

Case Comment on *Canada v. Fischbacher*

Stuart Hoegner

WHAT DOES A CASE about a Canadian accused of murder in Arizona have to teach the international gaming industry? Plenty.

On Oct. 16, 2009, the Supreme Court of Canada released its judgment in *Canada v. Fischbacher*,¹ clearing the way for the respondent, Henry Fischbacher, to be extradited to the United States to face a first degree murder indictment. *Fischbacher* is important to the gaming world in several respects. Close scrutiny of the misalignment test rejected by the Court brings the issue of double criminality in gaming cases into sharp relief; conduct must be an offense both abroad and at home to meet this standard, and it is not clear under Canadian law whether certain conduct involving gaming or betting (particularly on the Internet) would qualify as an offense in Canada. This concept of double criminality is related to the local nature of many Canadian gaming offenses. The highly specific nature of criminal gaming offenses in Canada, coupled with these parallel offense issues, will require heightened vigilance by criminal counsel in order to ensure that clients involved in gaming cases are fully protected.

After the judgment in *Fischbacher* was handed down, the Department of Justice issued a press release wherein the Minister of Justice and Attorney General of Canada pronounced himself pleased with the decision, stating in part:

This is a significant decision as it clarifies the application of the principle of double criminality in extradition law in the face of a series of conflicting decisions . . . The decision also

recognizes the importance of comity, or respect for the laws of our treaty partners in making my decision on surrender in extradition cases.²

The Minister should well be pleased. His discretion in extradition matters has been protected and expanded by the Court. However, the majority decision in *Fischbacher* does contain some perplexing comments and could have serious implications for extradition cases in Canada in which an individual within the Court's jurisdiction is charged with a gaming offense abroad.

OVERVIEW

The facts of *Fischbacher* are as follows:³ in October 2006, a grand jury in Arizona issued a criminal indictment against the respondent, Mr. Fischbacher. The indictment charged Mr. Fischbacher with one count of first degree murder in the death of his wife. The respondent was accused of beating his wife and drowning her in the backyard pool at their home in Tucson. Mr. Fischbacher, a Canadian citizen, fled to Canada by car. In December 2006, the respondent was arrested by Canadian authorities in Parry Sound, Ontario. In the same month, the United States, by diplomatic note, requested his extradition to stand trial in Arizona on the first degree murder charge.

¹[2009] S.C.J. No. 46 (Can.), *rev'g*, 91 O.R. (3d) 401 (C.A.) (Can.).

²Department of Justice Canada, News Release, Statement by Justice Minister Rob Nicholson Following the Supreme Court of Canada Approval of Fischbacher Extradition (2009), *available at* <http://www.justice.gc.ca/eng/news-nouv/nr-cp/2009/doc_32438.html> (last visited October 19, 2009).

³Also see *Fischbacher*, [2009] S.C.J. No. 46 (Can.) at ¶ 8-18, inclusive, for a recitation of the facts of the case.

Stuart Hoegner is an attorney and an accountant practicing exclusively in gaming law in Toronto, Canada. The author thanks Scott Hutchison of Stockwoods LLP Barristers for his valuable and insightful thoughts and suggestions in connection with this comment. Any errors herein are, however, the author's alone.

The process of extradition from Canada has two stages, as affirmed by the Supreme Court in *Fischbacher* and in *Lake v. Canada*: a judicial one and an executive one.⁴ In the words of Justice Louise Charron, who wrote for the majority in *Fischbacher*, the involvement of the political executive “book-ends the judicial phase, as the Minister holds a discretionary power at the outset and at the close of the extradition process.”⁵ The requesting state (the United States in *Fischbacher*) initiates the process by making a request to the Canadian government for extradition. The request is accompanied by a record of the case and may involve diplomatic assurances (e.g., that the death penalty will not be applied to an extradited Canadian citizen). If the Minister is satisfied that extradition is warranted, s/he can issue an Authority to Proceed (ATP) in accordance with section 15 of the Extradition Act.⁶ The ATP must contain the name of the person whose extradition is sought,⁷ the name of the extradition partner,⁸ and the offense or offenses under Canadian law that correspond to the alleged conduct of the person, provided that the conduct, if committed in Canada, is severe enough as measured by the maximum prison terms associated therewith.⁹

In *Fischbacher*, the ATP sought the respondent’s committal “for the corresponding Canadian offence of ‘Murder, contrary to section 231 of the *Criminal Code*’ but did not particularize the crime as first or second degree murder.”¹⁰ Pursuant to this ATP, Mr. Fischbacher was brought before the Ontario Superior Court of Justice for an extradition hearing in June 2007. The extradition judge concluded that there was no evidence of planning or deliberation in the record of the case and, pursuant to section 71 of the Act, issued an order committing Mr. Fischbacher to extradition on the Canadian offense of second degree murder. No appeal was taken from the committal order.

The effect of this order was to authorize, but not necessarily require, Mr. Fischbacher’s extradition to the United States. The decision to require extradition rests with the Minister, if and after extradition is authorized by the extradition judge; this is the Minister’s discretion at the close of the process referred to by Justice Charron.¹¹ Mr. Fischbacher made submissions to the Minister at this stage, taking the position that he should be surrendered for the American offense of second degree murder. In the respondent’s view, a surrender order for first degree murder would “substantially exceed” the evi-

dentiary record supporting the order of committal and would be unjust.¹²

On March 17, 2008, the Minister made an order of surrender pursuant to section 58 of the Act. Mr. Fischbacher was surrendered for the American offense of first degree murder. The Minister rejected Mr. Fischbacher’s submissions, stating that the application of foreign law is a matter for the requesting state and that the extradition judge’s order to commit Mr. Fischbacher on a second degree murder charge “did not preclude the Minister’s decision to order surrender for the requested offence of first degree murder.”¹³

Mr. Fischbacher sought judicial review of the Minister’s surrender order before the Ontario Court of Appeal. The Court of Appeal unanimously held that the Minister’s order was presumptively unreasonable based upon a so-called “misalignment” between the offense in respect of which the Minister ordered surrender (first degree murder) and the evidence adduced at the extradition hearing (which the extradition judge decided only warranted a committal order on second degree murder). This misalignment test had been relied upon by appellate courts in Ontario¹⁴ and British Columbia¹⁵ in a number of prior decisions. In *Fischbacher*, the Minister’s surrender order was quashed and the matter sent back to the Minister for reconsideration. The government of Canada appealed the Court of Appeal’s decision to the Court.

⁴*Id.* at ¶ 23; *Lake v. Canada*, [2008] 1 S.C.R. 761 (Can.) at ¶ 21.

⁵*Fischbacher*, *id.* at ¶ 23.

⁶1999 S.C., c. 18 (Can.) (hereinafter Act).

⁷*Id.* § 15(3)(a).

⁸*Id.* § 15(3)(b).

⁹*Id.* § 15(3)(c).

¹⁰*Fischbacher*, [2009] S.C.J. No. 46 (Can.) at ¶ 10, Charron, J. Subsection 231(1) of the Criminal Code, R.S.C., C-46 (1985) (hereinafter Code) provides that “[m]urder is first degree murder or second degree murder.” Subsection 231(2) of the Code states that “[m]urder is first degree murder when it is planned and deliberate.” There follows in § 231 certain provisions deeming various acts to be first degree murder, e.g., murder for hire (§ 231(3)) and murder of a police officer in the course of his duties (§ 231(4)(a)). In Canada, all murder that is not first degree murder is second degree murder: § 231(7).

¹¹*Fischbacher*, *id.* at ¶ 23.

¹²*Id.* at ¶ 16.

¹³*Id.* at ¶ 17, Charron, J.

¹⁴*See for example* *United States of America v. Goryca* (2007), 216 C.C.C. (3d) 403 (Ont. C.A.) (Can.).

¹⁵*See for example* *United States of America v. Reumayr* (2003), 176 C.C.C. (3d) 377 (B.C.C.A.) (Can.).

THE COURT'S ANALYSIS

The majority of the Court in *Fischbacher* starts its analysis with the principle of double criminality, which requires that the conduct forming the basis for the extradition request be a criminal offense of sufficient seriousness under the laws of both the requesting state and the state receiving the request. Double criminality is a clause in all of Canada's extradition treaties, including that with the United States,¹⁶ and is codified in subsection 3(1) of the Act.

The majority goes on to consider that double criminality may be satisfied by appeal to a conduct-based test or an offense-based test, i.e., ensuring correspondence between either the alleged offense abroad (in respect of which extradition is sought) and an offense in Canada or the alleged conduct abroad and an offense in Canada.¹⁷ The majority states that, "[c]onsistent with the vast majority of international practice, Canada has adopted the conduct-based approach to determining double criminality."¹⁸ The conduct test is codified in subsection 3(2) of the Act. Therefore—critically in the majority's view—it is not a requirement that the offense alleged in the ATP or in the committal order "match" the foreign offense.

Double criminality has both foreign and domestic elements. In receiving the initial request from the requesting state and in drafting the ATP, "the Minister will necessarily consider the law of the foreign state . . . The Minister must satisfy himself that the alleged conduct described in the extradition request is criminal in the foreign jurisdiction, and that the associated penalty meets the threshold."¹⁹ Interestingly, Justice Charron mentions at this point that "care must be taken to ensure that an ATP accurately identifies the Canadian offense that *most closely resembles* the alleged conduct underlying the foreign offense."²⁰ By contrast, the extradition judge considers only whether the underlying facts charged in the ATP would have constituted a crime of sufficient severity in Canada.

Assuming the order for committal is made, as it was here, the Minister then determines whether to issue a surrender order. Pursuant to the Act, the Minister is mandated to refuse surrender if, *inter alia*, he "is satisfied that the surrender would be unjust or oppressive having regard to all the relevant circumstances."²¹ Such circumstances can include the

punishment facing the individual surrendered in the requesting state and the conduct of proceedings in the requesting country. The circumstances should not include, according to the majority, a determination of whether the foreign and domestic offenses are aligned.

The misalignment test is therefore held by the majority to not be the law in Canada, calling it "incompatible with three key components of extradition law."²² First, it is inconsistent with an approach to double criminality based upon conduct (not offenses). Second, "the 'misalignment' test amounts to a second-guessing of the foreign state's assessment of its own law," and cuts against the principle of comity.²³ Finally, it would broaden the functions of the extradition judge beyond what is contemplated by the Act, forcing the judge to inquire about various elements underlying the foreign offense, when her or his current job is only to consider whether the facts in the ATP amount to an offense under Canadian law.²⁴

In the event, the majority allowed the appeal, set aside the Ontario Court of Appeal's order, and restored the Minister's surrender order. Justice Morris Fish, writing only for himself, also would have allowed the appeal, but for different reasons.

COMMENTS

The concerns expressed by Mr. Fischbacher in this case are not irrelevant. As one commentator noted following the Court's judgment: "The essence of the offense of first degree murder . . . differs widely from second degree murder. An individual premeditating a deliberate murder is fundamentally different from that same individual perpetrating sec-

¹⁶Extradition Treaty between Canada and the United States of America, 1976 Can. T.S. No. 3, arts. 2 and 10 (hereinafter Treaty).

¹⁷*See* Norris v. United States of America, [2008] 2 All E.R. 1103 (H.L.) at ¶ 65.

¹⁸*Fischbacher*, [2009] S.C.J. No. 46 (Can.) at ¶ 29, Charron, J.

¹⁹*Id.* at ¶ 30, Charron J.

²⁰*Id.* at ¶ 32 (emphasis added).

²¹1999 S.C., c. 18 (Can.) at § 44(1)(a).

²²*Fischbacher*, [2009] S.C.J. No. 46 (Can.) at ¶ 49, Charron, J.

²³*Id.* at ¶ 51, Charron, J.

²⁴*Id.* at ¶ 53.

ond degree murder.”²⁵ Presumably, however, all of these considerations are now to be subsumed under the Minister’s final decision about whether or not to issue the order to surrender. Certainly the Court has made clear that the extradition judge is not to concern himself with such matters. Some might consider this a doctrinal nicety, but the upshot of *Fischbacher* is that the judiciary’s role in the extradition process has been tightly circumscribed. At the same time, to the extent that the difference between first and second degree murder in Canada (and the respective punishments associated with the underlying conduct abroad) work their way into ideas about fundamental justice, the Minister’s discretion would seem to have been expanded. The Minister can determine whether such considerations will not bar extradition (as in Mr. Fischbacher’s case) or whether they will.

The majority’s remark that the ATP must cite the Canadian offense that “most closely resembles” the alleged conduct abroad²⁶ is perplexing. The ATP in *Fischbacher* identified the offense requiring committal as murder, contrary to section 231 of the Code. But did this most closely resemble the conduct purported to have happened in the United States? Arguably the answer is no. If the conduct in the Minister’s view supported only a second degree murder charge, should that have been specified in the ATP? If, as seems more likely, first degree murder most resembled the Minister’s view of the conduct in the United States, should the ATP not have cited first degree murder, contrary to subsection 231(2) of the Code? Clearly the ATP was carefully drafted by the executive branch and the reference to section 231 may have been left deliberately vague to allow room for maneuver at the committal hearing. Such considerations may not be dispositive of the matter in *Fischbacher*. Still, for the majority of the Court to raise the issue in its judgment and not address the potential deficiencies of the ATP under review seems odd.

What could *Fischbacher* mean for gaming cases wherein the extradition of persons in Canada is sought by foreign governments? An indictment issued by a grand jury in the United States District Court for the Southern District of New York is currently outstanding and charges Douglas Rennick with several criminal counts, viz., bank fraud conspiracy, money laundering conspiracy, and gambling conspiracy.²⁷ The indictment is the result of an investigation into Mr. Rennick’s involvement in payment processing for online casino and poker op-

erators, including through My ATM Online and Account Services Corporation. Mr. Rennick is a Canadian citizen and is believed to be presently in Canada. At the time of writing, I am unaware of whether any request for extradition has been received by the Canadian Department of Justice.

Fischbacher may not be seen to stand for much as it specifically relates to Mr. Rennick. All of the counts recited in the indictment could be cast as offenses in Canada. Even the gambling conspiracy charge may be prosecutable in Canada, for example, if operating online poker and casino games amount to keeping a common gaming house, though more will be said about this below. Mr. Rennick could potentially be a party to the gaming offense by aiding or abetting it through his payment processing activities, although *quaere* whether, among other items, the maximum penalties in section 201 of the Code or in other provisions would be sufficient to engage extradition on one or more counts. Of course, much would depend upon the ATP in Mr. Rennick’s circumstances and any number of other things that haven’t happened at the time of writing or that may not ever happen.

In a larger sense, *Fischbacher* leaves open as many questions as it answers for gaming attorneys and their clients. Even to the extent that the Court’s judgment resolves the misalignment test in favor of the Minister, a parallel offense is still required. It is debatable whether gaming offenses alleged to be committed abroad amount to conduct that would interest the courts in Canada. If double criminality is not met, extradition will fail.

For example, if one were to initiate and operate an international e-gaming Web site from Canada (but, say, not facing Canadian customers), wherein games of chance or of mixed chance and skill were offered, is that conduct that would engage section 201 of the Code? The answer will depend, at least in part, on whether or not an Internet site is a “place”

²⁵Benjy Radcliffe, Comment, *Canada v. Fischbacher: “Justice” Exceeding Its Boundaries?*, THE COURT, Oct. 22, 2009, <<http://www.thecourt.ca/2009/10/22/canada-v-fischbacher-justice-exceeding-its-boundaries/>> (last visited December 14, 2009). In this context, the majority’s conviction that “it is the ‘essence of the offence’ that is important on the conduct-based approach” is noteworthy. *Fischbacher*, [2009] S.C.J. No. 46 (Can.) at ¶ 29, Charron, J.

²⁶*Fischbacher*, at ¶ 32, Charron, J.

²⁷*United States v. Tung Yeung Lam*, No. 09 Cr. 752, Indictment (S.D.N.Y.).

within the meaning of subsection 197(1) of the Code. This is not settled law in Canada. If a requesting state were to seek extradition based upon this conduct, would the extradition judge accede to committal and would the Minister surrender the accused? What if the United States were to target a foreign (i.e., outside of Canada and the U.S.) online sports book operator taking U.S. and Canadian business, but which has no other nexus to Canada? Could this engage the Canadian extradition process? These considerations extend beyond questions of jurisdiction and go to an actual element of the offense in Canada.²⁸

Historically, the “keep common” offenses (e.g., betting houses, bawdy-houses) in Canada have been nuisance provisions whose justification for criminalization has had as much or more to do with harm to surrounding property-holders as with morality. If an illegal land-based card room were in a residential or commercial area, the Code would be used as a tool to address the harm that the neighbors would typically perceive as arising from the card room’s presence. The problem is that this reasoning can become tortured when it’s applied to something like Internet gaming or betting.

Another issue is the specificity involved in many gaming offenses under the Code, compared with something like murder, which, in its most basic elements, is painted in broad strokes. These kinds of highly specific offenses require heightened scrutiny

by counsel to ensure that the impugned conduct abroad truly meets the double criminality test in Canada.

In extradition cases based upon gaming conduct that may come before the Canadian courts from time to time, the person sought will do well to consider the implications of *Fischbacher*. The Minister will retain considerable discretion in surrendering someone to face trial in a foreign state. Furthermore, the gaming or gaming-related offenses in respect of which the individual is tried abroad may be considerably different, in terms of the pith and substance of those offenses and their respective punishments, than the corresponding offenses given in the ATP or even the committal order of an extradition judge. Finally, given the structure and language of the Code, it will behoove Canadian counsel to carefully scrutinize the complained-of conduct and the corresponding offense to ensure counsel’s client avails him or herself of every protection available in front of the committal judge and the Minister.

²⁸Similar examples can go the other way, i.e., there could be a question of whether conduct that is clearly illegal in Canada would be an offense abroad. The Code used to contain broad prohibitions against dice games in Canada. These were rescinded in the late 1990s. Prior to redrafting, say a Canadian resident travelled to Las Vegas, won a sum of money at craps, and brought the funds back to Canada. Would those funds have been proceeds of crime based upon an underlying offense having been committed in Canada? Clearly not.