File No: 35838

IN THE SUPREME COURT OF CANADA

(ON APPEAL FROM THE QUEBEC COURT OF APPEAL)

BETWEEN

M.M.

APPELLANT

AND

MINISTER OF JUSTICE CANADA ON BEHALF OF THE UNITED STATES OF AMERICA

RESPONDENT

AND

CRIMINAL LAWYERS' ASSOCIATION (ONTARIO), and the BRITISH COLUMBIA CIVIL LIBERTIES ASSOCIATION

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TABLE OF CONTENTS

Page

PART I – OVERVIEW

1. This appeal requires the Court to consider whether a defence in the nature of a justification or excuse – here, the necessity defence set out in s 285 of the *Criminal Code* – may be considered by an extradition judge in the judicial phase of extradition proceedings. The BCCLA submits that such defences not only may, but must, be considered in the course of determining whether the double criminality requirement is satisfied.

2. Conduct that is proscribed by law and performed with the requisite mental element does not necessarily amount to an offence punishable in Canada. In appropriate cases the Crown must also disprove a justification or excuse that, if made out, would relieve the accused of criminal liability. The significance of this in the extradition context is that a court charged with ensuring the double criminality requirement (under s 3(1)(*b*) of the *Extradition Act*) must, in proper cases, determine whether a defence of justification or excuse renders the conduct of the person sought not criminally punishable in this country.

3. In these submissions, the BCCLA explains why justifications and excuses must be considered in the judicial phase of the extradition process and proposes a procedural framework for considering them at the extradition hearing consistent with both the liberty interest of the person facing extradition and Canada's international obligations.

PART II - STATEMENT OF POINTS IN ISSUE

4. Does double criminality require extradition judges to consider, where applicable, any available defence of justification or excuse?

5. If so, what procedural framework should the extradition judge apply to the consideration of defences of justification or excuse?

PART III – STATEMENT OF ARGUMENT

A. Double criminality is not complete without consideration of justification or excuse

6. The *Extradition Act* implements Canada's international treaty obligations into Canadian law.[1] Subsection 3(1) of the *Extradition Act* codifies the traditional requirement of double criminality found in Canada's extradition treaties: the alleged conduct must be criminal in both the requesting state and the state of refuge.

7. Double criminality has roots in the doctrine of reciprocity. It ensures that Canada is "not embarrassed by an obligation to extradite a person who would not, according to its own standards, be guilty of acts deserving punishment."[2] It safeguards the liberty interests of the person facing extradition by ensuring he or she will not face prosecution in the requesting state for conduct that is not criminal in the state of refuge.[3]

8. The double criminality principle has long been a requirement of Canada's extradition agreement with its main extradition partner, the United States. Article 2(1) of the Canada-US Extradition Treaty[4] provides that persons shall be delivered up according to the treaty provided that the offences listed therein are punishable by the laws of both contracting parties. The same requirement is found in other long-standing Canadian extradition agreements.[5]

9. It is for the Minister to assess the law of the foreign state in deciding whether to issue an authority to proceed.[6] At the committal hearing, the inquiry focuses on the domestic side of the double criminality equation.[7] Before a person may be extradited from Canada, the extradition

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[1] *Canada (Minister of Justice) v Fischbacher*, 2009 SCC 46 at para 25, [2009] 3 SCR 170 ("*Fischbacher*") [Appellant's Book of Authorities ("ABOA") at Vol 1, Tab 2]; *McVey (Re)*, [1992] 3 SCR 475 at 508 ("*McVey*") [BCCLA's Book of Authorities ("BCCLA BOA") at Tab 1].

[2] *Washington (State of) v Johnson*, [1988] 1 SCR 327 at 341-42 [BCCLA BOA at Tab 10] per Wilson J, quoting IA Shearer, *Extradition in International Law* (Manchester: University Press, 1971) at 137-38.

[3] *Fischbacher*, *supra*, at para 26 [ABOA at Vol 1, Tab 2].

[4] [1976] Can TS No. 3 [BCCLA BOA at Tab 16].

[5] See *Treaty of Extradition Between the Government of Canada and the Government of the United Mexican States*, entry into force 21 October 1990, [1990] Can TS No. 35, art 2.1 [BCCLA BOA at Tab 15]; *Extradition Treaty between the Government of Canada and the Government of the Republic of France*, entry into force 1 December 1989, [1989] Can TS No. 38, art 2.1 [BCCLA BOA at Tab 14]; *Extradition Treaty between the Government of Canada and the Government of India*, entry into force 10 February 1987, [1987] Can TS No. 14, art 3.1 [BCCLA BOA at Tab 13].

[6] *Extradition Act*, SC 1999, c 18, s 15(1) [Respondent's Book of Authorities ("RBOA") at Vol 1, Tab 5].

[7] *Fischbacher*, *supra*, at para 35 [ABOA at Vol 1, Tab 2].

judge must be satisfied per s 3(1)(*b*) of the *Extradition Act* that "the conduct of the person, had it occurred in Canada, would have constituted an offence that is punishable in Canada".[8]

10. The s 3(1)(*b*) requirement is not concerned simply with whether the *actus reus* and *mens rea* of a extraditable offence are made out. An "offence that is punishable in Canada" comprises a third element: the absence of an exculpatory defence such as a justification or excuse.[9] These defences operate to relieve an accused of criminal liability after it has been proven that he or she committed the impugned act and had the relevant *mens rea*.[10]

11. If an accused makes out a valid defence of justification or excuse, no punishable offence has been committed. Here, punishability is distinguished from chargeability or prosecutability: it involves an assessment of potential exonerating factors to determine if the impugned conduct is in fact "punishable" rather than merely open to prosecution.[11] It follows that conduct cannot be said to constitute "an offence that is punishable in Canada" until potential justifications and excuses for the conduct have been given due consideration. In the context of the present case, s 3(1)(*b*) cannot be satisfied until the extradition judge has considered s 285 in addition to the substantive offences in ss 280 to 282.

12. Elsewhere, in s 29(1)(*a*), the *Extradition Act* provides that the extradition judge shall order the committal of the person facing extradition if there is sufficient admissible evidence of conduct that "would justify committal [of the person facing extradition] for trial in Canada".[12] The test under this section is whether there is sufficient evidence to permit a properly instructed

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[8] In the French version, that: « *l'ensemble de ses actes aurait constitué, s'ils avaient été commis au Canada, une infraction sanctionnée aux termes du droit canadien* ». *Extradition Act*, *supra*, s 3(1)(*b*) [RBOA at Vol 1, Tab 5]; *Fischbacher*, *supra*, at para 35 [ABOA at Vol 1, Tab 2].

[9] *R v Chaulk*, [1990] 3 SCR 1303 at 1404 [BCCLA BOA at Tab 3].

[10] *R v Ruzic*, 2001 SCC 24 at para 30, [2001] 1 SCR 687 [RBOA at Vol 2, Tab 62]; see also *R v Hibbert*, [1995] 2 SCR 973 at paras 38, 47 [BCCLA BOA at Tab 3]. The defence available in s 285 of the *Criminal Code* is a defence of justification or excuse insofar as it permits an accused the opportunity to justify or excuse what would otherwise be criminal conduct. The s 285 defence is akin to the common law defence of necessity. This Court has held that the common law defence of necessity is properly conceptualized as an excuse, though it has acknowledged that it could be conceptualized as a justification: see *R v Perka*, [1984] 2 SCR 232 at 259 [BCCLA BOA at Tab 5]. In the context of an extradition hearing this is a distinction without a difference, as justifications and excuses both operate to negative criminal liability after *actus reus* and *mens rea* have been proven.

[11] See EP Aughterson, *Extradition: Australian Law and Procedure* (Sydney: The Law Book Company Limited, 1995) at 77 [BCCLA BOA at Tab 17]; M Cherif Bassiouni, *International Extradition: United States Law and Practice*, 5th ed (New York: Oceana Publications Inc., 2007) at 524-525 [BCCLA BOA at Tab 18].

[12] *Extradition Act, supra*, s 29(1)(*a*) [RBOA at Vol 1, Tab 5].

jury to convict.[13] Traditionally, this test was approached in the same manner as that in s 548 of the *Criminal Code*. However, as this Court noted in *Ferras*,[14] Parliament loosened the analogy between extradition hearings and preliminary inquiries when it adopted the current *Extradition Act* in 1999.

13. *Ferras* interpreted the *Extradition Act* to provide a person facing extradition with a mechanism through which to challenge the evidence in the record of the case otherwise establishing *actus reus* or *mens rea*. The person facing extradition may impeach that evidence and, in so doing, might convince the extradition judge that it would be dangerous or unsafe to convict on the evidence, such that committal is not justified.[15]

14. In the present case, interpreting ss 3(1)(*b*) and 29(1)(*a*) in harmony, the Court is led to another departure from the old analogy between extradition hearings and preliminary inquiries. One must presume that the *Extradition Act* is internally consistent and coherent.[16] Section 29 sets out the standard of proof on an extradition hearing, which is whether "the whole of the evidence presented at the extradition hearing … discloses a case on which a jury could convict."[17] What s 3(1)(*b*) adds, as a general principle, is that the extradition judge must in the proper case look beyond the *actus reus* and *mens rea* components of an offence, and consider exculpatory defences of justification or excuse. In these instances, s 29 must be understood to require that the evidence in the record permit a reasonably instructed jury to conclude that the impugned conduct constitutes an offence that is punishable in Canada.

15. Any contrary interpretation which removes defences of justification and excuse from the extradition judge's purview fails to give effect to s 3(1)(*b*) and the animating principle of double criminality. For instance, if a person sought were prohibited from raising defences of justification or excuse at the extradition hearing, and such defences were not available in the requesting state, he or she could be convicted abroad for conduct that does not constitute "an offence that is punishable in Canada."

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[13] *United States of America v Ferras; United States of America v Latty*, 2006 SCC 33 at para 26, [2006] 2 SCR 77 ("*Ferras*") [ABOA at Vol 2, Tab 8].
[14] *Ibid.* at para 48 [ABOA at Vol 2, Tab 8].
[15] *Ibid.* at paras 46, 54 [ABOA at Vol 2, Tab 8].
[16] *R v LTH*, 2008 SCC 49 at para 47, [2008] 2 SCR 739 [BCCLA BOA at Tab 4].
[17] *Ferras*, *supra*, at para 54 [ABOA at Vol 2, Tab 8].

16. In short, the extradition judge is mandated by the *Extradition Act* to consider any applicable justifications or excuses in assessing whether the alleged conduct constitutes an offence punishable in Canada. The double criminality requirement is not satisfied unless (i) the person sought has an opportunity to adduce evidence going to an available defence of justification or excuse, and (ii) the extradition judge assesses that evidence to determine if s 3(1)(*b*) is satisfied.

17. While this Court previously held that extradition judges could not assess defences in the course of an extradition hearing,[18] those cases concerned procedural and *Charter* defences that did not directly go to criminality. The species of exculpatory defence before the Court in this appeal does engage criminality. Moreover, the earlier cases considered the former legislation, with its tighter links to the preliminary inquiry. The role of defences of justification or excuse in the double criminality analysis under the current *Extradition Act* is a matter of first impression.

B. Consideration of justifications or excuses is necessary for a meaningful judicial process

18. In *Ferras*, the Chief Justice noted that s 7 of the *Charter* guarantees a fair process having regard to the nature of the proceedings.[19] When considering a fair process in the extradition context, the Chief Justice cited the "ancient and venerable principle" that no person shall lose his or her liberty without a meaningful judicial process, which must include (a) a separate and independent judicial phase, (b) an impartial judge, and (c) a fair and meaningful hearing.[20]

19. The Court held that a fair hearing requires, at minimum, a meaningful judicial assessment of the case on the basis of the evidence and the law, wherein the judge considers the respective rights of the litigants, makes findings of fact based on the evidence, and applies the law to those findings.[21] The judge must act judicially and not as a mere rubber stamp.[22]

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[18] *Canada v Schmidt*, [1987] 1 SCR 500 at 515-16 [RBOA at Vol 1, Tab 18]; *Argentina (Republic) v Mellino*, [1987] 1 SCR 536 at 555 [RBOA at Vol 1, Tab 6]; *United States of America v Allard*, [1987] 1 SCR 564 at 571-72 [BCCLA BOA at Tab 6].
[19] *Ferras*, *supra*, at para 14 [ABOA at Vol 2, Tab 8].
[20] *Ibid*, at paras 19, 22 [ABOA at Vol 2, Tab 8].
[21] *Ibid*, at para 25 [ABOA at Vol 2, Tab 8].
[22] *Ibid*. [ABOA at Vol 2, Tab 8].

20. *Ferras* recognizes that a person facing extradition has a mechanism through which to attack the evidence in the record of the case otherwise establishing *actus reus* or *mens rea*. If that evidence is unreliable, the person facing extradition can adduce evidence impeaching it. In so doing, he or she may convince the extradition judge that it would be dangerous or unsafe for a jury to convict.[23]

21. Any interpretation of the *Extradition Act* that would deny the person sought an opportunity to raise evidence amounting to a justification or excuse in Canadian law would fail to provide him or her a fair and meaningful extradition hearing. It could not be said that such a person would receive a meaningful judicial assessment on the basis of the facts and the law. Subsection 3(1)(*b*) would not be fulfilled.

C. International perspectives

22. A review of international materials supports the argument that double criminality includes the assessment of any applicable justification or excuse.

23. The explanatory reports of two leading European criminal treaties insist on the point. The explanatory report[24] to the European Convention on the International Validity of Criminal Judgments 1970[25] discusses the convention's dual criminality requirement (art. 4(1)) as follows:

> The condition [of double criminality] is fulfilled if the act which gave rise to the judgment in a particular State would have been punishable if committed in the State requested to enforce the judgment and if the person who performed the act could have had a sanction imposed on him under the law of the requested State....
>
> ...account must be taken of relations between the offender and the injured party (when such relations make an act unpunishable), grounds justifying an act or serving as an excuse for it (self-defence, *force majeure* etc.) and objective considerations making the act punishable. Such circumstances are in fact among the factors which constitute an offence; relations between the offender and the injured party and grounds justifying an act or serving as an excuse for it, may take away from the act its criminal character and may exempt the perpetrator from his liability to punishment. Thus, if the justification and extenuating circumstances mentioned above are recognised by the law of the requested State, but not by the law of the requesting State, there is no dual liability *in concreto*, since in the requested State the offender would not have been punishable for the same act.

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[23] *Ibid*, at para 54 [ABOA at Vol 2, Tab 8].
[24] Online at http://conventions.coe.int/treaty/en/reports/html/070.htm [BCCLA BOA at Tab 21].
[25] ETS No. 070 [BCCLA BOA at Tab 12].

(Emphasis added.)

24. Similarly, the explanatory report[26] to the Convention on the Transfer of Sentenced Persons 1983 (to which Canada is a party)[27] comments on art 3(e) of the convention:

> 24. The fifth condition *e* is intended to ensure compliance with the principle of dual criminal liability.
>
> The condition is fulfilled if the act which gave rise to the judgment in the sentencing State would have been punishable if committed in the administering State and if the person who performed the act could, under the law of the administering State, have had a sanction imposed on him.

The report adds, consistently with the conduct-based approach to double criminality endorsed by this Court in *Fischbacher*, that:

> For the condition of dual criminal liability to be fulfilled it is not necessary that the criminal offence be precisely the same under both the law of the administering State and the law of the sentencing State. There may be differences in the wording and legal classification. The basic idea is that the essential constituent elements of the offence should be comparable under the law of both States.[28]

25. Commentators on extradition have noted the place of justification and excuse in the consideration of whether the double criminality requirement is satisfied.[29]

E. Proposed procedural framework

26. For these reasons, the BCCLA submits that the *Extradition Act* is properly construed as permitting a person facing extradition to adduce evidence going to a potential defence of justification or excuse.[30] The requesting state must then have an opportunity to adduce evidence

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[26] Online at: http://conventions.coe.int/Treaty/EN/reports/HTML/112.htm [BCCLA BOA at Tab 20].
[27] [1985] Can TS No. 9 [BCCLA BOA at Tab 11].
[28] Similar comments are found in the explanatory report to the European Convention on the International Validity of Criminal Judgments 1970 ("The rule does not imply that the *nomen juris* must necessarily be the same, for one cannot expect the legal systems of two or more States to agree to such an extent that they invariably consider a particular factual situation to constitute the same offence.")
[29] *Eg*, Christine Van Den Wyngaert, "Double Criminality as a Requirement to Jurisdiction" in *International Criminal Law and Procedure*, J Dugard and C Van Den Wyngaert, eds (Darthmouth: Brookfield, 1996) at 139 [BCCLA BOA at Tab 23]; W.V. Dunlap, "Dual Criminality in Penal Transfer Treaties" (1988-9) 29 Va. J. Int'l L. 813 at 823-26 [BCCLA BOA at Tab 19]; S.Z. Feller, "The Significance of the Requirement of Double Criminality in the Law of Extradition" (1975) 10 Isr. L. Rev. 51 at 71-72 [BCCLA BOA at Tab 22].
[30] *Extradition Act*, *supra*, s 32 [RBOA at Vol 1, Tab 5].

in response, after which the extradition judge engages in the "limited weighing" of evidence contemplated in *Ferras* to determine if the evidence satisfies the standard for committal.[31]

27. As stated in *Ferras*, the standard for committal is whether the evidence presented at the extradition hearing discloses a case on which a properly instructed jury could convict.[32] In order for a defence of justification or excuse to preclude committal, the evidence presented at the extradition hearing must be sufficiently compelling that a properly instructed jury could not convict. Put another way, the extradition judge should not order committal if it would be dangerous or unsafe for a jury to convict on the evidence presented.[33]

28. If a properly instructed jury could not convict in light of the justification or excuse proffered, the conduct will not be "punishable" in Canada and s 3(1)(*b*) of the *Extradition Act* will not be satisfied.

29. An extradition hearing is intended to be an expedited process, facilitating prompt compliance with Canada's international obligations at a minimum of expense.[34] The approach taken to *Charter* claims in the extradition context demonstrates that concerns of expediency, efficiency and comity are not unduly compromised by permitting the expansion of the evidentiary record for issues which may be determinative of liberty.[35] The same holds with justifications or excuses that, if proven, would relieve the person sought of criminal liability in Canada for the alleged conduct. As such, a similar approach is called for.

30. The defences of justification or excuse will generally rest upon an acceptance of the facts in the record of the case. In practical terms, therefore, the proposed inquiry is unlikely to take a significant amount of additional time. A person facing extradition who adduces evidence going to justification or excuse will, in most if not all cases, admit the *actus reus* and *mens rea* of an

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[31] *Ferras*, *supra*, at para 46 [ABOA at Vol 2, Tab 8].
[32] *Ibid*, at para 54 [ABOA at Vol 2, Tab 8].
[33] *Ibid.* [ABOA at Vol 2, Tab 8].
[34] *United States of America v Dynar*, [1997] 2 SCR 462 at para 122 [BCCLA BOA at Tab 8]; *McVey*, *supra*, at 551 [BCCLA BOA at Tab 1].
[35] See *United States of America v Kwok*, 2001 SCC 18 at paras 57, 100, [2001] 1 SCR 532 [BCCLA BOA at Tab 9]; *United States of America v Anekwu*, 2009 SCC 41 at paras 29, 31, [2009] 3 SCR 3 [BCCLA BOA at Tab 7]. If the alleged *Charter* breach has an air of reality and pertains directly to the issues relevant in the judicial phase of the extradition hearing, the extradition judge has jurisdiction to order production of materials relevant to the *Charter* claim or require the attendance of any witness in order to resolve the *Charter* issue.

offence under Canadian law. Not many persons sought are likely to take this path. The proposed inquiry will be a rare event. Nevertheless, it is one necessitated by s 3(1)(*b*) in the proper case.

31. *Prima facie*, from a double criminality perspective, this procedure might appear to suffer from a serious shortfall: a person who can in the extradition hearing raise an arguable—but not incontestable—defence of justification or excuse may nevertheless be committed. If the foreign state does not recognize the same exculpatory defence, there is a risk the person could be extradited and convicted abroad in circumstances where he or she may have been exculpated in the fullness of a domestic trial, where the conduct would not have constituted an offence punishable in Canada.

32. This risk inheres in the summary nature of the extradition hearing. However, it is controlled by the fact that, following committal, the person sought has the right under s 43(1) to make submissions to the Minister.[36] If the person sought has an arguable defence of justification or excuse, but not one strong enough to avoid committal, he or she may raise the defence again with the Minister and argue that the unavailability of the exculpatory defence abroad should influence the Minister's exercise of discretion to order surrender under s 40(1).

33. In such cases, the admission of evidence at the extradition hearing going to defences of justification or excuse serves a critical purpose in the s 43 process. It provides the evidentiary record for the submissions to the Minister, and will also assist the court in the event that it is tasked with judicially reviewing the Minister's decision to surrender.

F. Conclusion

34. Consideration of any applicable justification or excuse at an extradition hearing is necessary to satisfy both the requirement of double criminality in the *Extradition Act* and the basic obligation of the state to provide the person facing extradition with a meaningful judicial process including a fair hearing. The BCCLA's proposed procedure satisfies double criminality and ensures a fair hearing for the person facing extradition. At the same time, it facilitates an efficient extradition procedure in compliance with Canada's international obligations and the principle of comity.

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[36] *Extradition Act*, *supra*, s 43(1) [RBOA at Vol 1, Tab 5].

PART IV – COSTS

35. The BCCLA seeks no order for costs and asks that none be made against it.

PART V – NATURE OF ORDER SOUGHT

36. The BCCLA seeks leave to present oral argument for a period of ten minutes at the hearing.

DATED: 2 March 2015

For: Brent Olthuis

Greg J. Allen

Counsel for the intervener, the British Columbia Civil Liberties Association

PART VI – TABLE OF AUTHORITIES

Extradition Treaty between the Government of Canada and the Government of the Republic of France, entry into force 1 December 1989, [1989] Can TS 8

Treaty on Extradition Between the Government of Canada and the Government of the United Mexican States, entry into force 21 October 1990, [1990] Can TS no 35 8

Treaty on Extradition Between the Government of Canada and the Government of the United States of America, entry into force 22 March 1976, [1976] Can TS No 3 8

Secondary Sources

Aughterson, EP, Extradition: Australian Law and Procedure (Sydney: The Law Book Company Limited, 1995) 11

Bassiouni, M Cherif, International Extradition: United States Law and Practice, 5th ed (New York: Oceana Publications Inc., 2007) 11

Dunlap, WV. "Dual Criminality in Penal Transfer Treaties" (1988-9) 29 Va J Int'l L 813 29

Explanatory Report to the Convention on the Transfer of Sentenced Persons 1983 24

Explanatory Report to the European Convention on the International Validity of Criminal Judgments 1970 23

Feller, SZ, "The Significance of the Requirement of Double Criminality in the Law of Extradition" (1975) 10 Isr L Rev 51 29

Van Den Wyngaert, Christine, "Double Criminality as a Requirement to Jurisdiction" in International Criminal Law and Procedure, John Dugard and Christine Van Den Wyngaert, eds (Darthmouth: Brookfield, 1996) 29

PART VII – LEGISLATON AT ISSUE

Extradition Act, SC 1999, c 18 at ss 3(1), 29(1)

General principle

3. (1) 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.

Principe général

3. (1) Toute personne peut être extradée du Canada, en conformité avec la présente loi et tout accord applicable, à la demande d'un partenaire pour subir son procès dans le ressort de celui-ci, se faire infliger une peine ou y purger une peine si :

a) d'une part, l'infraction mentionnée dans la demande est, aux termes du droit applicable par le partenaire, sanctionnée, sous réserve de l'accord applicable, par une peine d'emprisonnement ou une autre forme de privation de liberté d'une durée maximale de deux ans ou plus ou par une peine plus sévère;

b) d'autre part, l'ensemble de ses actes aurait constitué, s'ils avaient été commis au Canada, une infraction sanctionnée aux termes du droit canadien :

(i) dans le cas où un accord spécifique est applicable, par une peine d'emprisonnement maximale de cinq ans ou plus ou par une peine plus sévère,

(ii) dans le cas contraire, sous réserve de l'accord applicable, par une peine d'emprisonnement maximale de deux ans ou plus ou par une peine plus sévère.

...

Order of committal

29. (1) 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.

...

Ordonnance d'incarcération

29. (1) Le juge ordonne dans les cas suivants l'incarcération de l'intéressé jusqu'à sa remise :

a) si la personne est recherchée pour subir son procès, la preuve — admissible en vertu de la présente loi — des actes justifierait, s'ils avaient été commis au Canada, son renvoi à procès au Canada relativement à l'infraction mentionnée dans l'arrêté introductif d'instance et le juge est convaincu que la personne qui comparaît est celle qui est recherchée par le partenaire;

b) si la personne est recherchée pour se faire infliger une peine ou pour la purger, le juge est convaincu qu'elle est celle qui a été déclarée coupable des actes et que ceux-ci correspondent à l'infraction mentionnée dans l'arrêté.