

# 4

## Options on How to Proceed

I. Retaining Counsel in the Foreign Jurisdiction . . . . .	94
II. Tactical Considerations . . . . .	94
III. Waiver of Extradition . . . . .	95
IV. Consent to Committal . . . . .	96
V. Consent to Surrender . . . . .	97
VI. Working Out a Resolution in the Requesting State . . . . .	98
Appendix 4.1 Sample Waiver of Extradition and Conveyance Order . . . . .	99
Appendix 4.2 Sample Consent to Committal . . . . .	105
Appendix 4.3 Sample Consent to Surrender . . . . .	108

Once a person is sought for extradition, there are different options for how the matter may proceed and how efficiently it might be done. The person may wish to contest all aspects of the extradition request or, in the face of unavoidable extradition, may want to expedite the process. This chapter focuses on ways in which the process could be expedited.

There are several options for a person to consider when faced with extradition proceedings; all are discussed in detail in this chapter. Simply stated, the options are:

1. Waive extradition and be conveyed to the requesting state.
2. Consent to committal (that is, agree that the evidence is sufficient to justify committal, but make arguments to the minister as to why surrender should not be ordered).
3. Consent to surrender to the requesting state.
4. Contest extradition.

## I. Retaining Counsel in the Foreign Jurisdiction

One of the first steps Canadian counsel should take is to assist the person sought in retaining counsel in the requesting state, because their viewpoints and guidance will be helpful in advising the client with respect to the most prudent course of action in Canada. Counsel should contact colleagues for referrals to the most appropriate lawyers in the foreign jurisdiction, or they can consult parallel criminal defence organizations such as the National Association of Criminal Defense Lawyers (NACDL) in the United States, which has a database of lawyers listed in all cities and states.

## II. Tactical Considerations

Counsel in the requesting state can be an important sounding board with respect to some of the tactical and practical considerations at play when dealing with the Canadian extradition request. Indeed, there are a number of tactical and practical considerations that the person sought must balance when deciding whether to expedite the extradition process. The most obvious consideration is the likelihood of success in resisting extradition. If, as is often the case, extradition is unavoidable, it may make little sense to contest the matter since it will only delay the inevitable and result in added emotional and financial costs to the person sought. On the other hand, delaying surrender may be beneficial if the person sought needs time to get their financial or personal affairs in order.

Some believe that contesting extradition is a strong negotiating tool because officials in foreign jurisdictions are anxious to have the matter dealt with expeditiously and, as a result, they may offer a more favourable disposition to the person in order to expedite the process and obtain closure. Indeed, given that extradition is often inevitable (especially on requests for extradition to the United States), it may be in the person's best

interest to seek an expeditious conclusion in the requesting state because the resolution proposal will often be better if the person agrees to surrender than it would be if they were to contest extradition. In addition to possibly negotiating a reduction in sentence, counsel in the requesting state may be in a position to persuade the requesting state not to oppose a request that the person be transferred back to Canada to serve all or part of a sentence imposed in Canada. Apart from the obvious benefits of returning to Canada, when Canada is the client's home, the transfer of the sentence to Canada will allow the person to take advantage of the more relaxed parole eligibility rules that Canada offers. Even if a final resolution cannot be achieved, counsel in the requesting state can sometimes use waivers and consents to extradition as a tool to negotiate bail in the requesting state. This can be an important consideration because bail in the requesting state is often more difficult to obtain if the person sought contests their extradition.

In other instances, the prosecutor in the requesting state may refuse to negotiate a resolution while extradition proceedings are outstanding. Counsel in the requesting state can help Canadian counsel assess the situation that the person sought may face when dealing with the foreign prosecutor.

Another factor to consider is whether the person is in or out of custody pending the extradition hearing. Aside from the obvious advantage of being out of jail while the matter is pending, there is another practical impact if one is detained pending a hearing. That is, unlike in Canada, where the accused is entitled to credit for any time spent in pre-trial custody, a person who is ultimately surrendered does not have a right to credit for time spent in Canadian custody; that determination is ultimately up to the requesting state. Time spent in Canadian custody may truly be "dead time" for which no credit will be received. Therefore, when assessing the different options available to the person sought, counsel must ensure that they advise their client of this fact and investigate this issue before finalizing a decision with respect to how to proceed.

If the tactical and practical considerations favour expediting the process, the person sought can consent to their extradition. Sections 70-72 of the *Extradition Act*<sup>1</sup> provide that the person sought may consent to committal, consent to surrender, or waive extradition altogether. Each of these options contains different yet important ramifications for the person sought.

### III. Waiver of Extradition

Any time after their arrest or appearance, a person can waive extradition. This must be done in writing and before a judge.<sup>2</sup> The judge would then order the conveyance of the person in custody to the extradition partner without delay and without ministerial

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1 *Extradition Act*, SC 1999, c 18. Unless otherwise noted, statutory references in this chapter are to the *Extradition Act*.

2 Section 72.

intervention. While waiving extradition is the most expeditious way to be rendered to the requesting state, it also carries with it the most serious risks to the person sought. In particular, unlike the other forms of consent, waiving extradition results in the person sought losing the protection of specialty<sup>3</sup> and, in particular, the right to be protected from being tried for offences not listed in the authority to proceed or from being extradited to a third country. Indeed, prior to ordering the person's conveyance, the judge must inform the person sought that they are waiving the protection of specialty and the fact that they will be conveyed without delay to the extradition partner.<sup>4</sup> Given that the other forms of consent contemplated by the Act provide for the protections of specialty, it is difficult to think of a situation where waiver would be the preferred course of action. With the exception of perhaps expediting the return of a person by a matter of weeks, it simply puts the person at serious risk of facing additional charges. A sample waiver of extradition is included as Appendix 4.1 to this chapter.

#### IV. Consent to Committal

A person may also consent to committal for extradition any time after the issuance of the authority to proceed. This consent must be done in writing and before a judge, who must then order the person's committal into custody to await their surrender and send a copy of the written consent to the minister of justice.<sup>5</sup> Practically speaking, there is no point to consenting to committal once a person has been ordered committed by an extradition judge. At that point, the simplest way to proceed is to not file a notice of appeal or, if a notice of appeal has been filed, to withdraw the notice. A sample consent to committal is presented in Appendix 4.2 to this chapter.

Consenting to committal is appropriate where there is no credible challenge to the sufficiency of the evidence on the record of the case or any Charter claims within the purview of the extradition judge but where the person sought still wishes to make submissions as to why the minister should refuse surrender. This approach streamlines the process and allows the person sought to focus on making their submissions to the minister on issues relating to surrender without losing the protections of specialty. This course of action is often resorted to because the person sought will make the practical decision to avoid the time and cost it would take for the committal stage to complete where committal is inevitable. Others believe that consenting to committal will assist the person on their eventual surrender because they will have appeared to have been cooperative in the requested state. In addition to ensuring that the person

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3 See Chapter 1, Section II.C, "Principle of Specialty."

4 Section 72(2)(a).

5 Section 70.

sought is not committed for extradition on any offences not set out in the authority to proceed, the person sought also maintains all rights that exist at the ministerial stage of the proceedings. In other words, unlike a waiver, the person sought can still seek bail pending their submissions to the minister, make submissions to refuse surrender, seek assurances from the extradition partner, and, if necessary, bring an application for judicial review of the minister's decision.

## V. Consent to Surrender

A person may consent to their surrender at any time after their arrest or appearance. This consent must also be done in writing and before a judge, who is then required to order the committal of the person in custody to await surrender and send a copy of the written consent to the minister.<sup>6</sup> A sample consent to surrender is included as Appendix 4.3 to this chapter. The consent to surrender typically lists the offences contained in the authority to proceed. Where the authority to proceed has not been issued, the offences named in the foreign indictment may be included. Also, it is worth noting that where a person has already been ordered committed and wishes to consent to surrender, the matter must be brought back before the Superior Court, rather than the Court of Appeal.

Consenting to one's surrender means that the person sought waives their right to make submissions to the minister;<sup>7</sup> their right to be discharged; reasons for refusal;<sup>8</sup> any right of judicial review;<sup>9</sup> and the statutory 30-day waiting period after the date of committal for surrender.<sup>10</sup> In other words, many of the provisions of the Act that would delay the person's return to the requesting state do not apply and the minister may, as soon as is feasible after receiving the written consent, order that the person be surrendered. The minister must still determine that surrender is appropriate in terms of the treaty and the Act. For example, if the person has refugee status, the minister still must consult with the minister responsible for the *Immigration and Refugee Protection Act*.<sup>11</sup> This form of consent is most appropriate when the person sought has no intention of arguing against surrender but wishes to ensure that the rule of specialty is respected. This is likely the most expeditious means of voluntarily surrendering that at the same time ensures that the person is not prosecuted for offences not set out in the authority to proceed.

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6 Section 71.

7 Section 71(4)(a).

8 Section 71(4)(b).

9 Section 71(4)(d).

10 Section 71(4)(e).

11 Section 40(2).

## VI. Working Out a Resolution in the Requesting State

Another option available to the person sought is to attempt to negotiate a resolution in the requesting state. Much like in domestic prosecutions, pre-surrender negotiations can sometimes result in the most favourable results for the person sought. In addition to the added benefits of obtaining a more lenient disposition, the person sought can attempt to negotiate their voluntary return to the requesting state rather than being committed into custody to await surrender. However, this requires the cooperation of the requesting and requested states and is often difficult if the person is not being surrendered to a US border state. If a voluntary surrender is achieved, counsel must also ensure that specialty is protected by obtaining an agreement in writing that the person will only be prosecuted for the specific offences for which they were being sought. Should an agreement be reached without a voluntary surrender, counsel for the person sought can consent to their surrender pursuant to section 71 in order to preserve the right to specialty. In those circumstances, counsel should make efforts to ensure that the surrender order specifies the offences for which extradition is being ordered.

While desirable, resolutions are often difficult to achieve because many jurisdictions, especially in the United States, consider those who oppose extradition to be “fugitives” and refuse to negotiate with fugitives until they are physically present in their jurisdiction. Persons sought should be advised, however, that the requesting state is not permitted to threaten, either implicitly or explicitly, harsher treatment if the person sought contests their extradition and does not voluntarily attend in the foreign jurisdiction. Indeed, the Supreme Court of Canada has held that such threats amount to an abuse of process and a violation of section 7 of the Charter.<sup>12</sup>

12 *United States of America v Cobb*, 2001 SCC 19, [2001] 1 SCR 587; *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11.

## Appendix 4.1 Sample Waiver of Extradition and Conveyance Order

Court File No.	
<b>SUPERIOR COURT OF PROVINCE</b>	
IN THE MATTER OF a Waiver of Extradition under section 72 of the <i>Extradition Act</i>	
BETWEEN:	
THE ATTORNEY GENERAL OF CANADA ON BEHALF OF REQUESTING STATE	Requesting State
—and—	
NAME OF PERSON SOUGHT	Person Sought
 <b><u>WAIVER OF EXTRADITION</u></b> ( <i>Extradition Act</i> , section 72)	
<p>I, NAME OF PERSON SOUGHT, am sought by REQUESTING STATE for extradition.</p> <p>I acknowledge that I am voluntarily waiving any and all of my rights under the <i>Extradition Act</i>, including but not limited to the right to an extradition hearing, the right to make submissions to the Minister of Justice in respect of surrender, and the right to appeal and apply for judicial review.</p> <p>I further acknowledge that, by waiving the protection of specialty, I may be prosecuted, tried and punished in REQUESTING STATE in relation to any conduct, including conduct other than the conduct for which my extradition is being sought.</p>	

(Appendix 4.1 is continued on the next page.)

## Appendix 4.1 Continued

I have been informed of the consequences of waiving extradition, including the consequences of waiving the protection of specialty, and I have been informed that I will be conveyed without delay to REQUESTING STATE.

Pursuant to section 72 of the *Extradition Act*, I waive my extradition, and consent to my being conveyed without delay, to REQUESTING STATE.

DATED at the City of \_\_\_\_\_, PROVINCE, this \_\_\_\_ day of \_\_\_\_\_, 20\_\_.

\_\_\_\_\_  
Name of Defence Counsel  
Counsel for the Person Sought

\_\_\_\_\_  
NAME OF PERSON SOUGHT  
Person Sought

## Appendix 4.1 Continued

Court File No.

**SUPERIOR COURT OF PROVINCE**

IN THE MATTER OF a Waiver of Extradition  
under section 72 of the *Extradition Act*

THE ATTORNEY GENERAL OF CANADA  
ON BEHALF OF  
REQUESTING STATE  
(Requesting State)

—and—

NAME OF PERSON SOUGHT  
(Person Sought)

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**WAIVER OF EXTRADITION**  
(*Extradition Act*, section 72)

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Name of AGC Counsel  
Department of Justice

(Appendix 4.1 is continued on the next page.)

## Appendix 4.1 Continued

Court File No.

### SUPERIOR COURT OF PROVINCE

IN THE MATTER OF a Waiver of Extradition under section 72 of the *Extradition Act*

BETWEEN:

THE ATTORNEY GENERAL OF CANADA  
ON BEHALF OF  
REQUESTING STATE

Requesting State

—and—

NAME OF PERSON SOUGHT

Person Sought

### **CONVEYANCE ORDER** (*Extradition Act*, section 72)

TO ALL PEACE OFFICERS in Canada

AND TO THE KEEPER of NAME OF JAIL or any other prison within Canada

This order is issued for the conveyance of NAME OF PERSON SOUGHT in custody to REQUESTING STATE.

WHEREAS NAME OF PERSON SOUGHT is sought by REQUESTING STATE for extradition,

AND WHEREAS NAME OF PERSON SOUGHT has, in writing and before me, waived his/her extradition and consented to his/her being conveyed to REQUESTING STATE,

## Appendix 4.1 Continued

NAME OF PERSON SOUGHT is ordered into the custody of the Keeper of NAME OF JAIL to await his/her conveyance in custody to REQUESTING STATE.

The Keeper of NAME OF JAIL is to receive NAME OF PERSON SOUGHT into custody, and keep him/her until he/she is delivered pursuant to this Order to the Constables of Her Majesty the Queen for the purpose of conveying him/her to the agents of REQUESTING STATE.

The Keeper of NAME OF JAIL shall release NAME OF PERSON SOUGHT to the custody of the Constables of Her Majesty the Queen upon presentation of a certified copy of this Order and the Constables shall deliver NAME OF PERSON SOUGHT without delay directly to the custody of agents of REQUESTING STATE at LOCATION, or any other port of entry in the Province of PROVINCE for the purpose of conveying NAME OF PERSON SOUGHT in custody to REQUESTING STATE.

DATED at the City of \_\_\_\_\_, PROVINCE, this \_\_\_\_ day of \_\_\_\_\_, 20\_\_.

\_\_\_\_\_  
The Honourable Justice

A Judge of the Superior Court of PROVINCE and a  
Judge under the *Extradition Act*

(Appendix 4.1 is concluded on the next page.)

## Appendix 4.1 Concluded

Court File No.

**SUPERIOR COURT OF PROVINCE**

IN THE MATTER OF a Waiver of Extradition  
under section 72 of the *Extradition Act*

THE ATTORNEY GENERAL OF CANADA  
ON BEHALF OF  
REQUESTING STATE  
(Requesting State)

—and—

NAME OF PERSON SOUGHT  
(Person Sought)

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**CONVEYANCE ORDER**  
(*Extradition Act*, section 72)

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Name of AGC Counsel  
Department of Justice

## Appendix 4.2 Sample Consent to Committal

Court File No.	
<b>SUPERIOR COURT OF PROVINCE</b>	
IN THE MATTER OF a Consent to Committal under section 70 of the <i>Extradition Act</i>	
B E T W E E N :	
THE ATTORNEY GENERAL OF CANADA ON BEHALF OF REQUESTING STATE	
Respondent	
—and—	
NAME OF PERSON SOUGHT	
Appellant	
<b><u>CONSENT TO COMMITTAL</u></b> <i>(Extradition Act, section 70)</i>	
I, NAME OF PERSON SOUGHT, consent to my committal into custody to await surrender to REQUESTING STATE in relation to the offence/offences set out in the Authority to Proceed, issued on DATE, YEAR, namely:	
<ul style="list-style-type: none"> <li>• FOREIGN OFFENCE;</li> <li>• FOREIGN OFFENCE; and</li> <li>• FOREIGN OFFENCE.</li> </ul>	
I am aware that, by my consenting to committal, I am giving up the right to appeal the committal order.	

(Appendix 4.2 is continued on the next page.)

## Appendix 4.2 Continued

DATED at the City of \_\_\_\_\_, Province of \_\_\_\_\_, this \_\_\_\_ day of  
MONTH, 20\_\_.

\_\_\_\_\_  
NAME OF DEFENCE COUNSEL  
Counsel for the Person Sought

\_\_\_\_\_  
NAME OF PERSON SOUGHT

## Appendix 4.2 Concluded

Court File No.

**SUPERIOR COURT OF PROVINCE**

IN THE MATTER of a Consent to Committal  
under section 70 of the *Extradition Act*

THE ATTORNEY GENERAL OF CANADA  
ON BEHALF OF  
REQUESTING STATE  
(Requesting State)

—and—

NAME OF PERSON SOUGHT  
(Person Sought)

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**CONSENT TO COMMITTAL**  
(*Extradition Act*, section 70)

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Name of AGC Counsel  
Department of Justice

## Appendix 4.3 Sample Consent to Surrender

Court File No.

### SUPERIOR COURT OF PROVINCE

IN THE MATTER OF a Consent to Surrender under section 71 of the *Extradition Act*

BETWEEN:

THE ATTORNEY GENERAL OF CANADA  
ON BEHALF OF  
REQUESTING STATE

Requesting State

—and—

NAME OF PERSON SOUGHT

Person Sought

### **CONSENT TO SURRENDER** (*Extradition Act*, section 71)

I, NAME OF PERSON SOUGHT, consent to my being surrendered by the Minister of Justice to REQUESTING STATE in relation to the offence/offences set out in the Authority to Proceed, issued on Date, Year, namely:

- Offence;
- Offence; and
- Offence.

I am aware that, by my consenting to being surrendered, various provisions of the *Extradition Act* do not apply to me, namely, provisions relating to: (a) the right to make submissions to the Minister of Justice in respect of surrender; (b) reasons for refusal by the Minister to make a surrender order; (c) discharge by the Minister; (d) judicial review of the Minister's surrender order; and (e) the requirement to wait 30 days before surrendering me to REQUESTING STATE.

## Appendix 4.3 Continued

DATED at the City of \_\_\_\_\_, PROVINCE, this \_\_\_\_ day of \_\_\_\_\_,  
20\_\_.

\_\_\_\_\_  
Name of Defence Counsel  
Counsel for the Person Sought

\_\_\_\_\_  
NAME OF PERSON SOUGHT  
Person Sought

(Appendix 4.3 is continued on the next page.)

## Appendix 4.3 Continued

Court File No.

**SUPERIOR COURT OF PROVINCE**

IN THE MATTER of a Consent to Surrender  
under section 71 of the *Extradition Act*

THE ATTORNEY GENERAL OF CANADA  
ON BEHALF OF  
REQUESTING STATE  
(Requesting State)

—and—

NAME OF PERSON SOUGHT  
(Person Sought)

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**CONSENT TO SURRENDER**  
(*Extradition Act*, section 71)

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Name of AGC Counsel  
Department of Justice

## Appendix 4.3 Continued

Court File No.

**SUPERIOR COURT OF PROVINCE**

IN THE MATTER OF a Consent to Surrender under section 71 of the *Extradition Act*

BETWEEN:

THE ATTORNEY GENERAL OF CANADA  
ON BEHALF OF  
REQUESTING STATE

Requesting State

—and—

NAME OF PERSON SOUGHT

Person Sought

**ORDER OF COMMITTAL**  
(*Extradition Act*, section 71)

TO ALL PEACE OFFICERS in Canada

AND TO THE KEEPER of NAME OF JAIL or any other prison within Canada

This order is issued for the committal of NAME OF PERSON SOUGHT into custody to await surrender to REQUESTING STATE.

WHEREAS NAME OF PERSON SOUGHT was arrested on a provisional arrest warrant under the *Extradition Act*,

(Appendix 4.3 is continued on the next page.)

## Appendix 4.3 Continued

AND WHEREAS NAME OF PERSON SOUGHT has consented, in writing and before me, to his/her surrender to REQUESTING STATE in relation to the offence/offences for which his/her extradition is sought, namely:

- Foreign offence;
- Foreign offence; and
- Foreign offence,

YOU, THE PEACE OFFICERS, ARE ORDERED to take the said NAME OF PERSON SOUGHT into custody and to deliver him/her into the custody of the said keeper of the prison;

AND YOU, THE KEEPER, ARE ORDERED to receive and keep the said NAME OF PERSON SOUGHT in custody until his/her surrender to REQUESTING STATE or discharge according to law.

DATED at the City of \_\_\_\_\_, PROVINCE, this \_\_\_\_ day of \_\_\_\_\_, 20\_\_.

\_\_\_\_\_  
The Honourable Justice

A Judge of the Superior Court of PROVINCE and a  
Judge under the *Extradition Act*

## Appendix 4.3 Concluded

Court File No.

**SUPERIOR COURT OF PROVINCE**

IN THE MATTER of a Consent to Surrender  
under section 71 of the *Extradition Act*

THE ATTORNEY GENERAL OF CANADA  
ON BEHALF OF  
REQUESTING STATE  
(Requesting State)

—and—

NAME OF PERSON SOUGHT  
(Person Sought)

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**ORDER OF COMMITTAL**  
(*Extradition Act*, section 71)

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Name of AGC Counsel  
Department of Justice

