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Parties: Czech Republic
Earl Jacob Moravek (Canada [ca])

Judges/Arbitrators: Scott (President); Philp; Steel

Procedural Stage: Appeal judgment

Previous Procedural Stage(s):
Order of extradition judge; *Czech Republic v Moravek*, unreported

Subsequent Development(s):
Referral back to the extradition judge; *Czech Republic v Moravek*, unreported

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Subject(s):

Extradition and mutual assistance — International criminal law — Torture — Foreign relations law — Treaties, application — Comity — Separation of powers

Core Issue(s):

Whether an extradition judge had the authority to inquire into the extradition obligations pursuant to a treaty.

Whether an extradition judge had the authority to determine if the extradition requirements were satisfied, under relevant statute and treaty.

Oxford Reports on International Law in Domestic Courts is edited by:

Professor André Nollkaemper, University of Amsterdam and August Reinisch, University of Vienna.

Facts

F1 Moravek, a Canadian citizen, was found guilty of burglary and sentenced to six months' imprisonment in the Czech Republic in December 1996. The same day, while being transported from the court to prison, he escaped custody and travelled on to Canada.

F2 The Czech Republic requested the extradition of Moravek for enforcement of the sentence.

F3 In March 2001, the Minister of Justice of Canada issued an authority to proceed pursuant to the Extradition Act, SC 1999, c 18 (Canada) ('Extradition Act'). The offence of theft in the Criminal Code, (Canada) was identified therein as the conduct in respect of which Moravek was convicted in the Czech Republic.

F4 Moravek was arrested and brought to court for an extradition hearing.

F5 The extradition judge ordered that Moravek be discharged based on two grounds. First, the application of an extradition agreement between Canada and the Czech Republic was not established, because the diplomatic correspondence was held to be ambiguous as to the actual existence of a treaty. Secondly, the extradition requirement pertaining to the remaining sentence (at least six months' imprisonment) was not satisfied, given that Moravek served a few hours of his six-month imprisonment sentence.

F6 The Czech Republic brought the present appeal, which raised the question whether the extradition judge, in discharging Moravek, strayed beyond his statutory jurisdiction.

Held

H1 The appeal was allowed and the order discharging Moravek was set aside. The matter was referred back to the extradition judge in order to complete the extradition hearing. (paragraph 46)

H2 Canada's international obligation to surrender a fugitive is treaty based, not founded on customary international law. Under Canada's domestic law, extradition must be provided for in a statute; the power of the executive branch of Government in that regard is not common law based. (paragraph 15)

H3 The authority of the extradition judge in these matters derives from domestic statute and international treaty. There is no inherent jurisdiction; the role of the judge in extradition matters is a modest one. (paragraphs 17, 20)

H4 Under Section 29(1) of the Extradition Act, the authority of the extradition judge in a case where a person is sought for the enforcement of a sentence is two-fold: (1) to see that 'the conviction was in respect of conduct that corresponds to the offence set out in the authority to proceed', and (2) 'that the person is the person who was convicted'. (paragraph 18)

H5 Under Section 7 of the Extradition Act, it is the responsibility of the executive branch of Government (the Minister of Justice) to ensure 'the implementation of extradition agreements'. Canada's obligations under international law are the responsibility of its political authorities. (paragraphs 23, 27)

H6 It is the duty of the Minister to see that the extradition instruments are in force and binding on Canada and that the request of the Czech Republic complies with their provisions. By issuing the authority to proceed, the Minister is deemed to be satisfied that Canada's treaty obligations are engaged. (paragraph 28)

H7 Under Section 3 of the Extradition Act, it is the duty of the Minister to see that the extradition requirements are met, looking at the request for extradition. When the Minister has issued the authority to proceed, it is assumed that the conditions are satisfied. (paragraphs 35, 36)

H8 The extradition judge has no jurisdiction to inquire into Canada's obligations under an extradition treaty or to examine whether the extradition requirements are fulfilled. (paragraphs 29, 37)

Date of Report: 15 December 2007

Reporter(s): Dr Stéphane Beaulac

Analysis

A1 This decision clarifies important issues pertaining to the law of extradition as it applies domestically in Canada. First and foremost, it defines the different roles of the executive and judicial branches of government in the process of extradition. (paragraphs 15–22)

A2 The court recalled that, in terms of international obligations, extradition is the responsibility of the political authority in the government of a sovereign State. The role of domestic judges in such proceedings is very limited indeed: they have no inherent jurisdiction and their functions must be founded in the international treaty (in the extradition agreement) and domestic statute. (paragraphs 20, 27)

A3 The significance of this case resides in the emphasis of the dichotomy between the international or foreign sphere, on the one hand, and the national or domestic sphere, on the other, in the context of extradition. The Minister of Justice dealt with international obligations (extradition) and foreign law (offence, sentence), while the extradition judge was only concerned with domestic ramifications based on the extradition statute. (paragraphs 38–41)

Date of Analysis: 15 December 2007
Analysis by: Dr Stéphane Beaulac

Instruments cited in the full text of this decision:

International

Treaty between the Czechoslovak Republic and the United Kingdom of Great Britain and Northern Ireland for the Extradition of Criminals (1924), as amended by a Protocol (1926) — extended to Canada in 1928

Cases cited in the full text of this decision:

Canadian domestic courts

Kindler v Canada (Minister of Justice), (1991) 2 SCR 779

McVey (Re); McVey v United States of America, (1992) 3 SCR 475

R v Waddell, (1992) BCJ No 2587 (QL) (BCSC)

United States of America v Lépine, (1994) 1 SCR 286

United States of America v Dynar, (1997) 2 SCR 462

United States v Drysdale, 2000 32 CR (5th) 164 (Ont SCJ)

Thailand v Karas, 2000 BCSC 1717; BCJ No 2689 (QL); 200 BCSC (CanLII)

Thailand v Karas, (2001) BCJ No 124; 2001 BCSC 72 (CanLII)

United States of America v Kwok, (2001) 1 SCR 532

United States of America v Cobb, (2001) 1 SCR 587

United States of America v Shulman, ILDC 188 (CA 2001); (2001) 1 SCR 616

Hong Kong Special Administration Region of the People's Republic of China v Chang, (2002) BCJ No 3097 (QL); 2002 BCSC 1834 (CanLII)

United States of America v Turner, (2002) 177 CCC (3d) 397 (Nfld & Lab SC (TD))

United States of America v Maydak, (2003) BCJ No 1032; 2003 BCSC 702 (CanLII)

Froom v Canada (Minister of Justice), 2003 FC 1299; (2004) 2 FCR 154

Czech Republic v Ganis, (2004) BCJ No 1024; 2004 BCSC 688 (CanLII)

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Decision - full text

Philp J.A.

Philp J.A.

Overview

1 This is an extradition proceeding in which the Czech Republic, the requesting country, seeks the extradition of the fugitive (Moravek) for enforcement of a sentence. The proceeding is governed by the provisions of the new *Extradition Act*, S.C. 1999, c. 18 (the *Act*), that came into force on June 17, 1999.

2 The extradition judge ordered Moravek's discharge at the conclusion of his extradition hearing. Identity was admitted at the hearing, and the extradition judge found that the Czech Republic had established that Moravek's conviction was "for conduct equivalent to 'theft'" (at para. 17), the offence set out in the authority to proceed. However, the extradition judge declined to order the committal of Moravek for the reasons, firstly, that "the Czech Republic has not met the onus of establishing that this particular Treaty and amending Protocol as filed can or should apply in this instance" (at para. 18) and, secondly, "that [Moravek] does not ... have 'at least six months' remaining to be served on his sentence such that he is subject to extradition" (at para. 19).

3 The Czech Republic has appealed. The overarching question raised on the appeal is whether the extradition judge, in discharging Moravek, strayed beyond his statutory jurisdiction.

The Relevant Statutory Provisions

4 The sections of the *Act* (as they now are) that come into play in assessing the jurisdiction of the extradition judge are set out in the appendix to these reasons. There have been minor technical amendments to two of these sections since the commencement of this extradition proceeding that have no effect upon its outcome.

Background Circumstances

5 On December 19, 1996, Moravek, a Canadian citizen who was visiting in the Czech Republic, pled guilty in the District Court in Jablonec nad Nisou to six offences of "burglary" and one offence of attempted "burglary" and was sentenced to "a total time of imprisonment lasting six (6) months." The six burglary offences involved breaking into parked cars and stealing personal items. He was arrested by police while committing the seventh offence, breaking into a newspaper kiosk.

6 On the same day that the sentence was imposed, Moravek escaped custody while being transported from the court to a prison.

7 On March 30, 2001, in response to the request of the Czech Republic for the extradition of Moravek for enforcement of the sentence that had been imposed, the Minister of Justice of Canada (the Minister) issued an authority to proceed (the ATP) pursuant to s. 15(1) of the *Act*. As required by s. 15(3)(c), the ATP named "Theft contrary to s. 334 of the *Criminal Code of Canada*" as "the conduct in respect of which [Moravek] was convicted." Moravek was located at his current residence in Brandon, Manitoba, arrested and brought before the court pursuant to a summons issued under s. 16(3) of the *Act*. He was then granted release pending completion of his extradition hearing.

The Proceedings Below

8 Issues that were raised at the extradition hearing but not argued on the appeal included whether the Czech Republic had established that Moravek had been convicted for conduct that was equivalent to the crime of "theft" in Canada (the crime named in the ATP), whether a six-month sentence had been imposed on him and the sufficiency of certified documents that were included in the record of the case. The conclusions of the extradition judge on these issues find ample support in the record. Nothing more need be said of them.

9 At the extradition hearing (and on appeal), Moravek argued that the Czech Republic had not established the Canada/Czech Republic extradition agreement. Counsel points to the diplomatic notes passing between the embassies of the Czech Republic and Canada in 1997, on behalf of their respective governments, declaring and confirming that the Czech Republic is bound by certain bilateral treaties to which the "Czech and Slovak Federal Republic" was a party. Included in each diplomatic note is a reference to:

> Treaty between the Czechoslovak Republic and the United Kingdom of Great Britain and Northern Ireland for the Extradition of Criminals, done at London on November 11, 1924, as amended by a Protocol signed at London on June 4, 1936.
>
> [underlining added]
>
> The Extradition Treaty of November 11, 1924, "as amended by the Protocol signed at London on June 4, 1926," was extended to Canada as of August 15, 1928. Copies of the documents that were filed at the extradition hearing indicate that they were published in the Dominion of Canada Treaty Series, 1928, as No. 8. The copies also confirm their respective dates — November 11, 1924, and June 4, 1926. I will refer to them as "the Treaty and the amending Protocol."

10 (References to the Treaty and the amending Protocol are also found in similar diplomatic notes passing between the embassies of the Slovak Republic and Canada in 1998 declaring and confirming that the Slovak Republic is bound by certain bilateral treaties. Those references are:

> Treaty between the United Kingdom and Czechoslovakia for the Extradition of Criminals, done at London on November 11, 1924, as amended by a Protocol signed at London on June 24, 1926 ….
>
> [underlining added]
>
> In the reference in the Canadian note, the bracketed words "(in force for Canada as of August 15, 1928)" are added.)

11 Counsel for Moravek argued before the extradition judge that two amending Protocols (one dated June 4, 1926, and the other dated June 4, 1936) are referred to in the documents, but only one was put before the court. Accordingly, he says, the Czech Republic has not proved the extradition agreement. In this court, counsel takes the argument somewhat further. He asserts that diplomatic notes passing between embassies cannot establish an extradition agreement between their respective governments.

12 On this issue, the extradition judge concluded (at para. 18):

> … I am not prepared to order extradition as requested in this particular circumstance. I come to this conclusion mindful of the obligations of the Government of Canada and of the courts to construe the legislation and the Treaty liberally and to ensure that Canada honours its international obligations. However, in the absence of proof that the reference to an amending Protocol having been agreed to on June 4, 1936 is a typographical error or (alternatively), in the absence of evidence as to exactly what amendments were made in 1936 (if this is not a typographical error), the Czech Republic has not met the onus of

establishing that this particular Treaty and amending Protocol as filed can or should apply in this instance.

13 In the next paragraph, he continued with respect to the length of Moravek's remaining sentence:

> Further, the evidence contained in the record of the case that has been admitted satisfies me, as submitted by Mr. Moravek, that he does not now (and did not when he escaped custody) have “at least six months” remaining to be served on his sentence such that he is subject to extradition. I accept his submission to the effect that from the moment he was sentenced in court and placed in the custody of the police to transport him to a prison facility, he was a sentenced prisoner. Accordingly, he served a portion of his sentence (albeit perhaps a very small portion). Parliament has made a policy decision, by enacting s. 3(3) of the **Act**, to prohibit extradition if the person in question has less than six months left to serve in his or her term of imprisonment. This conclusion is consistent with the provisions of s. 719(1) and (4) of the **Criminal Code**; in the absence of some specific enactment to the contrary (and I have no such evidence before me), a sentence commences when it is imposed; in this case the moment that it was imposed by the presiding judge in the District Court in the Czech Republic. Section 719(4) of the **Criminal Code** provides that the term of imprisonment commences on the day on which the convicted person is taken into custody under the sentence; the evidence before me establishes that Mr. Moravek was taken into custody under the sentence imposed by the District Court immediately following imposition of the sentence and prior to his escape from custody.

14 The extradition judge did not order the committal of Moravek and therefore ordered him discharged pursuant to s. 29(3) of the *Act*.

Analysis

The Role of the Extradition Judge

15 I begin with a brief overview of the extradition process. Canada's international obligation to surrender a fugitive to another country must be found in a treaty. It is not part of the customary international law. Under Canada's domestic law, extradition is a creature of statute. The power of the executive to extradite a fugitive is not part of the common law. See *McVey (Re); McVey v. United States of America*, 1992 CanLII 48 (S.C.C.), [1992] 3 S.C.R. 475 at 508–9. In *McVey*, La Forest J., writing for the majority, explained (at pp. 519–20):

> In essence, the treaty obligations are of a political character to be dealt with in the absence of statute by the political authorities. However, as Laskin J. noted in *Commonwealth of Puerto Rico v. Hernandez*, [1975] 1 S.C.R. 228, at p. 245, the liberty of the individual has not been forgotten in these rather special proceedings. The treaties, sensitive to the liberty of the individual, contain provisions for their protection. Most important is the requirement that there be *prima facie* evidence that the act charged would constitute a crime in Canada. This specific matter, about which judges are most competent, is the task assigned to a judge by the *Extradition Act*. Other tasks, no doubt, may be assigned to extradition judges, but one must find a statutory source, and courts should not reach out to bring within their jurisdictional ambit matters that the Act has not assigned to them. Barring statutory provision, the task of dealing with international treaty obligations is for the political authorities, and is performed by the Ministers and departments in the course of fulfilling their appropriate mandates. The *Extradition Act*, of course, gives the Minister of Justice authority respecting the surrender of a fugitive; see ss. 20 – 22 and 25. The treaty terms are aimed at the obligations of the parties and not the internal procedures by which these are to be carried into effect. The spirit in which the treaties should be approached is well stated by Lord Bridge in

Postlethwaite, [*Government of Belgium v. Postlethwaite*, [1987] 3 W.L.R. 365 (H.L.(E.))], as follows, at pp. 383–84:

> … an extradition treaty is "a contract between two sovereign states and has to be construed as such a contract. It would be a mistake to think that it had to be construed as though it were a domestic statute:" *Reg. v. Governor of Ashford Remand Centre, Ex parte Beese* [1973] 1 W.L.R. 969, 973, *per* Lord Widgery C.J. In applying this … principle, … it must be remembered that the reciprocal rights and obligations which the high contracting parties confer and accept are intended to serve the purpose of bringing to justice those who are guilty of grave crimes committed in either of the contracting states. To apply to extradition treaties the strict canons appropriate to the construction of domestic legislation would often tend to defeat rather than to serve this purpose.

16 In *Kindler v. Canada (Minister of Justice)*, 1991 CanLII 78 (S.C.C.), [1991] 2 S.C.R. 779, McLachlin J. (as she then was) emphasized the unique features of the extradition process in her concurring reasons (at p. 844):

> While the extradition process is an important part of our system of criminal justice, it would be wrong to equate it to the criminal trial process. It differs from the criminal process in purpose and procedure and, most importantly, in the factors which render it fair. Extradition procedure, unlike the criminal procedure, is founded on the concepts of reciprocity, comity and respect for differences in other jurisdictions.
>
> This unique foundation means that the law of extradition must accommodate many factors foreign to our internal criminal law. While our conceptions of what constitutes a fair criminal law are important to the process of extradition, they are necessarily tempered by other considerations.

17 The authority of the extradition judge in the extradition process is governed by statute and the extradition agreement. Perhaps the most frequently quoted expression of the limits of the jurisdiction of an extradition judge is found in the judgment of Cory and Iacobucci JJ. in *United States of America v. Dynar*, 1997 CanLII 359 (S.C.C.), [1997] 2 S.C.R. 462 (at paras. 120–22):

The jurisdiction of the extradition judge is derived entirely from the statute and the relevant treaty. Pursuant to s. 3 of the Act, the statute must be interpreted as giving effect to the terms of the applicable treaty. La Forest J., writing for the majority in *McVey*, *supra*, at p. 519, stated that courts must find a statutory source for attributing a particular function to the extradition judge, and that "courts should not reach out to bring within their jurisdictional ambit matters that the Act has not assigned to them". In particular, it was held in *Argentina v. Mellino*, 1987 CanLII 49 (S.C.C.), [1987] 1 S.C.R. 536, at p. 553, that

> absent express statutory or treaty authorization, the sole purpose of an extradition hearing is to ensure that the evidence establishes a *prima facie* case that the extradition crime has been committed. [Emphasis added.]

As a result, the role of the extradition judge has been held to be a "modest one", limited to the determination of whether or not the evidence is sufficient to justify committing the fugitive for surrender: see, for example, *United States of America v. Lépine*, 1994 CanLII 116 (S.C.C.), [1994] 1 S.C.R. 286, at p. 296; *Mellino*, *supra*, at p. 553; *McVey*, *supra*, at p. 526.

One of the most important functions of the extradition hearing is the protection of the liberty of the individual. It ensures that an individual will not be surrendered for trial in a foreign jurisdiction unless, as previously mentioned, the Requesting State presents evidence that demonstrates on a *prima facie* basis that the individual has committed acts in the foreign jurisdiction that would constitute criminal conduct in Canada. See *McVey*, *supra*, at p. 519; *Commonwealth of Puerto Rico*

v. Hernandez, [1975] 1 S.C.R. 228, at p. 245, *per* Laskin J. (as he then was); *Canada v. Schmidt*, 1987 CanLII 48 (S.C.C.), [1987] 1 S.C.R. 500, at p. 515. The extradition judge may also have limited *Charter* jurisdiction under s. 9(3) of the amended *Extradition Act*, although it is not necessary to delineate the scope of that jurisdiction in this appeal.

A judge hearing an application for extradition has an important role to fulfil. Yet it cannot be forgotten that the hearing is intended to be an expedited process, designed to keep expenses to a minimum and ensure prompt compliance with Canada's international obligations. As La Forest J. stated for the majority in *McVey*, *supra*, at p. 551, "extradition proceedings are not trials. They are intended to be expeditious procedures to determine whether a trial should be held". In fact, in some contexts, a requirement for more "trial-like" procedures at the extradition committal stage may "cripple the operation of the extradition proceedings": *McVey*, *supra*, at p. 528. See also *Schmidt*, *supra*, at p. 516.

18 The jurisdiction conferred upon the extradition judge is found in s. 29(1) of the *Act*. In the case of a person who is sought for the imposition or enforcement of a sentence (such as Moravek in this appeal), the extradition judge must consider whether "the conviction was in respect of conduct that corresponds to the offence set out in the authority to proceed and that the person is the person who was convicted." See s. 29(1)(b).

19 The *Act* has codified in ss. 3(1)(a) and 15 the responsibility of the Minister to determine whether the conduct alleged against the fugitive was a crime in the requesting country. See *Hong Kong Special Administration Region of the People's Republic of China v. Chang*, 2002 BCSC 1834 (CanLII), [2002] B.C.J. No. 3097 (QL), 2002 BCSC 1834, at para. 13, and the authorities referred to by Martinson J. in that paragraph. On this appeal, the Czech Republic argues that ss. 3(3) and 15 also assign to the Minister the responsibility to determine whether there is imprisonment of "at least six months" remaining to be carried out.

20 In *Thailand v. Karas*, 2000 BCSC 1717 (CanLII), [2000] B.C.J. No. 2689 (QL), 2000 BCSC 1717, Lysyk J. observed (at para. 19):

> It is common ground that this extradition court does not have inherent jurisdiction. Its jurisdiction is conferred by the terms of the Act and such authority as flows from the Treaty. Further, as will appear, the parties agree that the extradition court has some jurisdiction to apply the Charter; however, they disagree as to the scope of the jurisdiction to entertain Charter issues.

21 (In *United States of America v. Kwok*, 2001 SCC 18 (CanLII), [2001] 1 S.C.R. 532, 2001 SCC 18, and *United States of America v. Cobb*, 2001 SCC 19 (CanLII), [2001] 1 S.C.R. 587, 2001 SCC 19, appeals that were decided a few months after the decision of Lysyk J. in *Karas* was released, the court commented upon the limits of the jurisdiction of an extradition judge in granting relief under the *Canadian Charter of Rights and Freedoms* (the *Charter*). Those appeals were governed by the former *Extradition Act*, R.S.C., 1985, c. E–23 (amended S.C. 1992, c. 13), but in *Kwok*, Arbour J., writing for the court, reasoned, at para. 24, that for all intents and purposes, the *Charter* jurisdiction of the extradition judge under the *Act* is identical to what it was under the former *Act*. She described the limits of that jurisdiction in the following words (at para. 54):

In my view, the 1992 amendments did not confer unlimited *Charter* jurisdiction on the extradition judge and therefore do not render obsolete all previous extradition case law. Section 9(3) [s. 25 in the *Act*] clearly confers *Charter* jurisdiction upon the extradition judge insofar as the issues are specific to the functions of the extradition hearing, and to the extent that the *Charter* remedies could have previously been granted by the *habeas corpus* judge.

In *Cobb*, Arbour J., again writing for the court, confirmed (at para. 26):

The extradition judge is therefore competent to grant *Charter* remedies, including a stay of proceedings, on the basis of a *Charter* violation but only insofar as the *Charter* breach pertains directly to the circumscribed issues relevant at the committal stage of the extradition process.

22 However, the *Charter* jurisdiction of the extradition judge is not an issue on this appeal. *Charter* relief that Moravek may seek was not formalized at the extradition hearing by an appropriate notice or submission, although the extradition judge indicated during the hearing that the making of an order of committal would be subject to Moravek's right to do so.)

The Treaty and the Amending Protocol

23 Section 7 assigns to the Minister, *inter alia*, responsibility for "the implementation of extradition agreements." An extradition agreement is not a document that is required to be included as part of the record of the case at the extradition hearing (s. 33), and when published in the *Canada Gazette* or the *Canada Treaty Series* , it is "to be judicially noticed" (s. 8(3)). The publication of the Treaty and the amending Protocol has not been challenged in this extradition proceeding.

24 In *R. v. Waddell*, [1992] B.C.J. No. 2587 (QL) (S.C.), Thackray J. concluded that "section 8 is an evidentiary assist whereby the Court is required to accept that the appropriate steps were taken to bring an extradition treaty into force" (at p. 5).

25 In a second judgment in the *Karas* extradition proceeding (reported as 2001 BCSC 72 (CanLII), [2001] B.C.J. No. 124 (QL), 2001 BCSC 72), Lysyk J. applied the reasoning of Cory and Iacobucci JJ. in *Dynar* in concluding, at paras. 5 and 18, that the question of whether a treaty continued to be in force and binding on Canada is one for the Minister to determine and not one within his jurisdiction as an extradition judge.

26 Satanove J. reached a similar conclusion in *Czech Republic v. Ganis*, 2004 BCSC 688 (CanLII), [2004] B.C.J. No. 1024 (QL), 2004 BCSC 688, in rejecting the fugitive's argument that the treaty relied upon by the requesting state was defective. In doing so, she referred to the *Karas* decisions and, as well, to the decision of the extradition judge in this proceeding. She concluded (at para. 16):

It is obvious from reading both decisions in *Thailand v. Karas* that Lysyk J. had the benefit of full submissions and guiding case law to assist him in providing learned, lucid reasons for judgment on this issue. From the list of authorities attached to the Reasons for Judgment of [the extradition judge in *Czech Republic v. Moravek*] it appears he did not have the benefit of any authorities and probably no submissions regarding the limited jurisdiction of an extradition judge. Even if the Czech Republic v. Moravek were a decision emanating from this Court, I would not feel compelled to follow it for those reasons.

27 At the extradition hearing, neither party raised the question of the jurisdiction of the extradition judge. Had they done so, the extradition judge would have had to conclude that Canada's obligations under international treaties are the responsibility of its political authorities. In *United States of America v. Lépine*, 1994 CanLII 116 (S.C.C.), [1994] 1 S.C.R. 286, La Forest J. reiterated what he had said in *McVey*. He confirmed that "there is a role for Canada in monitoring compliance with that treaty, but that role is not one for the courts. It is one for the executive" (at p. 298).

28 It was the duty of the Minister to satisfy himself that the Treaty and the amending Protocol were in force and binding on Canada and that the request of the Czech Republic complied with their terms and conditions. Having issued the ATP pursuant to s. 15(1) of the *Act*, it must be assumed that the Minister concluded that the extradition agreement was the Treaty and the amending Protocol that were extended to Canada as of August 15, 1928, and that the difference in the dates in the amending Protocol (June 4, 1926) and in the embassy notes (June 4, 1936) was (as it

appears to be) merely a slip.

29 There is no provision in the *Act* or in the Treaty and the amending Protocol that authorizes the extradition judge to inquire into Canada's treaty obligations. The extradition judge exceeded his jurisdiction when he concluded that "the Czech Republic has not met the onus of establishing that this particular Treaty and amending Protocol as filed can or should apply in this instance" (at para. 18).

The Duration of the Sentence

30 Section 3(3) of the *Act* provides that the extradition of a convicted person may only be granted if he has "at least six months" remaining to be served. The extradition judge concluded that Moravek "does not now (and did not when he escaped custody) have 'at least six months' remaining to be served on his sentence such that he is subject to extradition" (at para. 19). He accepted Moravek's somewhat specious argument, based on Canada's domestic law (s. 719(1) and (3) of the *Criminal Code*), that because he had served a portion of his six-month sentence, he had less than six months left to serve. We do not know what portion of the sentence he had served between the time of its imposition and his escape from custody the same day. The extradition judge thought it was "perhaps a very small portion" (*ibid.*). We do know that it was less than a day and possibly no more than an hour or two.

31 However, that question is an irrelevant one in the circumstances of this case. The Czech Republic's request for extradition stated that "[a] sentence had been rendered … which has not become effective for the offender" (underlining added). That statement dispels any concern that the condition set out in s. 3(3) of the *Act* — the minimum term of imprisonment remaining to be carried out — had not been met.

32 The Czech Republic argues that the extradition judge "erred in usurping the role of the Minister of Justice to determine whether or not the minimum sentence requirements under the *Act* and the Treaty had been satisfied." In my view, that is what he did. Pursuant to s. 15 of the *Act*, the Minister must be satisfied that the conditions set out in s. 3(3) are met before issuing an ATP. It seems to me that if a question arose as to when the sentence imposed on Moravek had commenced, it would be resolved by a consideration of the law of the Czech Republic. That is the responsibility of the Minister, and the Supreme Court has made it clear that "the extradition judge 'is not concerned with foreign law at all.'" See *McVey*, at p. 529.

33 In *United States v. Drysdale*, (2000), 32 C.R. (5^{th}) 163 (Ont. S.C.J.), in his comments on the distinct roles of the Minister and the extradition judge, Dambrot J. referred to the Minister's duty under s. 15 to determine compliance with s. 3(3). He wrote (at para. 78):

It is the task of the Minister, by virtue of s. 15(1), after receiving an extradition request, to determine compliance with s. 3(1)(a), or s. 3(3) where applicable, and then to determine what offences under Canadian law correspond to the conduct alleged against the person in the requesting state, as distinct from the question of the sufficiency of the evidence. Sections 32 and 33 of the *Act* then contemplate that evidence, which is available for use in the foreign prosecution, will be placed before the extradition judge in the form of affidavits or a record of the case. The judge then determines whether the conduct of the person sought, as disclosed in the evidence placed before him or her, satisfies the requirement of s. 3(1)(b). Finally, armed with the judge's order of committal and report under s. 38, the Minister must decide, subject to review by the Court of Appeal of the relevant province pursuant to s. 57, whether surrender should be ordered. As will be seen, while the rule of double criminality is preserved by the new *Act*, the extradition judge is not its sole guardian. The extradition judge has but a modest role to play in ensuring that the rule is respected. The Minister has a significant role. In the end, the appellate courts have the final word.

34 In *United States of America v. Maydak*, 2003 BCSC 702 (CanLII), [2003] B.C.J. No. 1032 (QL),

2003 BCSC 702, Garson J. dealt directly with the lack of jurisdiction of the extradition judge on the question of the length of the remaining sentence pursuant to s. 3(3) of the *Act*. She wrote (at para. 17):

Section 3(3) of the Extradition Act appears to impose an impediment to extradition if there is no evidence that Mr. Maydak faces at least six month imprisonment, but Mr. Maydak's argument overlooks the fact that the Extradition Act assigns separate functions to the Minister of Justice and the Extradition Judge. It is for the Minister of Justice to assess compliance with s. 3(1)(a) and 3(3) of the Extradition Act and applicable Treaty.

35 In my view, the reasoning in *Maydak* and *Drysdale* on this point is sound. Sections 3(1)(a), 3(3) and 15 of the *Act* must be read together. They clearly assign to the Minister the responsibility for assessing whether a request for extradition meets the conditions set out in s. 3(1)(a) and s. 3(3). Specifically, pursuant to s. 3(3), he must be satisfied that, in the case of a fugitive who has been sentenced to imprisonment, there are at least six months of the sentence remaining to be carried out. It is only when the Minister is satisfied that the conditions in s. 3(1)(a) and s. 3(3) are met that he may issue an ATP that becomes the initiating or founding document for the extradition hearing.

36 In this case, the Minister issued the ATP. We must assume that in doing so, he was satisfied that the conditions in s. 3(3) (and in s. 3(1)(a)) were met. It was not open to the extradition judge to embark upon an inquiry as to what portion of Moravek's sentence remained to be carried out. His responsibility under s. 29(1)(b) was to determine on the evidence that was put before him whether Moravek's conduct corresponded to the offence that is named in the ATP.

37 The extradition judge found "(on any standard of proof) that the Czech Republic has proven, in this proceeding, Mr. Moravek's conviction and the fact that he was convicted for conduct equivalent to 'theft'" (at para. 17). On that finding, and the admission as to identity (and leaving aside *Charter* arguments that might possibly be raised), the extradition judge was bound as a matter of law to commit Moravek into custody to await surrender.

The Jurisdiction to Review

38 Moravek argues that the extradition judge had the jurisdiction to review the ATP for "shortcomings in statutory requirements, such as those found in the case at bar," and, if they are sufficient, to discharge him. He relies on the recent decisions in *United States of America v. Turner*, (2002), 177 C.C.C. (3d) 397 (Nfld. & Lab. S.C. (T.D.)), and *Froom v. Canada (Minister of Justice)*, 2003 FC 1299 (CanLII), [2004] 2 F.C.R. 154, 2003 FC 1299.

39 In *Turner*, Green C.J.T.D. concluded, at para. 36, that an extradition judge has jurisdiction to quash an ATP where that document does not comply with the statutorily mandated minimum contents. At the same time, he recognized that "[t]he real question for consideration, however, is what is sufficient to meet this minimum content standard" (at para. 37).

40 In *Froom*, Layden-Stevenson J. expressed a somewhat different view. She opined that "the extradition judge has no jurisdiction to review the ATP" (at para. 58). She found, however, that the Federal Court has jurisdiction to review the decision of the Minister to issue an ATP. She reasoned, at para. 56, that while the Federal Court has no jurisdiction to review the Minister's surrender decision pursuant to s. 57(1) of the *Act*, there is no similar provision displacing its jurisdiction for judicial review of the Minister's decision to issue an ATP pursuant to s. 15.

41 It may well be that it is within the jurisdiction of a provincial court of appeal to review the sufficiency of the ATP and the record of the case at the extradition hearing in the course of its judicial review pursuant to s. 57 of the *Act* of the surrender order made by the Minister under s. 40.

42 As well, it should not be overlooked that the inherent jurisdiction of an extradition court to control its own process and prevent its abuse was confirmed in *Cobb*, at paras. 36–38, and in

United States of America v. Shulman, 2001 SCC 21 (CanLII), [2001] 1 S.C.R. 616, 2001 SCC 21, at para. 33. Where fundamental principles of justice which underlie the community's sense of fair play and decency are violated, or where the proceedings are oppressive or vexatious, a stay of proceedings should be granted.

43 The circumstances of this case do not raise concerns relating to the sufficiency of the ATP or to the conduct of the Minister in exercising his authority under s. 15. The "shortcomings in statutory requirements" that Moravek alleges simply do not exist. The reasoning of Green C.J.T.D. in *Turner* is compelling. However, it is not necessary to consider whether the extradition judge would have had the power to quash the ATP if the record of the case had disclosed that Moravek had served a few hours of his sentence (but arguably still had six months remaining to be served).

44 A final comment on Moravek's personal circumstances. Medical reports were filed at the extradition hearing that indicate that Moravek suffered a serious spinal cord tumor in 2000 that has left him in a near-paraplegic condition. He lives with his partner and their two children in a small mobile home in rural Manitoba. He is unable to work, and his family subsists on his minimal disability pension.

45 It was acknowledged at the extradition hearing that the reports were not relevant to the issue of Moravek's committal. Rather, they were admitted as documents that could be included in the extradition judge's report to the Minister pursuant to s. 38(1)(c) of the *Act*. The reports, in my view, are very relevant to the grounds for refusal to surrender that the Minister must consider pursuant to s. 44. And, in my view, so are factors relating to Moravek's conviction and sentence. The offences for which he was convicted, and the circumstances of their commission, hardly depict the "grave crimes" (Lord Bridge's words in *Postlethwaite*, quoted by La Forest J. in *McVey*) that one usually associates with the extradition process, and the sentence that was imposed on him is the minimum one for which Canada will give effect to an extradition request.

Disposition

46 The appeal is allowed, and the order of the extradition judge discharging Moravek is set aside. Because *Charter* issues that Moravek indicated he wished to advance had not been argued, the matter is referred back to the extradition judge for completion of the extradition hearing.

_____J.A.

I agree: _____C.J.M.

I agree: _____J.A.

Appendix

Extradition Act S.C. 1999, c. 18

3. Extraditable Conduct

(1) General principle

A person may be extradited from Canada in accordance with this Act and a relevant extradition agreement on the request of an extradition partner for the purpose of prosecuting the person or imposing a sentence on –– or enforcing a sentence imposed on –– the person if

(a) subject to a relevant extradition agreement, the offence in respect of which the extradition is requested is punishable by the extradition partner, by imprisoning or

otherwise depriving the person of their liberty for a maximum term of two years or more, or by a more severe punishment; and

(b) the conduct of the person, had it occurred in Canada, would have constituted an offence that is punishable in Canada,

(i) in the case of a request based on a specific agreement, by imprisonment for a maximum term of five years or more, or by a more severe punishment, and

(ii) in any other case, by imprisonment for a maximum term of two years or more, or by a more severe punishment, subject to a relevant extradition agreement.

(2) Conduct determinative

For greater certainty, it is not relevant whether the conduct referred to in subsection (1) is named, defined or characterized by the extradition partner in the same way as it is in Canada.

(3) Extradition of a person who has been sentenced

Subject to a relevant extradition agreement, the extradition of a person who has been sentenced to imprisonment or another deprivation of liberty may only be granted if the portion of the term remaining is at least six months long or a more severe punishment remains to be carried out.

Functions of the Minister

7. Functions of the Minister

The Minister is responsible for the implementation of extradition agreements, the administration of this Act and dealing with requests for extradition made under them.

8. Publication of Extradition Agreements

(1) Publication in Canada Gazette

Unless the extradition agreement has been published under subsection (2), an extradition agreement — or the provisions respecting extradition contained in a multilateral extradition agreement — must be published in the *Canada Gazette* no later than 60 days after it comes into force.

(2) Publication in Canada Treaty Series

An extradition agreement — or the provisions respecting extradition contained in a multilateral extradition agreement — may be published in the *Canada Treaty Series* and, if so published, the publication must be no later than 60 days after it comes into force.

(3) Judicial notice

Agreements and provisions published in the *Canada Gazette* or the *Canada Treaty Series* are to be judicially noticed.

15. Authority to Proceed

(1) Minister's power to issue

The Minister may, after receiving a request for extradition and being satisfied that the conditions set out in paragraph 3(1)(*a*) and subsection 3(3) are met in respect of one or more offences mentioned in the request, issue an authority to proceed that authorizes the Attorney General to seek, on behalf of the extradition partner, an order of a court for the committal of the person under section 29.

(2) Competing requests

If requests from two or more extradition partners are received by the Minister for the extradition of a person, the Minister shall determine the order in which the requests will be authorized to proceed.

(3) Contents of authority to proceed

The authority to proceed must contain

(a) the name or description of the person whose extradition is sought;

(b) the name of the extradition partner; and

(c) the name of the offence or offences under Canadian law that correspond to the alleged conduct of the person or the conduct in respect of which the person was convicted, as long as one of the offences would be punishable in accordance with paragraph 3(1)(*b*).

…

16. Arrest or Summons Following Authority to Proceed

(1) Warrant of arrest or summons

The Attorney General may, after the Minister issues an authority to proceed, apply *ex parte* to a judge in the province in which the Attorney General believes the person is or to which the person is on their way, or was last known to be, for the issuance of a summons to the person or a warrant for the arrest of the person.

(2) When provisionally arrested

If the person has been arrested pursuant to a provisional arrest warrant issued under section 13, the Attorney General need not apply for a summons or warrant under subsection (1).

(3) Issuance of summons or warrant of arrest

The judge to whom an application is made shall issue a summons to the person, or a warrant for the arrest of the person, in accordance with subsection 507(4) of the *Criminal Code*, with any modifications that the circumstances require.

(4) Execution throughout Canada

A warrant that is issued under this section may be executed, and a summons issued under this section may be served, anywhere in Canada without being endorsed.

(5) Date of hearing — summons

A summons that is issued under this section must

(a) set a date for the appearance of the person before a judge that is not later than 15 days after its issuance; and

(b) require the person to appear at a time and place stated in it for the purposes of the *Identification of Criminals Act*.

(6) Effect of appearance

A person appearing as required by subsection (5) is considered, for the purposes only of the *Identification of Criminals Act*, to be in lawful custody charged with an indictable offence.

Extradition Hearing

…

29.

(1) Order of committal

A judge shall order the committal of the person into custody to await surrender if

(a) in the case of a person sought for prosecution, there is evidence admissible under this Act of conduct that, had it occurred in Canada, would justify committal for trial in Canada on the offence set out in the authority to proceed and the judge is satisfied that the person is the person sought by the extradition partner; and

(b) in the case of a person sought for the imposition or enforcement of a sentence, the judge is satisfied that the conviction was in respect of conduct that corresponds to the offence set out in the authority to proceed and that the person is the person who was convicted.

(2) Order of committal

The order of committal must contain

(a) the name of the person;

(b) the offence set out in the authority to proceed for which the committal is ordered;

(c) the place at which the person is to be held in custody; and

(d) the name of the extradition partner.

(3) Discharge of person

A judge shall order the person discharged if the judge does not order their committal under subsection (1).

(4) Relevant date

The date of the authority to proceed is the relevant date for the purposes of subsection (1).

(5) Extradition when person not present at conviction

Subject to a relevant extradition agreement, if a person has been tried and convicted without the person being present, the judge shall apply paragraph (1)(*a*).

Rules of Evidence

...

33.

(1) Record of the case

The record of the case must include

(a) in the case of a person sought for the purpose of prosecution, a document summarizing the evidence available to the extradition partner for use in the prosecution; and

(b) in the case of a person sought for the imposition or enforcement of a sentence,

(i) a copy of the document that records the conviction of the person, and

(ii) a document describing the conduct for which the person was convicted.

(2) Other documents — record of the case

A record of the case may include other relevant documents, including documents respecting the identification of the person sought for extradition.

(3) Certification of record of the case

A record of the case may not be admitted unless

(a) in the case of a person sought for the purpose of prosecution, a judicial or prosecuting authority of the extradition partner certifies that the evidence summarized or contained in the record of the case is available for trial and

(i) is sufficient under the law of the extradition partner to justify prosecution, or

(ii) was gathered according to the law of the extradition partner; or

(b) in the case of a person sought for the imposition or enforcement of a sentence, a judicial, prosecuting or correctional authority of the extradition partner certifies that the documents in the record of the case are accurate.

(4) Authentication not required

No authentication of documents is required unless a relevant extradition agreement provides otherwise.

(5) Record of the case and supplements

For the purposes of this section, a record of the case includes any supplement added to it.

38. Judge's Report

(1) Report of the judge

A judge who issues an order of committal of a person to await surrender shall transmit to the Minister the following documents:

(a) a copy of the order;

(b) a copy of the evidence adduced at the hearing that has not already been

transmitted to the Minister; and

(c) any report that the judge thinks fit.

(2) Right to appeal

When the judge orders the committal of a person, the judge shall inform the person that they will not be surrendered until after the expiry of 30 days and that the person has a right to appeal the order and to apply for judicial interim release.

40. Powers of Minister

(1) Surrender

The Minister may, within a period of 90 days after the date of a person's committal to await surrender, personally order that the person be surrendered to the extradition partner.

(2) When refugee claim

Before making an order under subsection (1) with respect to a person who has made a claim for refugee protection under the *Immigration and Refugee Protection Act*, the Minister shall consult with the minister responsible for that Act.

(3) Powers of the Minister

The Minister may seek any assurances that the Minister considers appropriate from the extradition partner, or may subject the surrender to any conditions that the Minister considers appropriate, including a condition that the person not be prosecuted, nor that a sentence be imposed on or enforced against the person, in respect of any offence or conduct other than that referred to in the order of surrender.

(4) No surrender

If the Minister subjects surrender of a person to assurances or conditions, the order of surrender shall not be executed until the Minister is satisfied that the assurances are given or the conditions agreed to by the extradition partner.

(5) Extension of time

If the person has made submissions to the Minister under section 43 and the Minister is of the opinion that further time is needed to act on those submissions, the Minister may extend the period referred to in subsection (1) as follows:

(a) if the person is the subject of a request for surrender by the International Criminal Court, and an issue has been raised as to the admissibility of the case or the jurisdiction of that Court, for a period ending not more than 45 days after the Court's ruling on the issue; or

(b) in any other case, for one additional period that does not exceed 60 days.

(6) Notice of extension of time

If an appeal has been filed under section 50 and the Minister has extended the period referred to in subsection (1), the Minister shall file with the court of appeal a notice of extension of time before the expiry of that period.

44. Reasons for Refusal

(1) When order not to be made

The Minister shall refuse to make a surrender order if the Minister is satisfied that

(a) the surrender would be unjust or oppressive having regard to all the relevant circumstances; or

(b) the request for extradition is made for the purpose of prosecuting or punishing the person by reason of their race, religion, nationality, ethnic origin, language, colour, political opinion, sex, sexual orientation, age, mental or physical disability or status or that the person's position may be prejudiced for any of those reasons.

(2) When Minister may refuse to make order

The Minister may refuse to make a surrender order if the Minister is satisfied that the conduct in respect of which the request for extradition is made is punishable by death under the laws that apply to the extradition partner.

57. Judicial Review of Minister's Order

(1) Review of order

Despite the *Federal Courts Act*, the court of appeal of the province in which the committal of the person was ordered has exclusive original jurisdiction to hear and determine applications for judicial review under this Act, made in respect of the decision of the Minister under section 40.

...