<u>IN THE SUPREME COURT OF NOVA SCOTIA</u>

Citation: R v. MacIntosh, 2008 NSSC 194

Date: 20080619
Docket: SPH 292755
Registry: Port Hawkesbury

Between:

Her Majesty the Queen

Respondent

v.

Ernest Fenwick MacIntosh

Applicant

Judge: The Honourable Justice Frank Edwards

Heard: May 23, 2008, in Port Hawkesbury, Nova Scotia

Counsel: Richard J. MacKinnon, for the respondent
Brian Casey, for the applicant

By the Court:

[1] This is an Application for an Order in the nature of Prohibition, prohibiting Her Honour Judge Halfpenny-MacQuarrie, or any judge of the Provincial Court of Nova Scotia, from proceeding with an Information sworn the 4th day of December 1995 alleging 1 count contrary to section 156 and 1 count contrary to section 157 of the Criminal Code; or upon an Information sworn the 22nd day of October 2001 alleging 2 counts contrary to section 156 and 2 counts contrary to section 157 of the Criminal Code; or upon an Information sworn the 10th day of December 2001 alleging 37 counts of offences contrary to the Criminal Code.

[2] ***Background:*** The Accused (MacIntosh) is charged on 3 Informations containing a total of 43 counts alleging sexual offences against 9 complainants in the 1970s. The first of these Informations was laid in 1995 and the remaining two in 2001.

[3] At the time the first Information was laid, MacIntosh was living and working in India. Eventually the Crown sought extradition in relation to MacIntosh pursuant to an Extradition Treaty between the Government of Canada and the

Government of India. On April 5, 2007, the Accused was arrested in India and returned to Canada by the Royal Canadian Mounted Police on June 6, 2007.

[4] Article 14 of the Extradition Treaty provides:

> "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."

[5] The Accused's position is that the Crown is now attempting to prosecute him for alleged offences other than those for which he was extradited. The leading textbook on this issue is LaForest, ***Extradition to and from Canada***. At pages 231 to 233, the author states the following:

> "On his return to Canada pursuant to a treaty, a fugitive 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. This principle, as sometimes referred to as specialty, is provided for in all the treaties as well as in section 33 of the Extradition Act.
> (p. 231)
>
> The onus is on the accused to establish that he is being tried for an offence other than that for which he was extradited, and

> mere vague allusions will not suffice to discharge this onus. The exact meaning of the provision has given rise to some difficulty but is now reasonably clear. As was said by Anglin J in **Buck v. The King**:
>
>> '... the offence for which (the accused) was surrendered' means the specific offence with ... which he was charged before the Extradition Commissioner [in the surrendering state] and in respect of which that official held that a prima facie case had been established and ordered his extradition, and not another offence or crime, though of identical legal character and committed about the same time and under similar circumstances."
>
> (p. 232-233)

[6] In ***Buck*** the accused was extradited on a charge that he had caused a false report to be published in a particular newspaper on May 7th. He was acquitted of that charge at trial. However, he was convicted of causing a false report to be published in a different newspaper on May 9th. The Court quashed the conviction: because he was not extradited on the second charge, the rule of specialty precluded the prosecution – even though it was essentially the same charge, committed two days later.

[7] The Certificate of Authentication dated July 6, 2006, seeks MacIntosh's extradition on a total of 43 counts.

[8] The request for extradition dated July 14, 2005 (Diplomatic Note No. 0329 issued by the Canadian High Commission) specifically requests extradition on the 43 counts now before this Court. The 43 counts are clearly referenced by the Indian Court at page 23 of its decision granting extradition:

> "The serial violations committed by the fugitive criminal in as many as 43 different reported counts are not isolated incidents between two individuals but have a definite impact on the society for which he has to be suitably dealt with. The courts are under a legal obligation to protect the innocence of the childhood and to ensure that no person is allowed to exploit the same. Hence in so far the application of fugitive criminal for discharge u/s. 7(3) of the Extradition Act on the ground that the alleged offences are not extradition offences, I do not find any merit in the same. The application is hereby dismissed."

[9] The final page of that decision indicates that MacIntosh consented to his extradition in exchange for time to wind up his affairs in India prior to his surrender. This is not the written waiver required by Article 16 of the Extradition Treaty. In the circumstances, I do not think the written waiver is required. MacIntosh was represented by Counsel before the Indian Court and, therefore, presumably gave his consent on the advice of counsel.

[10] MacIntosh submits that it is necessary to determine what evidence was put before the Indian Court. Only in this way, he argues, can I make a determination

of which charges formed the basis of his extradition. Despite the very able argument of counsel, I have concluded that I am really being asked to assess the sufficiency of that evidence. Any challenge to the sufficiency of the evidence in support of the extradition request was for the court in India to adjudicate.

[11] I recognize that in some cases it may be necessary to go behind the warrant of extradition to determine what charges led to extradition. This is not one of those cases. Extradition was requested for 43 charges and extradition was granted. Moreover, as I have already noted, MacIntosh consented to the extradition.

[12] ***The Charter:*** MacIntosh submits that he is entitled to the protection of Section 7 of the Charter, that his extradition was contrary to the principles of fundamental justice. Specifically, he points to the quality of the evidence and, in some cases, the lack of evidence which was compiled and forwarded to India by Canadian officials in support of the extradition request.

[13] That evidence, he argues, did not meet the Treaty requirements for extradition. Counsel's brief reads in part:

> "... The Treaty requirements exist for his protection; it is not in accordance with the principles of fundamental justice that he

> should be extradited without requiring Canada to comply with the standards which itself has agreed. The requirement, that Canada voluntarily agreed to, was to provide affidavit evidence. It did not." (Brief p. 24).

Further:

> "In Canada, we do not permit an extradition to occur unless satisfied that the affidavit evidence is reliable. Surely the Charter guarantees the same standard for extraditions to Canada. If we do not permit extradition from Canada based on a unreliable affidavit, it is a breach of the Charter to allow extradition to Canada, based on no affidavit at all – at least when the Treaty requires affidavit evidence." (Brief p. 25)

[14] While an attractive argument, it is based in part upon a misreading of the requirements of Articles 8 and 9 of the Extradition Treaty:

> "Article 8: Extradition Procedures
>
> 2. Where the request for extradition is for a person accused of an extradition offence it shall also be supported by:
> ...
>
> > (b) 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, including evidence showing that the person sought is the person to whom the warrant of arrest refers." (Emphasis mine)

> "Article 9: Extradition Evidence
>
> 1. The evidence submitted in support of a request for extradition shall be admitted in the extradition proceedings in the requested State if it purports to be under the stamp or seal of

> a department, ministry or minister of the requesting State, without proof of the official character of the stamp or seal.
>
> 2. The evidence referred to in paragraph 1 ***may*** include originals or copies of statements, depositions or other evidence purporting to have been taken on oath or affirmation whether taken for the purpose of supporting the request for extradition or for some other purpose." (Emphasis mine)

[15] Immediately following the quote of Articles 8 and 9 in Counsel's brief, the following paragraph appears:

> "The requirement of Article 8 is 'such evidence as, according to the laws of [Canada], would justify his ... committal for trial' and from Article 9 'statements, dispositions or other evidence purporting to have been taken on oath'. These are the sections that the federal Department of Justice is summarizing in concluding that there must be an affidavit from each complainant."

[16] In this situation the "requesting" state is Canada and the "requested" state is India. Yet, in his quote from Article 8, Counsel substitutes the word "Canada" for the word "requested". The quote therefore should properly read: "such evidence as, according to the laws of [India], would justify his ... committal for trial".

[17] Further, subparagraph 2 of Article 9 contains the permissive "may" rather than a mandatory "shall" when listing the types of permitted evidence. I take it

therefore that the list is not exhaustive and, in particular, that it does not necessarily mandate first person affidavits, or evidence under oath or affirmation.

[18] In short, the requirements of Articles 8 and 9 are open to argument. That argument should properly have been made to the Court in India. It is not my role to determine what evidence India would require for a committal to trial or whether India should or should not be satisfied with second-hand affidavits or other forms of hearsay evidence.

[19] It is evident in the correspondence that Counsel from the International Assistance Group of the Department of Justice was seeking first-hand affidavit evidence from the Crown. It is also clear that in some cases the Crown was unable to provide such evidence. I take it that Counsel in Ottawa was seeking the highest quality evidence to maximize the chances of a successful extradition request. Her request does not necessarily mean that the highest quality evidence was absolutely essential. That the request went forward on all 43 counts does not necessarily indicate that MacIntosh's Section 7 rights were violated.

[20] In any event, the quality or sufficiency of the evidence submitted in support of an extradition request is an issue for the Court in the requested state. In ***U.S.A. v. Ferras*** [2006] 2 SCR 77, Canada was the requested state. Our Supreme Court accordingly assessed the sufficiency of the evidence in support of the request using Canadian standards. Counsel did not supply a case which held that the same standards apply in a case of extradition ***to*** Canada as in a case of extradition ***from*** Canada. Clearly the Charter operates with respect to the latter. I am not persuaded that the Charter applies to the former.

[21] ***Conclusion:*** I am dismissing the Application.

Order accordingly.

J.