



Implementation of Chapter IV of the *UNCAC*: Enhancing International Cooperation

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**Reconciling the principle of *aut dedere aut judicare* with the constitutional right to remain in one's native country:
The Canadian experience**





The *UNCAC* articulation of the principle of *aut dedere aut judicare*

***UNCAC*, Chapter IV, Article 44. Extradition, Paragraph 11**

- ❖ *“A State Party in whose territory an alleged offender is found, if it does not extradite such person in respect of an offence to which this article applies solely on the ground that he or she is one of its nationals, shall, at the request of the State Party seeking extradition, be obliged to submit the case without undue delay to its competent authorities for the purpose of prosecution. Those authorities shall take their decision and conduct their proceedings in the same manner as in the case of any other offence of a grave nature under the domestic law of that State Party. The States Parties concerned shall cooperate with each other, in particular on procedural and evidentiary aspects, to ensure the efficiency of such prosecution.”*
- ❖ This is the site of the “extradite or prosecute” principle in the *UNCAC*.



The constitutional right to remain in Canada

Canadian Charter of Rights and Freedoms, Constitution Act, 1982, Section 6(1)

- ❖ “Every citizen of Canada has the right to enter, remain in and leave Canada.”
- ❖ The constitutional imperative articulated here would appear at odds with extradition.
- ❖ But, as our foreign partners know well, Canada can, and does, extradite its citizens.
- ❖ The question becomes: How does Canada extradite its nationals without offending the individual’s constitutionalized right to remain?

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The Answer?: *Cotroni*

Supreme Court of Canada: *United States of America v Cotroni*; *United States of America v El Zein*, [1989] 1 SCR 1469 [*Cotroni*]

- ❖ “The extradition of a Canadian citizen *prima facie* infringes the citizen's right to remain in Canada as guaranteed by s. 6(1) of the *Charter*.”
- ❖ The “central thrust” of s. 6(1) “is against exile and banishment for the purpose of excluding membership in the national community. Extradition is not directed to that purpose and lies at the outer edges of the core values being protected by the provision. The objectives underlying extradition are pressing and substantial and are sufficiently important to make it a **reasonable limit** [...] to the *Charter* right set out in s. 6(1). The investigation, prosecution and suppression of crime for the protection of the citizen and the maintenance of peace and public order is an important goal of all organized societies. The pursuit of that goal cannot realistically be confined within national boundaries.”
- ❖ What is this *reasonable limit*?

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The Answer?: The *Charter*

Canadian Charter of Rights and Freedoms, Constitution Act, 1982, Section 1

- ❖ “The *Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it subject only to such **reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.**”
- ❖ The *Cotroni* decision established that extradition does in fact violate an individual’s constitutional right to remain in Canada, however, the same constitutional document allows for principled and justifiable infringements of that right- it is not absolute.





How is the decision made to extradite or prosecute?

❖ The decision to extradite

- ❖ The Canadian Minister of Justice is statutorily vested with the authority to authorize surrender of individuals, whether Canadian citizens or not, pursuant to extradition requests made pursuant to the *UNCAC* or any other lawful basis (*Extradition Act, 1999*).

❖ The decision to prosecute

- ❖ Canada's 11 primary prosecuting authorities exercise their authority to prosecute, or not, independent of the Canadian Justice Minister.

❖ How is it decided whether to prosecute or extradite a Canadian citizen?

- ❖ The answer?: *Cotroni*. The Supreme Court of Canada set down 12 factors to be considered by the Justice Minister in rendering his decision on surrender. These have come to be called the ***Cotroni factors***.

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The *Cotroni factors*

❖ When a Canadian citizen is sought for extradition, the following 12 factors must be considered in determining whether prosecution is a “realistic option”:

1. Where the impact of the offence was felt or likely to have been felt.

7. Where the evidence is located.

2. Which jurisdiction has the greater interest in prosecuting the offence.

8. Whether the evidence is mobile.

3. Which police force played the major role in the development of the case.

9. The number of accused involved and whether they can be tried in one place.

4. Which jurisdiction has laid charges.

10. In which jurisdiction most of the acts in furtherance of the crime were committed.

5. Which jurisdiction has the most comprehensive case.

11. The nationality and residence of the accused.

6. Which jurisdiction is ready to proceed to trial.

12. The severity of the sentence the accused is likely to receive in each jurisdiction.

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Weighing the *Cotroni* factors

- ❖ No one factor will be determinative in the requisite multi-factorial analysis.
- ❖ However, many of these factors speak to whether or not a domestic prosecution is, or should be, instituted.
- ❖ When the International Assistance Group (Canada's central authority for extraditions and mutual legal assistance) receives a request for extradition on the basis of the *UNCAC* or other bilateral or multilateral extradition treaty, the relevant Canadian prosecuting authority is requested to consider the *Cotroni* factors shortly after receipt of the request.
- ❖ While a pending or anticipated domestic prosecution sought by the relevant Canadian prosecuting authority is not always determinative, in most cases this practical reality is the most persuasive factor because it tends to overwhelm so many of the factors relevant to the *Cotroni* analysis.

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Conclusion

- ❖ The regime and analysis offered by the Supreme Court of Canada in the *Cotroni* decision allows for the effective implementation of the *aut dedere aut judicare* principle, while respecting the constitutional rights of the citizen sought and the independence of the respective prosecution and extradition decision makers.



Thank you

