



DEPARTMENT OF EXTERNAL AFFAIRS
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CANADA/INDIA EXTRADITION TREATY

On February 6, 1987, the Secretary of State for External Affairs, the Right Honourable Joe Clark, and Shri N.D. Tiwari, Minister of External Affairs of India, signed a bilateral extradition treaty.

Part II of the Canada Extradition Act governed until today our extradition arrangements with India. The Treaty just signed will supercede those arrangements and will explicitly extend to defendants the protection of the Canadian Charter of Rights and Freedoms. Persons in Canada whose extradition is sought by India will henceforth, under this "model treaty", enjoy clearer safeguards than those under any other such treaty to which Canada is a party.

Canada has Extradition Treaties with 43 other countries. Under the Fugitive Offenders Act, Canada also has extradition arrangements with many Commonwealth countries.

Proclamation of Part II of the Extradition Act in 1985 instituted Canada-India arrangements, but did not cover crimes prior to 1985, and did not offer explicit Charter of Rights safeguards. Neither did it cover "modern crimes" such as hijacking and drug trafficking. The retroactivity of this Treaty is consistent with other extradition arrangements Canada has concluded.

The flight to India of the accused in the 1982 murder of a lawyer in a Toronto courtroom, and the Air India disaster have highlighted the need for Canada to have retroactive extradition arrangements with India. With this Treaty now in place, Canada will proceed expeditiously to bring to justice in Canada those in India who have committed serious crimes here but who until now have been beyond the reach of Canadian law.

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Only those whose alleged crimes are serious criminal offences in both India and Canada are subject to extradition under this Treaty. Indian requests for extradition will be subjected to thorough consideration by the Canadian Department of Justice to determine if sufficient evidence exists to bring them before a Canadian court. A judicial decision to extradite is reviewable by higher judicial authorities and by the Minister of Justice.

Canada is currently negotiating other extradition treaties. This treaty fills a serious gap in our criminal justice system. Other major western countries, including Great Britain and West Germany, are also known to be negotiating extradition treaties with India.

The attached Questions and Answers provide further details on the Extradition Treaty. Also attached is a short commentary on the subject of Canadian extradition law.

January 29, 1987

CANADIAN EXTRADITION LAW

Extradition is the surrender by one state at the request of another of a person who is accused, or has been convicted, of a crime committed within the jurisdiction of the requesting state. Its history can be traced back to biblical times. The purpose of extradition is to deter crime by ensuring that a person cannot avoid being brought to justice by fleeing the state where the crime was committed.

In Canada, extradition is basically a judicial rather than a political process and is governed by the Extradition Act, Chapter E-21 R.S.C. 1970, which is the domestic legislation by which Canada fulfils the obligations it incurs by entering into an extradition treaty. In Canada, the person sought, who is entitled to be represented by counsel, must be brought before an extradition judge. The Crown must establish under Canadian law three basic facts: (1) that the person before the court is the same person whose extradition is being requested; (2) that the offence for which extradition is sought is an extraditable offence under the treaty; and (3) that the evidence presented establishes a prima facie case in respect of the offence for which extradition is requested, i.e., that the evidence submitted if believed, establishes each element of the crime necessary to

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justify a conviction in law. It is stressed that the extradition judge does not determine the guilt or innocence of the person sought.

There are certain basic principles which apply to extradition treaties. These include:

- (1) dual criminality, i.e., the act for which extradition is requested must be a criminal offence in both states;
- (2) the Rule of Specialty, i.e., the person sought may only be tried in the requesting state for the offences for which extradition was granted unless the condition is waived by the requested state;
- (3) extradition is not granted for purely military or political offences; and
- (4) the offence must have been committed within the jurisdiction of the requesting state.

Many states will not extradite their own citizens or nationals as they claim extraterritorial jurisdiction over their own nationals for crimes committed anywhere in the world. If, however, they will not extradite, they undertake to try the fugitive in their own country. In Canada the practice generally is to prosecute offences which are committed here. In all other cases, where Canadians cannot be prosecuted in Canada, Canadian nationals can be extradited.

In accordance with Canadian practice, either country may submit an extradition request in respect of an offence committed before the treaty comes into effect.

Canada has extradition treaties with some 43 countries. In addition, Canada has extradition arrangements, but not treaties, under the Fugitive Offenders Scheme with those Commonwealth countries that recognize the Queen as Head of State. Canada also has extradition arrangements with Brazil and India under Part II of the Extradition Act. Part II has been unilaterally proclaimed to be in effect with those states, thus, giving Canada the legal basis to extradite to those states in accordance with the conditions established in that part of the Act.

Why did the Canadian Government agree to negotiate an extradition treaty with India at this time?

Canada has extradition arrangements and treaties with many countries and has on-going negotiations with a number of other countries. Formerly, there were extradition arrangements in place with India under the Canadian Fugitive Offenders Act. However, because of constitutional changes in India, these arrangements lapsed. Since then, the growth in the flow of people between Canada and India increased to the point where the Government considered that an extradition treaty was necessary. In recent years both India and Canada have sought to extradite persons from each country but were unable to do so because of the lack of a legal basis. The Extradition Treaty corrects that situation.

Concern has been expressed by the Sikh community that this treaty will be directed against them. Is this concern justified?

No. The treaty is designed to deal with serious criminal activity and not legitimate protest. Extradition will not be granted where the request is made for reasons of race, religion, colour or ethnic origin.

What crimes are covered by the extradition treaty?

The Treaty will permit the extradition of persons charged with crimes that are offences in both countries, and for which a minimum sentence of more than one year is prescribed.

Does the treaty provide for extradition for crimes committed prior to its effective date?

Yes. The Treaty has a retroactive provision which permits extradition for crimes committed prior to its effective date. This is in accordance with international treaty practice and is consistent with other extradition treaties Canada has concluded.

What sort of evidence will the Indian Government have to present in support of a request for extradition?

The evidence will have to conform to the requirements of Canadian law for admissibility and satisfy a Canadian extradition judge that the individual before the court is the fugitive charged with crime in India, that there is sufficient evidence to establish a probable case of guilt on the charges and the individual should therefore be extradited to stand trial. This is the same requirement as exists in all of Canada's other extradition treaties.

What safeguards protect an individual whose extradition has been requested?

In addition to the evidentiary requirements which ensure that there is a legal case according to Canadian standards as applied by a Canadian judge, there is a clear discretion to be exercised by the Minister of Justice to refuse extradition where the request was not made in good faith or it would be unjust in all the circumstances to extradite. The individual for whom extradition is requested may call evidence to support his contention that the request was made for improper reasons or make a submission directly to the Minister.

The safeguards are more clearly defined in this treaty than in any other of Canada's extradition treaties.

Can Canadian or Indian citizens be extradited?

Yes. The treaty does not preclude the extradition of Canadian or Indian citizens.

Does the treaty distinguish between criminal offences and offences of a political nature?

Yes. However, the fact that a serious crime was motivated by political considerations is not a defence to extradition. For example, a claim that a murder or a hijacking was committed for a political purpose would not be a bar to extradition for that offence.

Is there a requirement for a prompt trial after a person has been extradited?

Yes. The requesting state is required under the terms of the treaty to initiate prosecution of the offender within six months of the extradition.

Does the treaty have an extraterritorial application?

Yes. In cases where Canada and India claim a similar jurisdiction over a criminal act committed beyond their borders, then extradition may be granted.

Can Canada extradite to India for a conspiracy in Canada to commit serious harm in India?

Under the treaty Canada reserves the right to prosecute all offences including conspiracies which occur in Canada. Where the serious effects of the conspiracy were felt in India, a request for extradition will be considered. There is, however, no obligation to extradite even where the serious effects were felt or were intended to occur in India.

Does the treaty conform to recent court decisions interpreting the Canadian Charter of Rights in extradition cases?

Yes. The treaty conforms fully with the Canadian Charter of Rights and Freedoms. The rights of the individual are fully protected and extradition will not be granted where there is discrimination on the grounds of race, religion, colour or ethnic origin.

Are there any outstanding extradition requests between India and Canada and what will happen to these?

There are outstanding requests for extradition between our two countries, but it is not our policy to comment on individual cases. However, such requests may be resubmitted under the new treaty.

Could Canadians be extradited to India for a crime where a sentence of death could be imposed?

Yes. However, each country has the right to require, as a condition of extradition, assurances that the death penalty will not be carried out.

Previous extradition treaties contained a list of crimes that were extraditable. Why has this treaty no such list?

There were many problems associated with the listing of crimes in extradition treaties. There were problems in defining crimes for comparative purposes since different definitions are used in different countries. Under the Canada/India Treaty a minimum sentence determines the crimes covered. In addition, it will not be necessary to amend the treaty to cover new crimes in future.

Would the treaty permit extradition in situations where the individual is wanted for crimes in Canada, as well?

Each state has the right prior to granting extradition to try a person charged with an offence committed in its territory.

What assurances are there that a person extradited to India would receive a fair trial?

The Indian judicial system has comparable safeguards and rights for persons accused of crimes. These safeguards and rights would apply to persons extradited from Canada.

When will the treaty come into effect?

Once the treaty is signed and the instruments of ratification are exchanged, the treaty will come into effect.

Does the Treaty require Parliamentary approval?

This is not required by Canadian law. The Extradition Act provides the treaty shall be, as soon as possible, published in the Canada Gazette and laid before both Houses of Parliament.