

On June 17, 1999 Canada's new Extradition Law came into force, after receiving Royal Assent. The primary features of the new legislation are as follows:

- Extradition from Canada is possible on the basis of bilateral or multilateral treaty, or without treaty where the state or entity is designated under the legislation, or there is a specific agreement in place with respect to the particular case;
- Canada will be able to extradite both to states and to entities such as the existing war crimes tribunals;
- Extradition is based on conduct and penalty as opposed to a list of offences, so that, subject to treaty, extradition is available for any conduct which is punishable in Canada, and in the requesting state or entity, by imprisonment or other deprivation of liberty for a maximum term of two years or more;
- Where the requesting state seeks extradition for prosecution of an offence on the basis of extraterritorial jurisdiction, the Minister of Justice has the discretion to order surrender even though Canada could not exercise extraterritorial jurisdiction under similar circumstances;
- The process for extradition from Canada continues to have both a judicial and an executive phase. At the judicial phase, a judge will determine if the conduct constitutes an offence in Canada and if there is sufficient evidence such that, had it occurred in Canada, the person would be committed to stand trial. At the executive phase, the Minister of Justice will decide whether or not to surrender, taking into account all of the circumstances and any applicable ground of refusal;
- The person sought and the requesting state or entity each has the right to appeal the decision of the judge and the person sought may seek judicial review of the Minister's decision in the relevant provincial or territorial Court of Appeal. However, in most instances, the appeal from committal will not be heard until after the Minister's decision, so that both the appeal and judicial review will be heard and decided at the same time. An appeal from the appellate court decision to the Supreme Court of Canada may only be pursued if leave is granted by that Court;
- While a requesting state is still required to submit evidence in support of a request, that evidence no longer need be adduced in a form admissible under normal Canadian evidentiary rules. Thus, it is not necessary to provide individual first person affidavits, which relate only the personal knowledge of each witness, i.e., which contain no hearsay. Instead, a record of the case may be provided which summarizes the evidence in the case. The record of the case will be admissible in the Canadian judicial proceedings provided that a judicial or prosecuting authority in the requesting state certifies that the evidence is available for trial and either is sufficient to justify prosecution or was gathered in accordance with the law of extradition partner. In a conviction case the certification must relate that the documents in the record of the case are accurate;

- There is provision for temporary surrender both to and from Canada. This will permit the temporary extradition of a person, already serving a sentence in one state, for trial. Once the trial is completed the person will be returned to complete the original sentence and then will be finally surrendered if convicted and a period of incarceration imposed in relation to the offence for which he or she was temporarily surrendered;
- There is provision for both consent to extradition which will give the person the protections of the rule of specialty, and a full waiver of extradition without any such protections.

Obviously the new law, in particular the evidence scheme, will impact on the nature of the materials which must be provided in support of a request for extradition from Canada. Therefore, I thought it would be useful to outline our view of the form and content of the new “Record of the Case” and provide some general comments on the handling of transitional cases.

TRANSITIONAL PROCEDURES

First, with respect to transition, the new legislation provides that the old Act will continue to apply to cases in which the extradition hearing had already begun when the new Act came into force. Therefore, any cases which you have submitted already, where the hearing has begun, will continue to be governed by the old procedure.

There are several cases where a request for extradition has already been made and an extradition packet in conformity with the old Act and the applicable treaty has been provided, but the case has yet to reach the hearing stage. While the new Act will apply to such cases, there is no need for you to provide a new packet, in the form of the record of the case; nor is there any need to certify those existing packets as if they were a record of the case. Provided that the material has been certified in accordance with the applicable treaty, it can be relied upon before the court as material submitted in accordance with that treaty.

However, if an extradition packet has been submitted and a review of the material indicates that considerable amendments are needed before the matter can proceed before the court, we may in those instances recommend the preparation of a record of the case as opposed to a revised packet. Those matters will be dealt with on a case by case basis

EXTRADITION PACKET

The extradition packet under the new Act should have two separate parts - the Record of the Case and a general statement from a relevant official addressing issues other than the evidence.

a) Record of the Case

i) Content

In the case of a person sought for prosecution, the Record of the Case must summarize the evidence which is available for use in the prosecution of the particular offence or offences. It is important to note that a summary of the facts of the case is not sufficient. There must be a detailed summary of the actual evidence in support of each of the alleged offences. This may be in the form of a hearsay statement prepared by an investigating officer or magistrate.

For example, Mr. Smith is charged with the murder of Mr. Jones. It is alleged that Mr. Smith confronted Mr. Jones outside a bar in front of several people and shot him at point blank range. Mr. Smith died in hospital. The Record of the Case should include a summary of the following types of evidence:

The statements of the witnesses to the shooting, including their identification of Mr. Smith, which should be tied to an exhibited photograph;

The statements of the police who attended at the scene and/or arrested Mr. Smith, including a summary of any fingerprint evidence, attaching the fingerprints taken and tying them to the accused;

The statements of attending officials responsible for the transport of Mr. Jones to hospital;

The statements of the hospital officials with respect to his treatment and death and a summary of any autopsy report, linking that report to the victim;

A summary of any ballistic or other physical evidence which is available.

While it is not necessary to do so, you may attach statements, reports or other documents to the summary.

The Record of the Case itself should not contain a reference to the offence charged in the requesting state or to any other information required under the treaty. It should contain exclusively a summary of the evidence in the case.

In a conviction case, the Record of the Case should contain a copy of the document which records the conviction of the person and a summary of the conduct upon which the conviction is based. In this case, the summary can simply outline the facts underlying conviction. It need not detail evidence. However, it must contain sufficient information to link the person named in the conviction record to the person sought and thus it should also have a statement of identification which relates to attached photograph and fingerprints.

ii) Certification

Where the person is sought for prosecution, the Record of the Case must be certified by a judicial authority or a prosecutor. The authority who provides the certification must be able to attest that the evidence summarized in the Record of the Case is available for trial and either:

i) is sufficient under the law of that state to justify prosecution, or

ii) was gathered according to the law of that state.

The appropriate authority to give the certification, as well as the choice between (i) and (ii), will depend upon the nature of your legal system. Generally, we anticipate that common law countries will provide a certification by a prosecutor in accordance with (i) while civil law countries will have a judicial authority certify in accordance with (ii).

Attached to this letter, as Appendix A, you will find a draft Certificate which we believe will meet the requirements of the new legislation.

In a conviction case, the Record may be certified by a judicial, prosecuting or correctional authority who can attest to the fact that the documents in the Record of the Case are accurate. Attached, as Appendix B, is a draft certificate in a conviction case.

b) General legal statement

A general legal statement, separate and apart from the Record of the Case, must also be included in the extradition packet. The general statement can be signed by any appropriate authority in the requesting state. It may be most appropriate to have the person who certifies the record of the case provide the general statement as well. This document should contain the following:

- identification of the person providing the statement by name and position, with a brief description of that person's expertise with respect to the law of the requesting state;
- a description of the person's relationship to the prosecution, i.e., in charge of case, familiar with it;
- a statement that the extradition of X is requested for prosecution for the offence(s) of ...contrary to... (refer to any applicable statute and section number if applicable), with reference to and attaching a copy of the arrest warrant and any relevant charging document;
- a description or a copy of the text of the laws describing the offence and setting out the applicable punishment;
- reference to any law of prescription which would apply to the offence as well as a declaration as to whether the prosecution is barred or not by prescription in view of that law;
- a declaration that the law with respect to the offence was in force at the time of the alleged conduct and that it continues in force at this time;
- where the alleged offence is extraterritorial, an explanation of the basis for jurisdiction to prosecute, attaching if possible any statutory provision setting out the same.