the appellant had been extradited with respect to all 43 charges. In effect, the appellant seeks to draw unjustified factual inferences from correspondence and to have the Canadian courts review the sufficiency of the evidence before the Indian court. However, the inferences the appellant urges on us are negated by the official documents and the adequacy of the Indian process is a matter for the Indian, not the Canadian courts to determine.

[13] To explain these conclusions, I will set out the relevant legal principles and then address the appellant's specific submissions on this point.

2. The Principle of Specialty:

[14] The principle of speciality holds that a person who has been extradited cannot be tried for any offences committed before extradition other than those for which he was surrendered unless he has had an opportunity to return to the surrendering state: see, e.g. Anne Warner LaForest, *LaForest's Extradition To and*

From Canada , 3rd ed. (Aurora: Canada Law Book Limited, 1991) at 231. This principle is codified in s. 80 of the **Extradition Act**, S.C. 1999, c. 18. It provides that, subject to the extradition agreement (and some exceptions not relevant here), a person who has been extradited to Canada shall not be prosecuted here in respect of an offence that is alleged to have been committed or was committed before surrender other than the offence in respect of which the surrender was made or an included offence. In respects relevant to this case, s. 80 of the **Act** is consistent with the relevant extradition agreement, Article 14 of the Extradition Treaty between Canada and India. I have set out the text of s. 80 and Article 14 in the Appendix.

[15] The Supreme Court of Canada has described the specialty principle as an implied condition of an extradition treaty. When a state surrenders a fugitive in respect of a particular crime, that surrender must necessarily be subject to an implied condition that the requesting state will not try the fugitive for any other crime previously committed without the permission of the surrendering state: **R. v. Parisien**, [1988] 1 S.C.R. 950 at 956 - 7.

[16] The appellant accepts that the onus is on him to establish that he is being prosecuted contrary to the principle of specialty: *LaForest* at 232. The Indian warrant of surrender does not specify for which offences the appellant was surrendered. The appellant says that, as a result, it is open to him, in attempting to discharge his onus, to have the court "... look behind the warrant and examine the facts in the depositions and the proceedings abroad with a view to determining the crime for which [he] was surrendered.": *LaForest*, at 233. However, it is important to recognize that there is an important limitation on this exercise.

[17] The purpose of examining the record behind the warrant is limited strictly to answering the factual question of which charges were the subject of the surrender. The purpose of looking behind the warrant is not to question whether India complied with its own extradition laws and procedures. As LaForest put it, the courts in the requesting state (Canada in this case), "... will never go behind the warrant to inquire whether the surrender was valid and regular under the foreign law. <u>The foreign warrant is conclusive that the foreign law was followed</u>.": *LaForest*, at 235, emphasis added. Simply put, one looks behind the warrant to discover for what charges the appellant <u>was</u> extradited, not for what charges he <u>ought to have been</u> extradited.

3. Analysis of appellant's submissions:

(a.) Was extradition sought on all 43 charges?

[18] The appellant says that Canada did not request extradition on all 43 counts. He points to correspondence between the Federal Department of Justice International Assistance Group and the Nova Scotia prosecutor. This correspondence shows, he submits, that the Federal Department recognized that "first person affidavit material ... from each complainant" was required to support the extradition request. The correspondence also shows, the appellant contends, that the Nova Scotia prosecutor recognized that, because such material was not available from some of the other complainants, the extradition request could proceed with respect to only five of them.

[19] In my view, Edwards, J. did not err in concluding that Canada sought extradition on all 43 counts. Three documents in the record justify this conclusion. First, there is the diplomatic note which says that Canada's request was with respect to all 43 counts. (This note is erroneously dated July 14, 2005, but we have been advised that in fact it should be dated July 14, 2006, just 8 days after the Minister of Justice affixed his seal to the Certificate of Authentication.) Next, there is the Certificate of Authentication itself which not only refers to all 43 counts but includes copies of the three informations which set out all 43 counts. Finally, there is a letter dated May 5, 2008 from a senior counsel with the Federal Department of Justice International Assistance Group clarifying the fact that Canada had sought extradition on all 43 counts. In the face of this documentation, the material relied on by the appellant falls far short of establishing that Canada did not seek extradition on all 43 charges which the appellant now faces.

(b.) Did India extradite on all 43 counts?

[20] I turn next to the appellant's submission that India did not extradite the appellant on all of the charges. This submission is premised on the view that India could not have ordered extradition based on the material submitted by Canada. In a nutshell, the appellant's position is that we should conclude that extradition was not ordered on the subject counts because, absent the supporting material he says is lacking, extradition should not have been ordered.

[21] This argument fails for two related reasons.

[22] First, the appellant's submission fails on the facts. Indian law governs extradition procedure in India. The treaty provides that the procedures with regard to arrest and extradition are governed by the law of India, the requested state. Further, the treaty requires Canada to produce evidence, which according to the laws of [India], would justify his arrest and committal for trial: see Articles 20 and 8(2)(a). There is no evidence about what India requires in order to justify arrest and committal for trial, let alone to support the appellant's contention that Indian law would not permit extradition on the basis of the material submitted by Canada. The informal fax requests to the provincial Crown from the Federal International Assistance Group are not evidence of what Indian law requires. Even the appellant concedes that "first hand " affidavit material, as referred to in one of the faxes, is not required. The appellant has not established that under Indian law, extradition could not have been ordered on the material contained in Canada's request.

[23] Second, and more fundamentally, the appellant's argument is premised on a mistaken view of the law. His submission invites us to assess the propriety of India's decision to extradite on all charges to support a conclusion that it did not in fact extradite on all charges. But this offends the principle referred to earlier that the warrant is final and conclusive as to the propriety of the proceedings in India. It follows that Edwards, J. was correct in finding that he was "... really being asked to assess the sufficiency of that evidence..." before the Indian magistrate and that "[a]ny challenge to the sufficiency of the evidence in support of the extradition request was for the court in India to adjudicate." (Reasons para. [10])

[24] The appellant relies on **Buck v. The King** (1917), 55 S.C.R. 133 but, in my view, this reliance is misplaced. In that case, the question was whether Buck had been extradited from the United States on the charge for which he was subsequently convicted in Canada. The original request from Canada was for extradition in relation to a distinct offence and the warrant of surrender gave no particulars. The question was whether the charge of which Buck had been convicted following his extradition had been before the Extradition Commissioner in the United States. It was for the purpose of answering that question that the record before the Commissioner was reviewed by the Canadian courts.

[25] The Canadian courts did not question the validity of the committal in the United States. Rather, the evidence submitted by Canada was reviewed in order to determine for which distinct offence his extradition had been requested. So, for example, Anglin, J., one of the majority judges, commented that the particulars furnished at Buck's trial, describing the means by which the offence charged had been committed, referred to a statement different from the one mentioned in the depositions before the extradition commissioner. This led to the conclusion that the indictment on which Buck was charged did not correspond to the charge on which he was extradited: at 135. Similarly, Duff, J. (as he then was) reviewed the record and concluded that no charge had been laid or had been intended to be laid at the time extradition was sought in relation to the offence for which Buck had been convicted: 143-44.

[26] In the appellant's case, however, there is no similar ambiguity. There is no doubt that Canada sought extradition on all 43 counts on which he faces trial here. The Crown seeks to proceed at the preliminary inquiry on the very informations which were included in the extradition request. All 43 counts were referred to in the Certificate of Authentication and copies of all of the relevant informations were included in the attached material. The reasons of the Additional Chief Magistrate which are in the record (although it is not clear whether they constitute the Inquiry Report referred to in the warrant) refer to the need to have the appellant "dealt with" on the "43 different reported counts". The unconditional warrant for extradition to face the charges for which extradition was sought is not, in the context of this case, in the least ambiguous.

[27] The appellant's submission implies that India could not properly order extradition absent a *prima facie* case being made out against the appellant and that the material was not capable of making out such a *prima facie* case. He submits that the principle of specialty operates to preclude prosecution unless the charge prosecuted here is one disclosed by the depositions on which the extradition was obtained or in respect of which the extradition judge held that a *prima facie* case was established. The appellant relies on a statement by Anglin, J. in **Buck** to the effect that " ... 'the offence for which (the accused) was surrendered' means the specific offence with .... which he was charged ... and in respect of which that official held that a prima facie case had been established and ordered his extradition ...": 145.

[28] This submission, in my respectful view, misreads **Buck** and seriously misstates the applicable law. The statement from **Buck** to which the appellant refers was no doubt correct in the context of the **Buck** case. There, it was clear that the Extradition Commissioner had held that there was a *prima facie* case with respect to a charge different from that for which Buck had been convicted upon his extradition to Canada. But this statement in **Buck** does not mean that the speciality principle operates unless there was a *prima facie* case made out at the extradition hearing with respect to that charge or that it is open to Canadian courts to review the adequacy of the evidence adduced in the foreign court to see if it meets that standard.

[29] The reference to the *prima facie* case in **Buck** occurs in the context of the Court determining, as a factual matter, for which offence Buck had been extradited. The request by appellant's counsel is really a request to examine whether the Indian court should have extradited the appellant on all 43 charges. This is something the court cannot do. Although a court may examine the record to determine for which offences a person was extradited, this does not extend to assessing the strength of the evidence before the extraditing judge. It is not the role of a domestic court to determine whether the person sought should have been extradited on all charges. The sufficiency of evidence is a matter for the Indian court and is not reviewable here. If India requires *prima facie* proof, something which is not mentioned in the record, once we are satisfied that the appellant was extradited for 43 charges, we must assume that India's requirements were met. Reviewing the evidence to determine for which crimes the appellant was extradited does not mean this court can re-weigh the evidence and find that there was insufficient proof on some charges and, therefore, conclude that he should not have been extradited on those charges.

[30] In summary, I reject the appellant's first submission because it wrongly assumes that there is any ambiguity about which charges formed the basis of the extradition and further because it wrongly invites us to review the adequacy of the evidence before the Indian magistrate. On this record, Edwards, J. did not err in concluding that the appellant had failed to show that he was being prosecuted on charges other than those for which his extradition was sought and granted.

B. Charter:

1. Introduction:

[31] Section 7 of the **Charter** provides that everyone has the right to life, liberty and security of the person and not to be deprived thereof other than in accordance with the principles of fundamental justice. The appellant submits that Canada's request for extradition deprived him of his liberty and failed to conform to the principles of fundamental justice. He asserts that this breach of his constitutional rights occurred in Canada at the hands of Canadian officials.

[32] This submission raises four questions. Does the **Charter** apply to the actions of Canadian officials formulating and sending the request for extradition? In my view, it does. Did the actions of Canadian officials deprive the appellant of his liberty? I will assume, but not decide, that they did. Did the request for extradition conform to the principles of fundamental justice? In my view, it did. What remedy should follow from the alleged **Charter** breaches? As I conclude there was no breach, no remedy is required.

[33] My reasons for reaching these conclusions follow.

2. Analysis of the four questions:

(a.) Does the **Charter** apply to the extradition request?

[34] Section 32 of the **Charter** defines both the actors to which the **Charter** applies and the circumstances in which it applies to them: **R. v. Hape**, [2007] 2 S.C.R. 292 at para. 93. The **Charter** applies to government actors acting within the authority of Parliament or the Legislatures. The request for extradition was formulated by officials of the Department of Justice for Canada and forwarded to India under the seal of the Minister of Justice of Canada. These actions were taken at the request of an agent of the Attorney General of Nova Scotia acting within the authority of Parliament and the legislature of Nova Scotia respectively. In short, the request resulted from acts by provincial and federal government officials acting within the authority of Parliament and the Nova Scotia Legislature. By virtue of s. 32, the **Charter** applies to these acts.

[35] The appellant's submissions, in my view, do not raise any questions about how the **Charter** may be applied to acts outside Canada. All of his submissions relate to the extradition request which was formulated in and sent from Canada.

(b.) Did the request deprive the appellant of his liberty?

[36] The appellant says that Canada's extradition request led directly to his arrest and detention in India and his surrender to Canadian authorities. The request, he submits, should therefore be seen as a deprivation of his liberty. While I do not have to finally decide this point, I am inclined to accept the view that the request was so directly linked to the appellant's loss of liberty that it implicated the appellant's s. 7 **Charter** rights.

[37] I acknowledge that the majority decision of the Supreme Court of Canada in **Schreiber v. Canada (Attorney General)**, [1998] 1 S.C.R. 841 may be read as supporting the opposite view. In **Schreiber**, Canada sent a letter of request to Swiss authorities seeking assistance with a Canadian criminal investigation. The Swiss authorities accepted the letter of request and ordered the seizure of Mr. Schreiber's bank records. The question before the Court was whether Canada's request had to meet the standard for a reasonable search and seizure under s. 8 of the **Charter**. A majority of the Court held that it did not. As L'Heureux-Dubé, J. put it on behalf of the majority at para. 31, "By itself, the letter of request does not engage s. 8 of the Charter. All of those actions which rely on state compulsion in order to interfere with the respondent's privacy interests were undertaken in Switzerland by Swiss authorities. Neither the actions of the Swiss authorities, nor the laws which authorized their actions, are subject to Charter scrutiny...". **Schreiber**, therefore, draws a clear line for **Charter** purposes between the Canadian request on the one hand and the Swiss acts of search and seizure on the other.

[38] This reasoning may be seen as applying here. The request for extradition in this case, like the request for information in **Schreiber**, did not on its own, impair any of the appellant's rights. His arrest, detention and surrender all occurred in India and were effected by Indian officials pursuant to Indian law. In this case, as in **Schreiber**, neither the actions of the foreign authorities, nor the law which authorized their actions, is subject to **Charter** scrutiny. However, more recent cases, decided in the context of s. 7 (as opposed to the s. 8 claims made in

Schreiber), assess the strength of the causal connection between the Canadian and the foreign acts in order to assess the **Charter**'s requirements for the acts of Canadian officials in Canada.

[39] An example is **Suresh v. Canada (Minister of Citizenship and Immigrant)**, [2002] 1 S.C.R. 3. One of the issues was whether s. 7 of the **Charter** was engaged by the risk that torture would be inflicted by the receiving country on a person deported from Canada. Of course, any torture, if it were to occur, would be inflicted in a foreign country by foreign actors. However, the Court found that the risk of torture resulting from Canada's deportation of the appellant engaged s. 7 of the **Charter** because of the strong and direct causal connection between Canada's act of deportation and the risk of torture. As the Court said at para. 54:

> ... the guarantee of fundamental justice applies even to deprivations of life, liberty or security effected by actors other than our government, if there is a sufficient casual connection between our government's participation and the deprivation ultimately effected. .... At least where Canada's participation is a necessary precondition for the deprivation and where the deprivation is an entirely foreseeable consequence of Canada's participation, the government does not avoid the guarantee of fundamental justice merely because the deprivation in question would be effected by someone else's hand.

[40] Applying this reasoning here, it may be said that the appellant's s. 7 rights were engaged because Canada's extradition request was so closely and directly linked to the deprivation of the appellant's liberty in India and to the continuing limitation of his liberty by Canadian authorities in Canada. To use the language of **Suresh**, Canada's request was a "necessary precondition" for the appellant's arrest and detention in India. Moreover, his arrest and detention were not only the "entirely foreseeable" consequences of the request, but they were the consequences Canada intended and desired in making it. Canada wanted India to arrest, detain and surrender the appellant into Canadian custody, asked it to do so and that is exactly what happened.

[41] I incline to the view that the appellant's s. 7 rights were implicated by Canada's extradition request and therefore the acts of Canadian officials in formulating and making the request must comply with the principles of fundamental justice. However, I do not need to finally decide this point because, as I will explain in the next section, the appellant has not shown that the request was made other than in accordance with the principles of fundamental justice.

(c.) Third question: compliance with the principles of fundamental justice

[42] The appellant submits that two principles of fundamental justice were breached by Canada's request for extradition in this case. The first principle is that Canada must respect the treaty requirements governing the material that must be submitted by Canada to the requested state. The second principle is that Canada must provide some evidence that the person sought is the person who committed the offences for which extradition is being sought. The appellant says that Canada did not comply with either of these principles in his case.

[43] Principles of fundamental justice are the basic principles that underlie our notions of justice and fair process. They must be legal principles, there must be sufficient consensus that they are vital or fundamental to our societal notion of justice and they must be capable of being identified with sufficient precision and applied in a manner that yields predictable results. What fundamental justice requires must be assessed having regard to the nature of the proceedings and the interests at stake and will depend on the context: see **Charkaoui v. Canada (Citizenship and Immigration)**, [2007] 1 S.C.R. 350 at paras. 19 - 20; **Canadian Foundation for Children, Youth and the Law v. Canada (Attorney General)**, [2004] 1 S.C.R. 76 at para. 8.

[44] In my view, the two principles identified by the appellant fail to meet the second of these three requirements because there is no consensus that the proposed principles are vital or fundamental to our societal notion of justice. I also conclude that there is no failure to comply with the first principle which the appellant proposes, even if it were to be accepted.

(i.) compliance with the Treaty:

[45] The appellant says that fundamental justice requires Canada to comply with the provisions of the Extradition Treaty concerning the material necessary to accompany an extradition report. No authority is presented to support this view. That in itself suggests that consensus is lacking about the vital and fundamental notice of the requirement. There are good reasons that this principle should not be recognized as vital to our sense of justice.

[46] The implications of the appellant's position is that extradition procedures in a foreign country would be reviewed here for technical glitches. This would not be in accordance with our most basic sense of justice. Consider this. The treaty requires that the extradition request be supported by a copy of the arrest warrant: Article 8(2)(a). It appears that Canada's request for extradition in this case may not have included all of the arrest warrants, although it is clear from the material that such warrants were, in fact, issued with respect to all of the charges for which extradition was sought. I find it hard to think that this sort of technical glitch should be elevated to the violation of a principle of fundamental justice. I note that the appellant did not rely on this apparent technical defect.

[47] I do not accept that it is vital or fundamental to our sense of justice that Canadian officials in seeking extradition must comply with every aspect of the relevant extradition treaty. In any case, there was no substantial failure to comply with the treaty in this case. I cannot accept the appellant's submission that the treaty requires Canada to provide to India sworn evidence of identification or the allegations.

[48] As discussed earlier, Indian law governs what is required for extradition from India. The treaty provides, in Article 20, that "[e]xcept where otherwise provided by the Treaty, the procedures with regard to arrest and extradition shall be governed by the laws of the requested State." We must take it that the material submitted by Canada satisfied Indian requirements. So the question is whether the treaty provides some other standard that Canada must meet. In my view it does not.

[49] There are two provisions that refer to evidence for the purposes of an extradition request, Article 8 and Article 9. Contrary to the appellant's submissions, my view is that neither requires sworn evidence of identity or of the allegations.

[50] The appellant says that Article 9(2) imposes a requirement for sworn (or affirmed) evidence. I do not agree. Articles 8 and 9 of the Treaty must be read together and when they are, it is clear, in my view, that Article 9(2) is a permissive, and not exhaustive, provision dealing with the form of the evidence.

[51] Article 8 sets out the material that must accompany an extradition request. Note that Article 8(1) provides that a request "shall be supported" by the listed material and that Article 8(2) specifies that a request in relation to an accused (as opposed to a convicted person) "shall also be supported" by the material listed in 8(2)(a) and following. Section 8(2) also provides that a request for extradition of a person accused of an extradition offence is to be supported by "...such evidence as, according to the laws of the requested State, would justify his arrest and committal for trial if the offence had been committed within its jurisdiction ...". (emphasis added).

[52] Section 9 deals with the admissibility of evidence, not what evidence is required. Article 9(1) provides, for example, that "the evidence submitted in support of a request for extradition" is to be admitted in the requested State if certain certification requirements are met. Section 9(2) provides that evidence submitted in support of a request for extradition, "... may include ... depositions or other evidence purporting to have been taken on oath or affirmation ...". (emphasis added) It thus provides the form which the evidence submitted in support of an extradition request as set out in s. 8(1) may take. The use of the words "may" and "include" make it clear that the mentioned forms of evidence are not required. The language is clearly inclusive, not directive. I cannot accept that the text of the treaty supports the appellant's submissions.

[53] The appellant relies on other arguments to support his view that affidavit evidence is required. He points to a letter from the Federal Department of Justice to the Nova Scotia Crown. The letter, written some four years before the extradition request was sent says that "... the request for extradition to India will need to be supported by first person affidavit material." This letter, with respect, is not evidence of what either the treaty or Indian law requires. It is either a statement of Canadian practice or the opinion of a lawyer working for the federal government. It does not support the appellant's position that such first person evidence is required by the treaty. It is worth noting that even the appellant did not contend that "first person" affidavit material, as referred to in the letter, is required. I note that the provisions in Part 3 of the **Extradition Act** dealing with extradition to Canada are silent concerning the sort of evidence to be contained in a request by Canada for extradition.

[54] Next, the appellant relies on a passage from the LaForest treatise on extradition. It states at p. 228 that affidavit evidence to establish identity and a *prima facie* case of the offence charged should accompany an extradition request. This statement, viewed in its proper context, does not support the appellant's position. The learned author makes it clear that the discussion in which this passage appears is expressed in "broad and general terms, with some emphasis on the procedure to be followed when ... extradition is sought from the United States.": at 222. Moreover, the author also makes it clear that "... there are considerable variations in the extradition arrangements with various countries.": at 221. I, therefore, do not read the treatise as supporting the proposition that the treaty in issue here requires affidavit evidence. In any event, a treatise cannot create legal obligations that are not supported by the text of the treaty or the statute.

[55] Finally, the appellant relies on **United States of America v. Ferras; United States of America v. Latty**, [2006] 2 S.C.R. 77 for the proposition that sworn evidence must be part of the request. However, the passage on which the appellant relies (para. 29 of the judgment) addresses the requirements of the former **Extradition Act**, R.S.C. 1985 c. E-23 in relation to the evidence to be presented by the requesting state when extradition was sought from Canada, a process which is of course governed by Canadian law. These provisions, respectfully, have no bearing on what is required by this extradition treaty or when Canada is the requesting state.

[56] In summary, I reject the appellant's contention that the extradition treaty required Canada to accompany its extradition request with affidavit evidence. To the extent that the claimed breach of the **Charter** depends on this alleged breach of the treaty, that claim fails.

(ii.) identification evidence:

[57] The appellant claims that Canada's extradition request violated fundamental justice because it did not contain identification evidence by two of the complainants. The submission relates to the material in the record concerning the complainants C.M. and A.M. It will helpful first to set out the factual context for this submission.

[58] C.M. is the complainant in count 31 of the information sworn December 10, 2001. It alleges one count of indecent assault on a male person alleged to have been committed between April of 1974 and April of 1975. There is an affidavit from C.M. in the record in which he deposes that the incident occurred after he was picked up by a man driving a van with "Scotia Sun" written on it and that he believes this was the appellant because he "... had told a few of his friends about this incident and they said that it was the appellant and [they] went down to see him come out of his house ...". (AB 180). There is other evidence linking the appellant to this same house.

[59] The informant on the information, RCMP Constable Deveau swears that he had reasonable and probable grounds to believe that this offence was committed. In the officer's affidavit attached to the extradition request, he indicates that he met with C.M. in March of 2000 and presented him with a photo lineup but that C.M. was not able to identify the appellant. (AB 193) (Remember that this meeting occurred a year and half before Officer Deveau swore his information charging the offence involving C.M. in December of 2001.)

[60] As is reflected on the back of the information, Judge Embree of the Provincial Court issued a warrant with respect to all counts on the 37 count information, including of course this one, on December 12, 2001.

[61] A.M. is the complainant in counts 29 and 30 (indecent assault and gross indecency between 1971 and 1973) of the 37 count information sworn in December of 2001. Officer Deveau's affidavit indicates that he meet with A.M. on September 7 of 2000 and that A.M. provided a statement outlining the circumstances where he was sexually abused by the appellant.

[62] There is in the record an affidavit sworn by A.M. in July of 2002 to which is attached his statement of September 7, 2000 to Constable Deveau. A.M. deposes that the contents of the statement are true. A.M. indicates that at age 10 or 11 he met the appellant because of his connection with hockey and that the appellant introduced him to hockey players boarding at the appellant's house. It is a reasonable inference from reading the affidavit and the statement that A.M. was personally acquainted with the appellant.

[63] In May of 2002, the International Assistance Group wrote to the provincial Crown raising the point that there was no evidence that A.M. had been put through a photo lineup. In 2006, the provincial Crown advised the International Assistance Group that he would not be able to provide an affidavit of either Corporal Deveau or A.M. concerning the ability to identify the appellant because A.M. did not respond to "many requests from Corporal Deveau to meet with him."

[64] As noted earlier, a warrant was issued by Judge Embree in relation to these charges on December 12, 2001.

[65] The appellant does not challenge the fact that as of the date of the information charging the counts relating to C.M. and A.M. (December of 2001), the informant, Constable Deveau, had reasonable and probable grounds to believe that these offences had been committed. It is also not challenged before us that the warrant issued for the appellant's arrest with respect to these charges was properly issued in December of 2001.

[66] Canadian jurisprudence holds that in the case of extradition from Canada, fundamental justice requires that the person sought for extradition have an independent and impartial judicial determination on the facts and evidence on the ultimate question of whether there is sufficient evidence to establish the case for extradition: **Ferras, supra**, [2006] 2 S.C.R. 77 at para. 34. However, very different considerations govern what is required by the principles of fundamental justice when Canada is seeking extradition from another country.

[67] The two situations are completely different. When Canada is asked to extradite a person to another country, Canada is being asked to authorize the forcible removal of the person from Canadian territory, jurisdiction and protection so that the person may be subjected to the penal laws of another country. However, when Canada seeks extradition, it does so to obtain enforcement jurisdiction over a person charged with a crime committed here so that he or she may be dealt with as if he or she had been apprehended in Canada. In other words, by seeking his extradition, Canada was simply seeking to establish criminal law enforcement jurisdiction over the appellant by means of his surrender by India into Canadian custody. The objective was to prosecute him in Canada subject to all of the rights and safeguards provided by our criminal and constitutional law.

[68] There is no suggestion here that any principle of fundamental justice was infringed by the deprivation of the appellant's liberty in accordance with the normal rules of criminal procedure in this country. The appellant's submissions relate to the process for requesting his surrender, in other words, the process leading to Canada acquiring (or perhaps more exactly, reacquiring) criminal law enforcement jurisdiction over him.

[69] The appellant's submission amounts to saying that more is required when Canada seeks extradition than would be required to arrest the appellant in Canada. No authority that I am aware of supports this submission and nothing has been placed before us that persuades me that requiring more is vital or fundamental to our sense of justice.

[70] It is useful to recall the process that applies where a person who is present in Canada is charged with offences like these. A peace officer with reasonable and probable grounds to believe that the appellant had committed these offences could have arrested him in Canada without a warrant. Moreover, a justice receiving these informations from a peace officer could have issued an arrest warrant if satisfied that the case for doing so had been made out: see **Criminal Code**, s. 495 and s. 507. As noted, the latter course was adopted in this case: the record shows that arrest warrants for all of these charges were issued by judges of the Provincial Court. It is important to note that the appellant has not challenged either these proceedings or the statutory provisions governing them. We must, therefore, for the purposes of this case, assume that these warrants were lawful and complied with all constitutional requirements.

[71] The appellant, however, claims that some higher standard should apply to assertion of criminal law enforcement jurisdiction over him, as a matter of fundamental justice, because he was outside Canada. I do not agree. A lawful basis existed for the appellant's arrest in Canada. Canada complied with the applicable laws of India to obtain from India the appellant's surrender into Canadian jurisdiction. I do not accept the proposition that fundamental justice required Canada to support its request with anything more than the Treaty and Indian extradition law required.

[72] Of course, if Canada had requested extradition for some improper purpose or to permit a prosecution that was somehow tainted with bad faith, other

considerations might well come into play. But there is nothing of that nature alleged in this case.

[73] At certain points during oral submissions, the appellant came close to suggesting that Canadian officials requested extradition knowing that arrest warrants would no longer be issued on the present state of the known evidence or knowing that there was no evidence of identification available. If the appellant intended to go this far, these submissions are not supported by the record. The record falls far short of establishing that there was no evidence of identification available to the Crown to offer at trial with respect to the allegations in relation to C.M. or that there was no evidence available to the Crown in relation to the charges involving A.M.

[74] In the case of C.M., it is clear that his failure to identify the appellant in the photo lineup occurred long before the warrants were issued. There was nothing new after the warrants issued in relation to C.M.'s identification of the appellant. The record falls far short of establishing, or even plausibly suggesting, that Canadian authorities knew that there was no evidence of identification available to offer at the appellant's trial of the offence involving C.M. In the case of A.M., there is nothing in the material to suggest that A.M. did not know the appellant at the time the offences were allegedly committed or that he would fail to respond to a subpoena to testify at trial.

[75] I conclude that the appellant has not shown that Canada's extradition request failed to comply with the principles of fundamental justice.

(d.) Remedy:

[76] As I conclude there was no breach of the **Charter**, no remedy is required.

4. Summary of Conclusions Concerning the Charter:

[77] In my view, Canada's request to India for the appellant's extradition did not breach his **Charter** rights.

V. DISPOSITION

[78] I would dismiss the appeal.

Cromwell, J.A.

Concurred in:

MacDonald, C.J.N.S.

Fichaud, J.A.

A P P E N D I X

Extradition Act, S.C. 1999, c. 19

Speciality if person is in Canada

80. Subject to a relevant extradition agreement, a person who has been extradited to Canada by a requested State or entity shall not, unless the person has voluntarily left Canada after surrender or has had a reasonable opportunity of leaving Canada,

(a) be detained or prosecuted, or have a sentence imposed or executed, or a disposition made or executed under the *Young Offenders Act*, chapter Y-1 of the Revised Statutes of Canada, 1985, in Canada in respect of an offence that is alleged to have been committed, or was committed, before surrender other than

(i) the offence in respect of which the person was surrendered or an included offence,

(ii) another offence in respect of which the requested State or entity consents to the person being detained or prosecuted, or

(iii) another offence in respect of which the person consents to being detained or prosecuted; or

(b) be detained in Canada for the purpose of being surrendered to another State or entity for prosecution or for imposition or execution of a sentence in respect of an offence that is alleged to have been committed, or was committed, before surrender to Canada, unless the requested State or entity consents.

Extradition Treaty between Canada and India

ARTICLE 14

Rule of Specialty

1. A person extradited under this Treaty shall not be detained, tried or punished in the requesting State for an offence committed prior to his surrender other than that for which he was extradited, unless

(a) he has left the requesting State and voluntarily returned thereto, or

(b) he has not left the requesting State within 60 days after being free to do so.

2. A person extradited under this Treaty shall not be extradited by the requesting State to a third State for an offence committed prior to his extradition unless the requested State consents or the requirements of subparagraphs (a) or (b) of paragraph 1 above have been met.

3. Paragraphs 1 and 2 do not apply to any offence the commission of which is included in the commission of the offence for which the person sought was surrendered and the proof of which is based on the evidence that was submitted in support of the request for extradition.