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EXTRADITION FROM CANADA TO THE UNITED STATES FOR SECURITIES FRAUD: FRUSTRATION OF THE NATIONAL POLICIES OF BOTH COUNTRIES†

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INTRODUCTION

THE four thousand mile border between the United States and Canada has long symbolized the ultimate in cordial relations between two sovereign nations. It has been an instrument to facilitate, rather than a barrier against, the free flow of trade and the movement of citizens between the two countries. In the important area of extradition from Canada to the United States of persons indicted for violating the United States securities laws, however, the border unfortunately has been utilized to frustrate the national policies of the United States and Canada.

For more than two decades the United States Securities and Exchange Commission¹ has been confronted with the problem of the fraudulent operations of a small but highly successful group of broker-dealers peddling worthless securities into the United States from across the Canadian border by long distance telephone and the mails.² It has been

† The Securities and Exchange Commission, as a matter of policy, disclaims responsibility for any private publication by any of its employees. The views expressed herein are those of the authors and do not necessarily reflect the views of the Commission or of the authors' colleagues upon the staff of the Commission.

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1. The "S.E.C." was established pursuant to § 4 of the Securities Exchange Act of 1934, 48 Stat. 885, 15 U.S.C.A. § 78(d), which became effective July 1, 1934, 48 Stat. 905, 15 U.S.C.A. § 78(hh). See 1st Ann. Rep. of S.E.C. 1, 8 (1935), for details concerning the organization and assumption of functions by the Commission under that Act and the Securities Act of 1933, 48 Stat. 74, 15 U.S.C.A. § 77(a).

2. See testimony of then S.E.C. Commissioner Richard B. McEntire on March 3, 1952 before the U.S. Senate Committee on Foreign Relations and the Report of that Committee on Executive G (Supplementary Extradition Convention with Canada), S. Exec. Rep. No.

estimated in past years that the predatory activities of these securities confidence men have resulted in the extraction from American investors of sums ranging from ten to fifty million dollars annually.⁸

In July of 1952, after many years of intermittent negotiations, a Supplementary Extradition Convention with Canada was finally ratified,⁴ which was specifically designed to provide extradition for securities frauds.⁵ It was hoped and anticipated that with the mutual cooperation of enforcement authorities of both countries this convention would go a long way toward eliminating the depredations of these securities salesmen, by permitting their extradition for trial to the United States where the victims resided and the basic evidence necessary for their prosecution was available.⁶ However, less than two and a half years later, these high hopes were dealt a substantial blow when, in the first case⁷ brought under the new extradition arrangements,⁸ extradition was denied by the Associate Chief Justice of the Superior Court of the Province of Quebec, sitting as extradition judge.⁹ Although having previously ruled that

5, 82d Cong. 2d Sess. 3, 5-16 (1952); 17th Ann. Rep. of S.E.C. 159 (1951), and 18th Ann. Rep. of S.E.C. 179 (1952).

3. S. Exec. Rep. No. 5, *supra* note 2, at 3, 6.

4. The treaty came into force on July 11, 1952. See T.I.A.S. No. 2454 (1952), U.S. Dep't of State Pub. No. 4709 (1952); Can. T. S., 1952, No. 12 (1953).

5. "The United States of America and Canada, being desirous of modifying and supplementing in certain respects the lists of crimes on account of which extradition may be granted . . . so as to comprehend any and all frauds which are punishable criminally by the laws of both contracting states, *particularly those which occur in connection with transactions in securities*, have decided to conclude a Supplementary Convention for that purpose. . . ." (Emphasis added.) Preamble to Supplementary Extradition Convention between Canada and U.S.A. (1952), *supra* note 4. See also S. Exec. Rep. No. 5, *supra* note 2; Minutes of Proceedings and Evidence, No. 10 and Report to House of the Standing Committee on External Affairs of the Canadian House of Commons, 6th Sess., 21st Parl., 1952.

6. See S. Exec. Rep. No. 5, *supra* note 2, at 4, 9, 13; 98 Cong. Rec. 3241 (1952); 17th Ann. Rep. of S.E.C. 159 (1951), 18th Ann. Rep. of S.E.C. 179 (1952).

7. In the Matter of U.S.A. and Walter H. Link and Harry H. Green, No. 134, Superior Court, Province of Quebec, District of Montreal, judgment rendered Dec. 17, 1954, officially reported as U.S.A. v. Link and Green [1955] 3 D.L.R. 386, leave to appeal denied [1955] S.C.R. 183.

8. The extradition request was based on two of four indictments returned in the U.S. Dist. Ct. for the E.D. of Mich., Southern Division, on April 27, 1954, *United States v. T. M. Parker Inc.*; one indictment (No. 34275) charges violations of the mail fraud statute, 62 Stat. 763, 63 Stat. 94, 18 U.S.C.A. § 1341 (1949), the other indictment, also based on use of the mails (No. 34276), charges violations of the anti-fraud provisions (section 17(a)) of the Securities Act of 1933, 48 Stat. 84, 15 U.S.C.A. § 77q(a) (1933). See 20th Ann. Rep. of S.E.C. 103-04 (1954) and S.E.C. Litigation Release No. 842, dated April 27, 1954, for additional details as to the charges in this case.

9. Honorable W. B. Scott of the District of Montreal, acting pursuant to § 9(1) of the Canadian Extradition Act, R.S.C. 1952, c. 322.

he was fully satisfied that a prima facie case had been established as to the fraud offenses charged against the two accused,¹⁰ the extradition judge nevertheless denied extradition because he did not approve of the evidence which would be admissible in the United States prosecution to establish the offenses charged in the indictments upon which the extradition was requested.¹¹ In view of the tremendous adverse precedential impact such a judgment could have upon future extradition cases, application was made to the Supreme Court of Canada for leave to appeal the adverse decision.¹² The application was heard on March 7, 1955, by the complete nine judge panel of the Court¹³ and was unanimously denied for lack of jurisdiction.¹⁴

After summarizing the background of the securities fraud extradition problem, we shall analyze the extradition judge's decision with a view to demonstrating the errors inherent in it and to advancing certain procedural reforms which we believe essential, if proper effectuation is to be accorded extradition arrangements entered into in good faith between the high contracting parties.

10. Both Canada and the United States require that before an accused may be committed for extradition the requesting country must produce such evidence as would justify his committal for trial, if the crime had been committed in the country of asylum. Section 18(1)(b) Canadian Extradition Act, supra note 9; 62 Stat. 822, 18 U.S.C.A. § 3184 (1948); art. X, Webster-Ashburton Treaty of 1842, 8 Stat. 572. See also *Re United States and Grossberg*, 41 C.C.C. 306, 315 (1921) and *Collins v. Loisel*, 259 U.S. 309, 315-16 (1922). For a discussion as to the necessity and advisability of requiring such a showing, see 18 Cornell L.Q. 608 (1933) (against) and 31 Mich. L. Rev. 544 (1933) (in favor).

11. The judge phrased it in these terms:

"Although 11B [of the treaty] deals with making use of the mails in connection with schemes devised or intended to deceive or defraud the public or for the purpose of obtaining money under false pretences, it would be manifestly unjust, unfair and grievously prejudicial to the accused to surrender them for trial on indictments where, in addition to the charges of fraudulent use of the mails, fraudulent telephone calls constituting false pretences and fraud committed in Canada without using the mails would also be put to the jury.

"To hold otherwise would be contrary to law and to our established principles of British justice."

12. The application was made under § 41(1) of the Supreme Court Act of Canada, 1952 R.S.C., c. 259. See, *Application for Special Leave to Appeal, U.S.A., Appellant, and Walter H. Link and Harry H. Green, Respondents*, Supreme Court of Canada, dated February 1, 1955, p. 203.

13. Customarily, applications of this type are heard only by from one to five judges.

14. *U.S.A. v. Link and Green* [1955] S.C.R. 183. The decision was announced by the Chief Justice in open court at the conclusion of the argument. The argument was confined solely to the jurisdictional issue, the Chief Justice having noted previously that the importance of the problem was self-evident.

Another avenue is still open by which a determination could be obtained from the Canadian Supreme Court on the important questions raised by the adverse extradition

BACKGROUND OF THE SECURITIES FRAUD EXTRADITION PROBLEM

Transfer of "Boiler-Room" Operations From the United States to Canada

The enactment of the federal securities laws in 1933 and 1934¹⁵ and the vigorous enforcement which followed rendered it virtually impossible for the securities "boiler-room"¹⁶ operators to continue their activities in the United States with any degree of safety. Accordingly, a group of these securities salesmen, who never have lacked for ingenuity, conceived the idea of transferring the scene of their operations across the border to Canada.¹⁷ The modern city of Toronto in the Province of Ontario with its central location and close proximity to the United States was chosen by them as the center of operations. Their typical fraud promotions were dependent not upon personal contact but almost entirely upon mass mail campaigns and vigorous and extensive telephone solicitation.¹⁸ This type of fraudulent selling could as easily be continued from that convenient location as from cities within the United States. The Canadian border provided on the one hand an excellent screen for the share-pushing activities of these promoters and on the other hand has been used as a curtain of protection against apprehension.¹⁹ The only method by which the United States enforcement authorities could hope to crush and effectively exterminate such operations was by way of extradition.²⁰ Unfortunately, the offenses included in the then existing extradition arrangements were inadequate to meet the modern fraud techniques employed by telephone and mail securities promoters.

judgment. Under § 55 of the Supreme Court Act of Canada, supra note 12, the Governor in Council (i.e. the Canadian Cabinet) may, if it sees fit, submit such questions to the Supreme Court for an advisory opinion, special jurisdiction being conferred upon the court to hear and consider all such submitted matters.

15. Securities Act of 1933 and Securities Exchange Act of 1934; see supra note 1.

16. This is the colloquial term used in the securities field to describe the premises from which the high pressure telephone solicitation is conducted. Normally, in a "boiler-room" operation each telephone salesman will be equipped with two telephones, so that a constant continuity of calls may be maintained without any loss of time. It is a frequent practice to use so-called sequence calls, i.e., a number of calls are placed simultaneously with the long distance telephone operator with instructions to place the calls in the order given, so that no time will be wasted in picking up the next call.

17. Thus, while originally these long distance securities operators were mostly immigrants from the United States, it was not long before a number of Canadians were trained by them and succeeded in large measure to the control of the fraudulent enterprises. See S. Exec. Rep. No. 5, supra note 2, at 11.

18. See 27 Dep't of State Bull. 67 (1952); Loss, Securities Regulation 1173 (1st ed. 1951).

19. See note 2 supra.

20. Ibid.

Webster-Ashburton Treaty of 1842

The first extradition arrangements with Canada were provided by the Webster-Ashburton Treaty of 1842²¹ between the United States and the British Empire.²² Although primarily concerned with the settlement of boundaries, provision was made in the treaty for extradition for the crime of murder and six other specified offenses. The entire extradition agreement was included in just one short paragraph comprising article X of the treaty.²³ Thus the pattern was established between the two governments for "list-type" extradition arrangements, wherein it is agreed to extradite for the specified but undefined offenses named therein.²⁴

Blaine-Pauncefote Convention of 1889

In 1889, the Blaine-Pauncefote Convention²⁵ provided for the embodiment of a number of additional basic extradition provisions and the inclusion of ten items of additional offenses for which extradition was to be granted. Included among these are two of some interest here, since they represent the first attempts to provide extradition for any fraud type offenses. One of the added items covered the crime of ". . . receiving any money, valuable security, or other property, knowing the same to have been embezzled, stolen or fraudulently obtained"; the other item covered "Fraud by a bailee, banker, agent, factor, trustee, or director,

21. 8 Stat. 572. For delegation of powers to the Parliament and Government of Canada, respecting obligations of Canada under treaties between the British Empire and foreign countries, see section 132, art. IX, The British North America Act, 1867, 30 Victoria, c. 3, R.S.C. 1952, at 6212.

22. Both the United States and Canada adhere to the principle that international extradition shall be granted only in accordance with applicable statutes or treaties. See *Valentine v. United States ex rel. Neidecker*, 299 U.S. 5 (1936); Draft Convention on Extradition, 29 Am. J. Int'l L. 74 (1935 Supp.). See also Canadian Extradition Act, supra note 9, and U.S. Extradition Provisions, 62 Stat. 822, 18 U.S.C.A. § 3181 (1948), §§ 3184-3195, which provide substantially similar procedures for implementing international extradition arrangements.

23. It is of interest to note that even at this early date the extradition provision was written to cover not only persons who sought asylum in the foreign country but also persons "found" therein.

24. So long as the list is confined to well known offenses similarly described in both countries, this presents no great problem. However, in the case of other less well established offenses and particularly in the case of statutorily created offenses, this procedure obviously gives rise to questions of interpretation as to the coverage of the treaty. For this reason it was early suggested that it might be preferable to list in extradition treaties the actual statutes or crimes of each country which are intended to be covered. See Draft Convention on Extradition, supra note 22, app. I. at 74-75, 82. This in turn, however, may lead to other difficulties, in view of the frequent statutory revisions which occur with the passage of time.

25. 26 Stat. 1508.

or member or officer of any company, made criminal by the laws of both countries."²⁶ The limited application of these provisions is apparent.²⁷ They are important, however, in demonstrating the concern at this early date, at least with respect to the fraud offenses falling within the scope of these items.

Supplementary Conventions of 1900, 1905, 1922 and 1925

In 1900 the list of offenses was further supplemented, and among the offenses then added was the crime of "obtaining money, valuable securities or other property by false pretenses."²⁸ Additional offenses were added by Supplementary Conventions in 1905, 1922 and 1925,²⁹ but the fraud coverage of the extradition arrangements was not affected by these amendments.³⁰

The offense of obtaining money by means of false pretenses, limited as it is to the restrictive common law concept covering only misrepresentations regarding past or present facts,³¹ was obviously insufficient to cope with the twentieth century techniques developed by accomplished telephone and mail order security fraud promoters. Their fraudulent selling schemes, relying almost exclusively upon promissory type representations and glowing and fictitious representations as to the future, in order to whet the appetite of and deceive unsophisticated persons, were beyond the reach of this limited offense.³²

Early S.E.C. Efforts to Obtain Extradition Treaty Revision

Accordingly, very soon after creation of the Securities and Exchange Commission, consideration was given to the feasibility of obtaining

26. Items 3 and 4, art. I of the Convention.

27. See *Rex v. Nesbitt*, [1913] 28 O.L.R. 91, 21 C.C.C. 251, 11 D.L.R. 708, 20 Can. Abr. 31. Cf. *Browne v. United States*, [1906] 30 Que. S.C. 363, 11 C.C.C. 167, 20 Can. Abr. 123.

28. Item 11 of the Supplementary Convention of 1900, 32 Stat. 1864. By the mechanical application of the narrow principle of *eiusdem generis*, this provision has been held by the Canadian courts to be inapplicable to the offense of obtaining goods by false pretenses. *In re Rosen*, [1931] 2 W.W.R. 799, 44 B.C.R. 203, 20 Can. Abr. 31.

29. 34 Stat. 2093, 42 Stat. 2224, 44 Stat. 2100.

30. The 1922 convention, which added the offenses of wilful desertion and non-support of dependent children, was restricted in its application to extradition between the United States and Canada, an apparent recognition of the need for special treatment in view of the common and open border between the two countries. See article II of this convention. Similarly, the 1925 convention, which covered narcotic offenses, was entered into only with respect to Canada. See Preamble and article II of this convention.

31. See *Chaplin v. United States*, 157 F. 2d 697 (C.A. D.C. 1946); § 404 (now § 303, see *infra* note 71) of the Canadian Criminal Code.

32. Similarly, the treaty provision added in 1889 covering frauds by the fiduciary persons designated therein, see text *supra*, is easily avoided by their practice of acting in a principal capacity as dealers and by their scrupulously avoiding appearance as record officers of the companies whose securities they are distributing.

an amendment of the extradition arrangements with Canada, so as to meet this new international securities fraud problem. A completely new extradition treaty with Canada was even then under discussion by the State Department. One of the offenses suggested for inclusion in the proposed revised treaty arrangements was use of the mails to defraud. Informal exploratory discussions were had, at least on this side of the border, relative to the addition of security act type offenses as well, but the whole treaty revision program came to naught, apparently lost among the more pressing economic problems of the day.

The Lamar Case

In 1940 an unsuccessful effort was made to obtain the extradition of one Lamar, a partner in a Texas securities brokerage firm, who fled to Canada after being indicted³³ for violating the anti-fraud provisions of the Securities Act,³⁴ the Mail Fraud and Conspiracy Statutes.³⁵ Although the total loss to investors was in the neighborhood of \$100,000, in an effort to bring the case within the existing treaty arrangements, extradition was sought only for a single Securities Act count based on the charge that the accused had misrepresented in a confirmation sent to a customer his cost of purchasing a security, thereby causing the customer to overpay \$175.³⁶ Extradition was denied³⁷ on the grounds (1) that a prima facie violation of the Securities Act was not made out because the money was obtained before the mailing of the confirmation, (2) that no prima facie case of false pretenses under Canadian law was shown because the money passed before the untrue statement was made, and (3) that, because the charge under section 17(a)(2) of the Securities Act was based on the obtaining of the money by means of an untrue statement of a material fact "by the use of the mails," this was "a specific kind of offense under a particular law" not included within the extradition arrangements.

Negotiations for Extradition Treaty Revision, 1941-1945

The lack of success in the *Lamar* case and continuing activities of the coterie of Toronto operators gave new impetus to the efforts to obtain a more effective treaty arrangement with Canada. Once more the

33. A co-defendant was convicted on his plea of guilty and sentenced to a three-year prison term. See 7th Ann. Rep. of S.E.C., Table II, 328 (1941), *United States v. Bedford* (W.D. Tex.), (unreported).

34. Section 17(a), 48 Stat. 84, 15 U.S.C.A. § 77q(a) (1933).

35. Now §§ 1341 and 371, respectively, tit. 18 U.S.C.A., 63 Stat. 94, 62 Stat. 701 (1949) (1948).

36. See discussion of this case in S. Exec. Rep. No. 5, supra note 2, at 10-11.

37. *Re Lamar*, [1940] 2 W.W.R. 471, 73 C.C.C. 194, 2 S.E.C. Jud. Dec. 19. See Comment on case in Loss, op. cit. supra note 18, at 1172-73.

approach took the form of a wholly new extradition agreement. Negotiations were reopened with the Canadian authorities in the early summer of 1941. By the end of April, 1942, the new proposed treaty was signed by representatives of both countries.³⁸ A comprehensive list of offenses was incorporated in the new proposal, which included all of the offenses previously covered and many new ones.³⁹ From the Commission's viewpoint the important additions were those covering (1) use of the mails to defraud,⁴⁰ (2) crimes against the laws for the prevention of fraud in the sale or purchase of securities,⁴¹ (3) crimes against the laws regulating "(a) public securities markets, or activities affecting such markets; (b) registration or licensing of securities or persons or companies doing business in securities, or giving advice with respect thereto; (c) investment or public utility companies."⁴² The Commission considered the coverage of the treaty to be ideal. It would generally have made extraditable all types of federal securities offenses⁴³ and would have comprehended not only fraud violations, but also criminal violations of the registration and other regulatory provisions of the various acts administered by the Commission.⁴⁴

Another innovation was the inclusion in the treaty of a specific provision⁴⁵ eliminating the double criminality doctrine in extradition proceedings, i.e. the necessity of establishing that the offense for which extradition is sought is a crime in the requested as well as in the requesting country. The proviso was inserted to insure that the broad coverage of the treaty would not be defeated by application of that doctrine and findings that its double criminality requirements were not met.⁴⁶

The treaty was quickly approved by the United States Senate.⁴⁷ It

38. The treaty is set forth in S. Exec. C, 77th Cong., 2d Sess. (1942).

39. Art. III of the Treaty, S. Exec. C, supra note 38, at 3-4.

40. Id. Item 26.

41. Id. Item 32.

42. Id. Item 32. And by Item 33 the extradition coverage was further extended to include ". . . participation or conspiracy in any of the crimes . . . or any attempt to commit any of such crimes."

43. The provisions were broad enough to cover offenses under the various state securities laws, as well.

44. See Securities Act of 1933, 48 Stat. 74, 15 U.S.C.A. § 77(a); Securities Exchange Act of 1934, 48 Stat. 881, 15 U.S.C.A. § 78(a); Public Utility Holding Company Act of 1935, 49 Stat. 838, 15 U.S.C.A. § 79; Trust Indenture Act of 1939, 53 Stat. 1149, 15 U.S.C.A. § 77(aaa); Investment Company Act of 1940, 54 Stat. 789, 15 U.S.C.A. § 80a-1; Investment Advisers Act of 1940, 54 Stat. 847, 15 U.S.C.A. § 80b-1.

45. Article IX of the Treaty.

46. Discussed in greater detail, p. 319 *infra*.

47. Transmitted May 6, 1942, made public May 11, 1942, approved May 27, 1942. See S. Exec. C, supra note 38, and 88 Cong. Rec. 4641 (1942). It was ratified by the President on June 6, 1942. See S. Exec. I, 79th Cong., 1st Sess. 2 (1945).

provoked a great deal of controversy in Canada, however, and was never acted upon by the Canadian Parliament. All sorts of hypothetical applications were suggested to make it appear that under the treaty innocent persons would be subject to extradition for unwitting violations of the various state and federal securities laws.⁴⁸ Three of the leading objections to the treaty which were advanced were (1) that it was retroactive, (2) that it would permit extradition for fraud under the laws of the United States, even though such acts were not illegal in Canada, and (3) that Canadian publishers might be extradited if a copy of their publications, which carried advertisements for the sale of securities, reached the United States.⁴⁹

Further negotiations were undertaken to resolve these differences. Finally, in November, 1945, in an effort to meet these objections, a Protocol amending the 1942 proposal was agreed upon.⁵⁰

The Protocol provided that the treaty would not be retroactive and that insofar as the offense of mail fraud and the various securities offenses were concerned⁵¹ extradition would not be available as to persons dealing in securities in compliance with the laws of the requested country, unless the offense involved ". . . (a) fraud, as defined by the laws of both countries, or (b) wilful and knowing violation of the laws of the requesting country."⁵² It also provided that the extradition provisions would not apply to any publisher of a periodical primarily intended for sale and circulation in the requested country and the circulation of which was only incidental in the requesting country.⁵³ Despite these concessions and amendments, the treaty was never approved by the Canadian Parliament.⁵⁴

Stop-Gap S.E.C. Enforcement Efforts

Meanwhile, the failure to achieve a revised extradition arrangement and the increased interest in securities resulting from the post-war boom, gave additional impetus to the activities of these fraudulent securities operators. The result was an immense increase in the number of illicit promotions emanating from Toronto "boiler-rooms" and, as time passed, the problem became more and more acute.

While attempts were being made to negotiate new extradition ar-

48. See S. Exec. Rep. No. 5, *supra* note 2, at 11.

49. See S. Exec. I, *supra* note 47, at 2-3.

50. *Ibid.*

51. Items 26, 31, 32 of Act III of the 1942 Treaty.

52. Paragraphs 1 and 3 of the 1945 Protocol.

53. *Id.*, paragraph 2.

54. For a summary of the objections advanced with respect to this proposal, see Debates of Canadian House of Commons 2427-28 (1952).

rangements, the Commission, in an effort to meet the problem at least partially, investigated many of these promotions, with the result that a number of indictments were obtained in the United States.⁵⁵ For the most part the indictments were not made public, but were kept secret, with the thought that some of the promoters might be unwary enough to cross the border into the United States. On two occasions the defendants did so and they were promptly apprehended; in both instances, however, the defendants, to avoid standing trial, forfeited bail of \$50,000 and \$25,000 respectively, and fled back to Canada.⁵⁶

In addition, in a further effort to cripple these illicit operations, the Commission, in cooperation with the United States Post Office Department, obtained the issuance by that department of "fraud and fictitious name orders"⁵⁷ against a large number of such operators.⁵⁸ In effect, these orders banned the delivery of mail from the United States to the violators against whom they were issued. These measures, however, were only partially successful in view of the inherent difficulty of screening out the banned mail and the fact that continual amendments of the orders were necessary, because the promoters with their typical ingenuity changed their addresses or used different return mail addresses or other similar dodges in order to defeat or make more difficult the enforcement of the mail ban.⁵⁹

Concomitantly with the above measures the newspaper, magazine and radio media were most effective in publicizing the fraudulent activities of the fringe group of operators and warning United States investors against their deceitful solicitations.⁶⁰

In the meantime, the operations of this small minority of high pressure

55. The first convictions in these types of cases were obtained in *United States v. E. M. McLean* (E.D. Mich.), *aff'd sub nom. Kaufman v. United States*, 163 F.2d 404 (6th Cir. 1947), cert. denied, 333 U.S. 857 (1948). See 11th Ann. Rep. of S.E.C. 82-83 (1945), 15th Ann. Rep. of S.E.C. 170 (1949).

56. *United States v. Albert Edward De Palma* (N.D. Ohio), (unreported) and *United States v. Noel H. Knowles* (E.D. N.Y.), (unreported). See 14th Ann. Rep. of S.E.C. 103 (1948) and 15th Ann. Rep. of S.E.C. 170 (1949); S. Exec. Rep. No. 5, *supra* note 2, at 11; Loss, *op. cit. supra* note 18, at 1173.

57. 17 Stat. 322, 26 Stat. 466, 28 Stat. 964; 25 Stat. 873, 39 U.S.C.A. §§ 259, 255 (1875) (1889). See Loss, *op. cit. supra* note 18, at 806 n. 1.

58. See 15th Ann. Rep. of S.E.C. 170-71 (1949); 16th Ann. Rep. of S.E.C. 152-53 (1950); 17th Ann. Rep. of S.E.C. 159-60 (1951); S. Exec. Rep. No. 5, *supra* note 2, at 12.

59. See 17th Ann. Rep. of S.E.C. 159 (1951); S. Exec. Rep. No. 5, *supra* note 2, at 12.

60. *Ibid.* Publicity of this type was not restricted to the United States; Canadian newspapers and periodicals also were calling attention to the harmful activities of this group of Toronto stock promotion houses. See, e.g., "All that Glitters is not Gold," *Financial Post* (Toronto), April 15, 1950, p. 1; "High-Pressure Stock Promotions are Going Full Blast," *Toronto Daily Star*, Nov. 25, 1949, p. 15.

share-pushers not only were causing extensive damage in the United States; they also unfortunately were having a serious adverse effect upon all Canadian legitimate enterprises by creating an overall aura of distrust in the minds of American investors against all Canadian securities and investments.⁶¹ In the summer of 1951 a crime committee of the Ontario Provincial legislature conducted an investigation into the activities of such promoters. This also served to throw a floodlight of unfavorable publicity upon their fraudulent promotions.⁶²

Supplementary Extradition Convention of 1952

In early 1951, active discussions once again were renewed with the Canadian Dominion authorities concerning revision of the extradition arrangements between the two countries.⁶³ Since the main objective was to halt the more serious violations, i.e. fraudulent promotions rather than violations of the securities registrations provisions, the former broad treaty proposal was abandoned. Instead the negotiators now concentrated on working out more limited extradition provisions which would effectively meet the fraud problem. The negotiations were successful. On October 26, 1951, a Supplementary Extradition Convention was signed. This ultimately became effective on July 11, 1952, after ratification by both governments.⁶⁴

To achieve the desired objective of providing extradition for securities frauds, the Convention added, in substitution for the old restricted and limited false pretenses extradition provision which had been added in 1900,⁶⁵ the following two new provisions:⁶⁶

"11A 'Obtaining property, money or valuable securities by false pretences or by defrauding the public or any person by deceit or falsehood or other fraudulent means, whether such deceit or falsehood or any fraudulent means would or would not amount to a false pretence.

"11B 'Making use of the mails in connection with schemes devised or intended to deceive or defraud the public or for the purpose of obtaining money under false pretences.'"

In the Preamble to the Supplementary Convention the parties made it plain that by the addition of these two items it was their intention to modify and supplement the list of extradition crimes "so as to comprehend any and all frauds which are punishable criminally by the laws of both contracting states, particularly those which occur in connection

61. See S. Exec. Rep. No. 5, supra note 2, at 15.

62. See, e.g., Newsweek, Aug. 20, 1951, p. 42.

63. See S. Exec. Rep. No. 5, supra note 2, at 14; 16th Ann. Rep. of S.E.C. 153 (1950).

64. See note 4 supra.

65. Item 11 of the Supplementary Extradition Convention of 1900, supra note 28.

66. Art. I of the 1952 Convention, supra note 4.

with transactions in securities.⁶⁷ The reports of the respective Canadian and United States legislative committees⁶⁸ also make plain that the new treaty provisions were intended to comprehend violations of the anti-fraud provisions of the Securities Act of 1933⁶⁹ and the United States Mail Fraud Statute,⁷⁰ and the analogous fraud provisions of the Canadian Criminal Code⁷¹ and the Canadian Mail Fraud Statute,⁷² the

67. See notes 4, 5 *supra*.

68. See Minutes of Proceedings and Evidence, No. 10 and Report of the Standing Committee on External Affairs of the House of Commons, 6th Sess., 21st Parl. (1952) on the Supplementary Extradition Convention between the United States and Canada at 267-69, 281, 287; S. Exec. Doc. G, 82d Cong., 2d Sess. 2 (1952); S. Exec. Rep. No. 5, *supra* note 2, at 1, 4, 14.

69. Section 17(a) provides:

"It shall be unlawful for any person in the *offer or* sale of any securities by the use of any means or instruments of transportation or communication in interstate commerce or by the use of the mails, directly or indirectly—

- (1) to employ any device, scheme, or artifice to defraud, or
- (2) to obtain money or property by means of any untrue statement of a material fact or any omission to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, or
- (3) to engage in any transaction, practice, or course of business which operates or would operate as a fraud or deceit upon the purchaser." (Emphasis added.)

On October 10, 1954 the italicized words "offer or" appearing before the word "sale" were added to the section by Pub. L. No. 577, 73d Cong., 2d Sess. (Aug. 10, 1954). This amendment was required because of other revisions of the statute which were effected at that time. It involved no change in the section's coverage, since "sale" was defined previously by § 2(3) of the Act, 48 Stat. 74, 15 U.S.C.A. § 77b(3) (1933) as including "offers."

70. 63 Stat. 94, 18 U.S.C.A. § 1341 (1949) which provides:

"Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, or to sell, dispose of, loan, exchange, alter, give away, distribute, supply or furnish or procure for unlawful use any counterfeit or spurious coin, obligation, security, or other article, or anything represented to be or intimated or held out to be such counterfeit or spurious article, for the purpose of executing such scheme or artifice or attempting so to do, places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Post Office Department, or takes or receives therefrom, any such matter or thing, or knowingly causes to be delivered by mail according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, any such matter or thing, shall be fined not more than \$1,000 or imprisoned not more than five years, or both."

71. 1948 c. 39, section 444 which provides:

"Everyone is guilty of an indictable offence and liable to five years' imprisonment who, by deceit or falsehood or other fraudulent means, defrauds the public or any person, ascertained or unascertained, or affects the public market price of stocks, shares, merchandise, or anything else publicly sold, whether such deceit or falsehood or other fraudulent means would or would not amount to a false pretense as hereinbefore defined."

latter section having been broadened by amendment in June 1951⁷³ to make it more nearly parallel to the comparable United States fraud statutes and "so that the double criminality standard would be clearly met."⁷⁴

In the interim, the prospective adoption of an extradition treaty, coupled with a vigorous enforcement program by the local Ontario securities authorities, had virtually halted the activities of the Toronto "boiler-room" operators by the time the treaty was finally ratified in July of 1952.⁷⁵ But unfortunately it did not remain so for very long.

Not many months after the new treaty provisions became effective a number of Toronto operators surreptitiously transferred their activities to the city of Montreal where, operating behind fronts, they once again commenced their high pressure mail and telephone securities fraud promotions into the United States. One of the most flagrant of these, the T. M. Parker, Inc. promotion,⁷⁶ provided the first extradition case⁷⁷ under the 1952 Supplementary Extradition Convention.

THE T. M. PARKER, INC. PROMOTION

Nature of Scheme Involved

As previously noted, the extradition proceedings were based upon Mail Fraud and Securities Act indictments returned in the United States in April, 1954.⁷⁸ The extradition charges involved a "boiler-room" promotion which was conducted from Montreal in the late spring and early summer of 1953.

The evidence adduced at the extradition hearing showed that the promotion followed the acquisition and reactivation of T. M. Parker, Inc., a dormant securities firm of Montreal. In the short period of approxi-

A recodification and renumbering of the Canadian Criminal Code became effective April 1, 1955; this section is now 1953-54 c. 51 § 323(1) and (2).

72. 1951 c. 47, § 12 (renumbered 1953-54 c. 51), § 209(c) now § 324, which provides: "Everyone is guilty of an indictable offence and is liable to two years' imprisonment who makes use of the mails for the purpose of transmitting or delivering . . . (c) any letter or circular concerning schemes devised or intended to deceive and defraud the public, or for the purpose of obtaining money under false pretenses."

73. The amendment substituted the phrase "makes use of the mails for the purpose of transmitting or delivering" for the prior language "posts for transmission or delivery by or through the post." Dominion of Canada Laws, 1951, c. 47, § 12.

74. See S. Exec. Rep. No. 5, supra note 2, at 14. See also Report of the Standing Committee on External Affairs of the House of Commons, supra note 5, at 267-69, 287.

75. 18th Ann. Rep. of S.E.C. 179 (1952); S. Exec. Rep. No. 5, supra note 2, at 13; Debates of Canadian Senate, 6th Sess., 21st Parl., 319 (1952).

76. This was the corporate name under which the sales campaign was conducted.

77. U.S.A. v. Link and Green, supra note 7 (3 D.L.R. at 398).

78. Indictments Nos. 34275, 76, S.D. E.D. Mich.

mately ten weeks during which the promotion was actively in operation over \$300,000 was obtained from United States investors residing in some forty states and the District of Columbia.⁷⁹

It was further shown that at the height of the promotion some twenty telephones were in operation in two "boiler-rooms"⁸⁰ and that during the limited period in which the promotion was conducted the telephone toll charges amounted to approximately \$14,000.⁸¹

In essence, the promotion involved the "reloading"⁸² of United States investors, by means of fraudulent letters and high pressure telephone calls, with additional shares of stock of various Toronto corporations in which they had previously been induced to invest by Toronto fringe securities operators. The proof showed that the prices investors paid to T. M. Parker, Inc. were ten to fifteen times more than the negligible prices at which the stocks could have been purchased. In numerous instances no delivery was ever made of the stock sold. Every effort was made to conceal the identities of the participants in the promotion. Only with considerable difficulty and after intensive investigation were their true identities uncovered.⁸³ The overall nature of "this nefarious operation"⁸⁴ is further illustrated by the more than 200 false and fraudulent representations which it was alleged were made in soliciting investors to purchase the various stocks which were the subject of the promotion. These related to such items as the purported special "rights" which investors had as shareholders to purchase additional shares at prices below the current market price, the alleged market and market price which existed for such shares, the alleged impressive discoveries and developments which had taken place in properties owned by the corporation, the guaranteed profits which investors were supposed to make and a host of other similar matters.⁸⁵

The Extradition Hearings

The extradition hearings commenced at Montreal in the Superior Court for the Province of Quebec on November 3, and concluded on

79. U.S.A. v. Link and Green, *supra* note 7 (3 D.L.R. at 398).

80. *Id.* The extradition judge noted (3 D.L.R. at 398): "A glance at the photographs of the wooden cubicles installed by the carpenter Tash in these small rooms readily shows how a set-up of this nature has come to be known on the street as a 'boiler-room.'"

81. *Id.* (3 D.L.R. at 398).

82. This is the colloquial expression used to describe swindles in which investors are re-solicited to make additional investments in the same promotion.

83. See U.S.A. v. Link and Green, *supra* note 7 (3 D.L.R. at 397-98).

84. This is one of a number of similar descriptions used by the extradition judge in describing the scheme employed in this case. *Id.* (3 D.L.R. at 397-98).

85. See Application for Special Leave to Appeal, *supra* note 12, at 26-63, 142-45, 147-53, 157-60, 166-69. See also U.S.A. v. Link and Green, *supra* note 7 (3 D.L.R. at 387-88).

December 7, 1954.⁸⁶ In the course of this five-week hearing, twenty depositions of United States investors were introduced, and approximately forty witnesses were called on behalf of the United States. The extradition judge thereupon announced in open court that he was fully satisfied that a prima facie case had been made out by the prosecution against the two accused⁸⁷ and directed that no further evidence of the fraud need be adduced.⁸⁸ However, on December 17, 1954, he handed down a judgment denying the extradition request.⁸⁹

The Extradition Judgment

The extradition judgment referred to a number of arguments which were advanced as possible grounds for denying the extradition, but the judge ruled it was unnecessary to reach or decide them.⁹⁰ Rather he based his refusal to grant the extradition request wholly upon the ground that—although he found both the Mail Fraud and Securities Act indictments involved in the extradition request to be within enumeration 11B of the treaty—in his view it “would be manifestly unjust, unfair and grievously prejudicial to the accused” and “contrary to law” and to “established principles of British justice” to surrender the accused for trial in the United States, for under the indictments “in addition to the charges of fraudulent use of the mails, fraudulent telephone calls constituting false pretenses and fraud committed in Canada without using the mails would also be put to the jury.”⁹¹

Impact of the Judgment

The judgment represents a substantial setback to the efforts of both countries to enforce their respective securities laws. Inherent in the

86. After considerable preliminary groundword, the formal request for extradition was made in the latter part of October, 1954. Warrants were issued and the two accused were immediately apprehended, bail was denied and they were remanded to jail. See *U.S.A. v. Link and Green*, supra note 7 (3 D.L.R. at 387); Application for Special Leave to Appeal, supra note 12, at 2.

87. One of the defendants also testified in his own behalf. See *U.S.A. v. Link and Green*, supra note 7 (3 D.L.R. at 397).

88. *U.S.A. v. Link and Green*, supra note 7, vol. 22, Record of Evidence and Proceedings (Nov. 30, 1954) pp. 107-09; Application for Special Leave to Appeal, supra note 12, at 7.

89. As previously pointed out, leave to appeal this decision to the Supreme Court of Canada was denied by that court on the ground that under the Supreme Court Act of Canada, R.S.C. 1952, c. 259, it lacked jurisdiction to review extradition judgments. See p. 303 supra.

90. Although the judge expressly declined to rule upon these other contentions, they are set forth in some detail in his judgment. We comment on some of these points infra. See *U.S.A. v. Link and Green*, supra note 7 (3 D.L.R. at 394-96).

91. See note 11 supra.

judgment also are additional far-reaching implications. If applied to other extradition matters, it could well serve to defeat all such requests. For, wherever the foreign government's trial procedures do not meet with the approval of the individual extradition judge, he would be free to deny extradition. This, too, is wholly aside from the fact that in reaching such a result, the extradition judge might labor under a misunderstanding as to the nature of the offenses involved and the evidence essential to their proof.

Once the judge found, as he did, that a *prima facie* case had been shown before him as to the offenses involved, that the offenses were within the treaty, that they were crimes under Canadian law, and thus met the double criminality requirement, he fulfilled his extradition function.⁹² In undertaking a consideration of the appropriateness *vel non* of the evidentiary rules or procedures which he deemed would be applicable in the prosecution of the indictments in the United States, it is believed that he encroached upon the province of the executive.

The trial procedures which may or may not be followed in the requesting country are not a concern of the extradition judge.⁹³ They must be assumed to have been approved by the respective governmental authorities when the treaties were entered into.⁹⁴ Otherwise it would be impossible, for example, ever to fulfill extradition treaty obligations with continental countries where the civil law procedures do not include many of the basic principles (such as trial by jury, presumption of innocence, etc.) deemed essential to Canadian or British, as well as American, justice.⁹⁵

In any event, such considerations are peculiarly within the domain of the executive departments. The extradition judge's committal of the

92. See §§ 15, 18 and 19, Canadian Extradition Act, *supra* note 9.

93. In *re Arton* (No. 1), [1896] 1 Q.B. 108, 116: ". . . we must assume that the French Courts will administer justice in accordance with their own law; and so long as they do that, or whether they do it or not, we cannot interfere beforehand to prevent them from exercising in this particular case the procedure which they exercise with regard to any criminals who may be brought within their jurisdiction." To the same effect, see *Neely v. Henkel* (No. 1), 180 U.S. 109, 123 (1901). This principle, of course, is equally applicable to the contention noted in the judgment (3 D.L.R. at 394) that the extradition request may have been illegal, because after surrender the accused might be tried in the United States on both indictments at the same time. See Fed. Rules Cr. Proc. rule 13, 18 U.S.C.A. (1948), which provides that the ". . . court may order two or more indictments . . . to be tried together if the offenses, and the defendants if there is more than one, could have been joined in a single indictment. . . ."

94. If any special conditions are to be provided in this regard, they should be incorporated in the treaty. Cf. article II of the Supplementary Convention of 1889, *supra* note 25, and § 15, Canadian Extradition Act, *supra* note 9, relating to political offenses.

95. See note 93 *supra*.

accused is not self-executing and the final determination as to whether the surrender shall be made is vested in the discretion of the executive department.⁹⁶

Under the treaty provisions too, the requesting country is duty bound to try the accused upon surrender solely for the offenses as to which extradition is granted.⁹⁷ It is not to be assumed by the judge in advance that the requesting country will breach this treaty obligation. In any event, failure to comply with a treaty condition would be solely the concern of the executive, who has ample power to take such remedial action as to him may seem proper in the circumstances.⁹⁸

Finally, insofar as the extradition judge suggested that the indictments before him charged other offenses,⁹⁹ in addition to violations of the anti-fraud provisions of the Securities Act and the Mail Fraud statute, he did not fully appreciate the elements of the offenses charged and the testimony of an "eminent member of the New York Bar"¹⁰⁰ who testified as a legal expert on United States law and who lucidly explained the nature of the offenses covered by the indictments.¹⁰¹

Under the statutes involved, before an offense is shown, one of the essential elements which must be established is the scheme to defraud;¹⁰² and the crime is completed when the mails¹⁰³ are used "to

96. See § 25, Canadian Extradition Act, *supra* note 9. For the similar United States provision, see 62 Stat. 824, 18 U.S.C.A. § 3186 (1948).

97. Article III of the Supplementary Extradition Convention of 1889, *supra* note 25. Even without such a treaty provision, the rule would be so in the United States. See *United States v. Rauscher*, 119 U.S. 407, 430 (1886), holding that absent an affirmative provision to the contrary, a person could be tried only for the crime for which he was extradited. See also *Cosgrove v. Winney*, 174 U.S. 64 (1899) and *Collins v. Johnston*, 237 U.S. 502 (1915).

98. The Treaty and the Supplementary Conventions each affirmatively provide that the extradition arrangements "shall continue in force until one or the other of the parties shall signify its wish to terminate it, and no longer." Article XI, Webster-Ashburton Treaty, *supra* note 21. See also article IX, Supplementary Convention of 1889; article II, Supplementary Conventions of 1900, 1905 and 1952; article III, Supplementary Conventions of 1922 and 1925.

99. *U.S.A. v. Link and Green*, *supra* note 7 (3 D.L.R. at 393).

100. The description is that used by the judge in referring to William R. Meagher, Esq., of New York City, who was the legal expert called on behalf of the United States Government in the case.

101. In the Matter of *U.S.A. and Walter H. Link and Harry H. Green*, *supra* note 7, vol. 10, Record of Evidence and Proceedings (Nov. 9, 1954) pp. 59-64, 70, 79-80, 122, 124-31, vol. 22, *supra* note 88 (Nov. 30, 1954) pp. 45-52, 80.

102. See, e.g., *United States v. Young*, 232 U.S. 155, 161-62 (1914); *Durland v. United States*, 161 U.S. 306, 312-15 (1896); *Mansfield v. United States*, 155 F.2d 952, 953-55 (5th Cir.), cert. denied, *Browne v. United States*, 329 U.S. 792 (1946); *United States v. Monjar*, 47 F. Supp. 421, 424-25 (D. Del. 1942), aff'd, 147 F.2d 916 (3d Cir.), cert. denied, 325 U.S. 859 (1944); *Chew v. United States*, 9 F.2d 348, 350-52 (8th Cir.

employ" or for the "purpose of executing" such a scheme. While there are no cases construing the Canadian Mail Fraud Statute,¹⁰⁴ the same requirements undoubtedly are applicable under this provision, which also speaks in terms of prohibiting "use of the mails . . . concerning schemes devised or intended to deceive and defraud the public. . . ."¹⁰⁵ Thus, the portions of the indictments which were construed as "charging the commission of many [other] criminal offenses," in fact, did no more than furnish the requisite description of the scheme to defraud, which the accused were charged with having devised and employed. It is incongruous to hold, because the particular scheme involved activities which also might be broken down and separately charged as additional offenses under Canadian law, that this somehow was a valid reason for refusing extradition. This can lead only to absurd results. For all that the schemers need do to defeat extradition is to make sure that the scheme they contrive and employ includes as an integral part thereof activities which are also criminal under other statutes.¹⁰⁶

It was also held that the fraudulent conduct charged under the Securities Act indictment did not fall within enumeration 11A of the 1952 Supplementary Extradition Convention.¹⁰⁷ This ruling is inconsistent with the background and purpose of the convention and involves a restricted and unrealistic application of the double criminality doctrine.

The background summary of the negotiations leading up to the 1952 treaty amendment¹⁰⁸ amply demonstrates that the very target at which the new convention provisions were aimed was the "boiler-room" fraud

1925). Under the Securities Act the scheme must, of course, also relate to the sale of securities.

103. Or, under the Securities Act, the use of the proscribed interstate facilities.

104. Section 209(c) (now § 324) of the Canadian Criminal Code, see *supra* note 72.

105. The effect of the instant decision would be to block the prosecution at the very threshold of its proof of the case by barring any evidence of the fraudulent scheme which occurred "independently of the use of the mails." See *U.S.A. v. Link and Green*, *supra* note 7 (3 D.L.R. at 393).

106. This, too, is wholly apart from the fact that, while actually irrelevant in the circumstances of this case, the judge cited no authority to support his conclusion that because the telephone calls may have emanated from Montreal, the false pretenses and fraud were committed there. As a matter of fact, it would seem more consonant with law and logic to say that they were committed where the victims who received the calls were located. And query, whether it would be different if the telephone calls emanated from the victims, as is frequently the case, as collect calls made in response to requests by the promoters to do so. Moreover, as a minimum it would seem to be a most restricted and narrow construction and a failure to accord proper understanding to this modern medium of communication, to say that the false pretenses were not made at least at both places.

107. *U.S.A. v. Link and Green*, *supra* note 7 (3 D.L.R. at 391-92).

108. See p. 311 *supra*.

promotions, which were being carried on by long distance telephone and the mails from Canada into this country in violation of the Securities Act¹⁰⁹ and the Mail Fraud statute.

In the light of the problem the treaty amendment was intended to reach, it is difficult to explain the reason for the inclusion of the broad language of item 11A of the Convention, unless it was intended to cover Securities Act fraud offenses. The 11B proviso alone was sufficient to cover mail frauds. In the presentation of the Convention before the Canadian House of Commons Committee, the provisions of section 17(a) of the Securities Act were specifically equated to and presented as an analogue to section 444 of the Canadian Criminal Code, the provisions of which are reflected in enumeration 11A of the treaty amendment.¹¹⁰

The Double Criminality Doctrine

It was held, however, that since section 17(a) of the Securities Act required the use of the mails or interstate facilities to constitute a violation, and section 444 of the Canadian Criminal Code did not, the sections were not similar.¹¹¹ This holding represents a restricted and artificial application of the double criminality standard, and one

109. We have previously alluded to the statement of purpose contained in the preamble to the Convention. Despite its broad language, the extradition judge read it as being merely a restatement of the "well known doctrine" of double criminality. *U.S.A. v. Link and Green*, supra note 7 (3 D.L.R. at 393). The quote from the preamble included in the decision to support this construction, however, omits the specific reference made therein regarding the intentment of the contracting parties to amend the extradition arrangements so as to comprehend "particularly those [frauds] which occur in connection with transactions in securities." See note 5 supra.

110. See Minutes of Proceedings and Evidence No. 10, supra note 5, at 267-69, 287. See also Debates of Canadian Senate, 316-19 (1952). Cf. Minutes of Proceedings, supra at 282-83; Debates of Canadian House of Commons 2425 (1952), where it was pointed out that the only type of communication specifically covered by the treaty was the mails. The use of other types of communication facilities, of course, would not alone afford a separate basis for extradition, as in the case of the mails, in view of the limited scope of item 11B. But obviously, where the fraudulent conduct falls within the provisions of 11A, that item would afford the necessary basis for extradition, for, as was observed by a member of the House of Commons Committee, "11A covers everything." See Minutes, supra at 283.

111. To support this conclusion the judgment referred to the "very clear and lucid proof" of the United States legal expert, Mr. Meagher, in which he explained that there was no "Federal law similar to Section 444" in wording because the fraud had to be related to the use of the mails or interstate facilities in order to provide federal jurisdiction. (3 D.L.R. at 391-92). But the decision does not reflect the equally cogent testimony of the expert to the effect that § 17(a) of the Securities Act was analogous to § 444, *except that the latter was broader*, because it was not jurisdictionally limited and was not restricted solely to the sale of securities as was the Securities Act provision. *U.S.A. v. Link and Green*, supra note 7, vol. 10, Record of Evidence and Proceedings (Nov. 9, 1954) pp. 84-87.

which is inconsistent with the development and purpose of that doctrine.

The double criminality principle has obtained wide acceptance and is adhered to in both England and Canada¹¹² and also is followed in the United States.¹¹³ It should be emphasized that the doctrine requires only that the conduct involved be criminal by the laws of both countries. It does not require "that there must be an exact identity of the offense named in the two systems of law; it means merely that the act charged must fall within the proscription of the two systems of criminal law."¹¹⁴ The United States and Canadian decisions are to the same effect. As stated in *Collins v. Loisel*:¹¹⁵

"The law does not require that the name by which the crime is described in the two countries shall be the same; nor that the scope of the liability shall be co-extensive, or, in other respects, the same in the two countries. It is enough if the particular act charged is criminal in both jurisdictions."¹¹⁶

Similarly, as noted in *Re Gaynor & Greene* (No. 11):¹¹⁷

"The practice has been; in England, the United States and Canada, not to insist on an absolute identity between the offence as described in the laws in force in either territories, provided it appears clear that the facts alleged and proved as the ground for extradition contain the essential elements of a like extraditable crime in each country."¹¹⁸

Although the Canadian decisions tend to emphasize a comparison of

112. Hudson, *The Factor Case and Double Criminality in Extradition*, 28 Am. J. Int'l L. 274, 283-360 (1934). Cf. Borchard, *The Factor Extradition Case*, 28 Am. J. Int'l L. 742 (1934), where it is contended that the doctrine is not an established principle of international law.

113. But see *Factor v. Laubheimer*, 290 U.S. 276 (1933). There the Supreme Court held that since the extradition arrangements with Great Britain expressly required that only certain of the treaty listed offenses be punishable by the laws of both countries, that double criminality was not required as to the other treaty offenses, which did not contain such a modifying provision. However the court noted that while the particular offense was not criminal in the state of asylum (Illinois), it was generally recognized as a crime by the laws of both countries and was clearly within the treaty coverage. Whether the decision be construed as an abandonment of the double criminality doctrine, unless the treaty expressly requires it, or as merely a liberal application of the doctrine, the result reached by the court, in any event, is consonant with the purpose of the doctrine. See also Note, 42 Yale L.J. 978 (1933).

114. Hudson, *op. cit.* supra note 112, at 285. See also Borchard, *op. cit.* supra note 112, at 745-46.

115. 259 U.S. 309 (1922). See also e.g., *Kelly v. Griffin*, 241 U.S. 6, 14 (1916); *Wright v. Henkel*, 190 U.S. 40, 58 (1903). And see *Factor v. Laubheimer*, supra note 113.

116. *Collins v. Loisel*, supra note 115, at 312.

117. 10 C.C.C. 154 (Que. K.B. 1905). See also e.g., *Rex v. Stone*, 17 C.C.C. 249, *aff'd*, 17 C.C.C. 377, 391 (Que. K.B. 1911), and *Re Sieman*, [1930] 1 W.W.R. 970, 974 (B.C.) (prisoner committed on reapplication, see [1930] 2 W.W.R. 111, 411, 412). Cf. *In re Lamar*, supra note 37.

118. *Re Gaynor and Greene* (No. 11), supra note 117, at 163.

the statutes in the respective countries, while the United States cases, on the other hand, tend to emphasize the particular conduct proscribed as criminal in both countries, it is clear that neither country has ever insisted that the offenses shall be identical, either in name or in all technical respects, but rather only that substantially the same conduct shall be criminal in both.¹¹⁹ This approach is entirely consistent with the origin and development of the principle, which, as Professor Hudson has pointed out, was designed to insure that persons would not be extradited for conduct not deemed contrary to the mores or criminal laws of the country of asylum.¹²⁰ To apply it otherwise and thus emphasize technical differences between the offenses in the domestic and foreign countries—particularly where they are required solely because of differences in the governmental systems, represents a perversion of the rule. It is plain that section 444 of the Canadian Code makes criminal the conduct for which extradition was sought in the instant case.¹²¹ As already noted, in its fraud coverage section 444 is broader than section 17(a) of the Securities Act of 1933; similarly, in its general coverage it is also broader in that it does not require—as does section 17(a)—the proof of the use of particular jurisdictional facilities.¹²² Both acts are designed to reach fraudulent schemes, and it is only because of the United States federal system that the use of the mails or interstate facilities, are required as an element of the offense.¹²³ Under the circumstances, to hold that they do not mutually satisfy the double criminality requirement is inconsistent with the object and purpose of the principle.

Constructive Presence in the Foreign Country

In the course of the hearing concern was expressed over the fact that the accused had never been physically present in the United States where the fraud was effected.¹²⁴ There were also set forth in some detail the contentions which were raised with respect to the question of the juris-

119. See cases cited notes 115, 117 *supra*.

120. See Hudson, *op. cit. supra* note 112, at 282-83.

121. Upon the denial of the extradition request, the accused were immediately charged at Montreal with violating § 444 of the Canadian Criminal Code, as well as § 209(c) and § 573, now § 408(1)(d) the Canadian Conspiracy Statute, 1892 Code, § 527 (amended 1906 Code § 573).

122. See note 111 *supra*.

123. See *United States v. Monjar*, 47 F. Supp. 421, 425 (1942), *aff'd*, 147 F.2d 916 (3d Cir.), *cert. denied*, 325 U.S. 859 (1944). See also Loss, *op. cit. supra* note 18, at 876-77.

124. See, e.g., the judge's reference to the U.S. prosecution as being a "backdoor" one. *U.S.A. v. Link and Green*, *supra* note 7, vol. 22, *Record of Evidence and Proceedings* (Nov. 30, 1954) p. 101. The judge had no difficulty in finding that the accused were "fugitives" (3 D.L.R. at 387), in view of the clear definition of fugitive contained in § 2(e) of the Canadian Extradition Act, *supra* note 9, as including a person in Canada who is accused of an extradition crime committed within the jurisdiction of a foreign state. See also note 23 *supra*.

diction of the United States court over the offenses involved, because of the fact that the mailings had emanated from Canada, but it was stated that it was unnecessary "to decide this interesting question."¹²⁵

In view of the long established jurisprudence as to the sufficiency of constructive presence as a basis for jurisdiction, both as a matter of general law as well as of extradition law,¹²⁶ it is difficult to understand a reluctance to concede the existence of United States jurisdiction.¹²⁷ As early as the 1800's the English courts held that an accused could be extradited from England to a foreign country—although never physically present there—where he had by use of the mails obtained property by false pretenses from a victim located in such foreign country.¹²⁸ Thus, it was established at this early date that a "person may, by his acts, bring himself between the territorial laws of two countries, being actually present in one and constructively present in the other, in which case therefore both countries have territorial jurisdiction over him and as in the case of *Nillins* the country in which he is only constructively present may demand his extradition from the other."¹²⁹

The contention that the United States did not have jurisdiction over a mail fraud offense committed by the posting of a letter by an accused in Canada which was received by an addressee in the United States was squarely rejected in *United States v. Steinberg*,¹³⁰ where the court noted:

" . . . It has long been a commonplace of criminal liability that a person may be charged in the place where the evil results, though he is beyond the jurisdiction when he starts the train of events of which that evil is the fruit. *Strassheim v. Daily*, 221 U.S. 280, 284, 285, 31 S.Ct. 558, 55 L.Ed. 735; *Lamar v. United States*, 240 U.S. 60, 64, 65, 66, 36 S.Ct. 255, 60 L.Ed. 526; *Ford v. United States*, 273

125. *U.S.A. v. Link and Green*, supra note 7 (3 D.L.R. at 394-95).

126. See cases cited note 128 infra.

127. This is particularly so in view of the specific application of item 11B to use of the mails. Manifestly the judge failed to distinguish between the use of the mail facilities of a country and the nature of the mailings which may be carried by such facilities. Thus, where letters are delivered in this country, it is plain that the mails of the United States are used, regardless of whether the letter itself is a Canadian, French or United States one.

128. See *Regina v. Nillins*, [1884] 53 L.J. (M.C.) 157. See also *Regina v. Jacobi and Hiller* [1881], 46 L.T. 595 (n. a); *Rex v. Godfrey* [1923] 1 K.B. 24. And see *Ex parte Hammond*, note 130 infra. The background materials show that the treaty negotiators were aware of this jurisprudence. See *Minutes*, etc., supra note 110 and *Debates of Canadian Senate*, supra note 110.

129. *Piggott*, *Extradition* 71 (1910).

130. 62 F.2d 77 at 78 (2d Cir. 1932). See also *Kaufman v. United States*, 163 F.2d 404, 411 (6th Cir. 1947), cert. denied, 333 U.S. 857 (1948); *Ex parte Hammond*, 59 F.2d 683, 686 (9th Cir.), cert. denied, *Hammond v. Sittell*, 287 U.S. 640 (1932); and 1 *Oppenheim on International Law* 639, and note 1 (*Lauterpacht*, 7th ed. 1948). In the *Hammond* case, supra, extradition was granted from the United States to Canada of an accused, who had not been present in Canada, for the extradition offense of obtaining money and property by false pretenses in Canada by means of a false bank draft.

U.S. 593, 620, 621, 47 S.Ct. 531, 71 L.Ed. 793. The constitutional question is frivolous."¹³¹

In the *Ford* case,¹³² the United States Supreme Court in overruling a similar jurisdictional contention, pointed out:

"In *Regina v. Garrett, Dearsly's Crown Cases Reserved*, 232, 241, Lord Campbell said:

"I do not proceed upon the ground that the offense was committed beyond the jurisdiction of the Court—which was the fact there—'for if a man employ a conscious or unconscious agent in this country, he may be amenable to the laws of England, although at the time he was living beyond the jurisdiction.'

"It will be found among the earlier cases that the principle is sometimes qualified by saying that the person out of the State cannot be held for a crime committed within the State by his procurement unless it is done by an innocent agent or a mechanical one; but the weight of authority is now against such limitation. . . .

"
"The principle that a man who outside of a country wilfully puts in motion a force to take effect in it is answerable at the place where the evil is done, is recognized in the criminal jurisprudence of all countries. And the methods which modern invention has furnished for the performance of criminal acts in that manner has made this principle one of constantly growing importance and of increasing frequency of application.

"Its logical soundness and necessity received early recognition in the common law. Thus it was held that a man who erected a nuisance in one county which took effect in another was criminally liable in the county in which the injury was done. (*Bulwer's case*, 7 Co. 2 b. 3 b.; Com. Dig. Action, N. 3, 11.) So, if a man, being in one place, circulates a libel in another, he is answerable at the latter place. (*Seven Bishops' case*, 12 State Trials, p. 331; *Rex v. Johnson*, 7 East. 65.)"¹³³

In an earlier case, *In re Palliser*,¹³⁴ the Supreme Court, in holding that an offense involving use of the mails was punishable at the place where a letter was received as well as at the place of mailing, stated:

". . . it is settled by an overwhelming weight of authority that he may be tried and punished at that place, whether the unlawfulness of the communication through the post-office consists in its being a threatening letter; *The King v. Girdwood*, 1 Leach, 142; S.C. 2 East P.C. 1120; *Esser's Case*, 2 East P.C. 1125; or a libel; *The King v. Johnson*, 7 East, 65; S.C. 3 J. P. Smith, 94; *The King v. Burdett*, 4 B. & Ald. 95, 136, 150, 170, 184; *Commonwealth v. Blanding*, 3 Pick. 304; *In re Buell*, 3 Dillon, 116, 122; or a false pretence or fraudulent representation; *Regina v. Lcech, Dearsly*, 642, S.C. 7 Cox Crim. Cas. 100; *The Queen v. Rogers*, 3 Q.B.D. 28; S.C. 14 Cox Crim. Cas. 22; *People v. Rathbun*, 21 Wend. 509; *People v. Adams*, 3 Denio, 190, and 1 N.Y. 173; *Foute v. State*, 15 Lea (Tenn.) 712."¹³⁵

In the light of the above English and United States authorities and in view of the modern means of communication it is somewhat surprising

131. *United States v. Steinberg*, supra note 130, at 78.

132. 273 U.S. 593, 621, 623 (1926).

133. *Id.* at 621, 623.

134. 136 U.S. 257 (1890).

135. *Id.* at 266-67.

that the question as to whether constructive presence is sufficient to afford a basis for the exercise of jurisdiction should be presented as an "interesting" one.

Interpretation of the Treaty

It has also been suggested that perhaps a treaty should be interpreted by the narrow rules of construction applicable to statutes and particularly those applicable to criminal statutes.¹³⁶ In the light of the fact that the treaty represents an agreement between two sovereign governments, it would appear that it should not be restrictively construed but rather liberally interpreted to effectuate the intent of the high contracting parties.¹³⁷ Thus, where a treaty may be ambiguous in its provisions,¹³⁸ reference should be made to such background materials as may reflect the intention of the parties concerned. In the instant case the principle followed was that applied by the English and Canadian courts of not referring to legislative materials in the interpretation of statutes, so that there was a declination to accept any proof with regard to the intention of the parties in adopting the Supplementary Extradition Convention of 1952. This English-Canadian principle of non-reference to legislative materials in the case of statutory construction, has no place in the interpretation of treaty agreements. In any event, even under the Canadian rule applicable to statutory construction, it has been emphasized that in cases of genuine ambiguity consideration should be given to "the general object and broad purpose of the legislation, which in most instances can be elicited partly from the context and partly from the knowledge of those who will give close attention to public affairs. . . . For it can be said with some confidence that the majority which supported the bill intended that it should be reasonably effective in achieving its purpose."¹³⁹ The strained and narrow result reached in the instant judgment wholly fails to accord with the above principle.¹⁴⁰

136. *U.S.A. v. Link and Green*, supra note 7 (3 D.L.R. at 395).

137. See, e.g., *Factor v. Laubenheimer*, 290 U.S. 276, 293-94 (1933): "In choosing between conflicting interpretations of a treaty obligation, a narrow and restricted construction is to be avoided as not consonant with the principles deemed controlling in international agreements." See also *In re Arton* (No. 2, [1896] 1 Q.B. 509, 517; *Lauterpacht, Restrictive Interpretation and the Principle of Effectiveness in the Interpretation of Treaties*, 26 *Brit. Year Book Int'l L.* 48 (1949); *Some Observations on Preparatory Work in the Interpretation of Treaties*, 48 *Harv. L. Rev.* 549 (1935).

138. The treaty here under consideration, as we have noted, is strikingly free of ambiguity.

139. Corry, *The Use of Legislative History in the Interpretation of Statutes*, 32 *Can. B. Rev.* 624, at 627 (1954). See also the observations of the author at 637: "If the federal cabinet finds that there are too many cases where the judges do not grasp the general object and purpose of legislation, let it revive the ancient practice of a short preamble which is certified by inclusion in the statute itself." In this connection, see note 109 supra.

140. We do not comment on the extradition judge's further suggestion (3 D.L.R. at

CONCLUSION

In both Canada and the United States no appeal is available to a requesting country from an unsuccessful extradition request. This is true whether the extradition is refused because of a purported lack of evidence, or for any reason, legal or otherwise. Thus, a well-founded extradition request may be blocked because of either factual or legal errors by an extradition judge. While reapplication may be made by the requesting country¹⁴¹ in an effort to overcome the adverse decision, this is a wasteful and outmoded procedure.¹⁴²

In the United States under present procedures it may be by pure happenstance that the requesting country may obtain a right of appeal from an adverse ruling. Thus, for example, recently an accused, in lieu of attacking jurisdiction before the extradition commissioner, immediately sought out a writ of habeas corpus from another judge.¹⁴³ Although the accused was successful in the initial habeas corpus action, he thus provided an avenue of appeal for the foreign government and on appeal the judgment was reversed.¹⁴⁴ Had the accused made the same jurisdictional argument in the extradition hearing itself, and obtained a ruling in his favor, there would have been no appeal available to the foreign country.

In Canada the accused also may seek a writ of habeas corpus¹⁴⁵ from an extradition committal, but no appeal is provided to either party from the decision on the habeas corpus petition.¹⁴⁶

It would seem consonant with the development of modern procedural practices that the extradition procedures should be reformed, so that at least with respect to legal errors, an appeal avenue may be available to a requesting country from denial of an extradition request. The comity which should exist between friendly countries having international extradition agreements would seem to require more than the preliminary hearing now provided by an extradition commissioner or judge.

395-96) that perhaps the whole treaty was a nullity because it was entered into in the name of the Dominion of Canada rather than in the name of her Majesty. See § 2(b) of the Canadian Extradition Act, *supra* note 9.

141. See *Re Harsha*, [1906] 11 O.L.R. 457, 42 C.L.J. 356, 11 C.C.C. 62, 20 Can. Abr. 128 (C.A.), *aff'd* in this respect, 42 C.L.J. 754 (P.C.); *Re Parker* [1890] 26 C.L.J. 619, 10 C.L.T. 373, 20 Can. Abr. 128 (Ont.); *Ex parte Seitz* [1899] 8 Que. Q.B. 392, 3 C.C.C. 127, 20 Can. Abr. 128. And see e.g., *Collins v. Loisel*, 262 U.S. 426, 429-30 (1923).

142. See, e.g., the three *Collins* cases. *Collins v. Loisel*, *supra* note 141; 259 U.S. 309 (1922) and *Collins v. Miller*, 252 U.S. 364 (1920).

143. *Artukovic v. Boyle*, 107 F.Supp. 11 (S.D. Cal. 1952).

144. *Ivancevic v. Artukovic*, 211 F.2d 565 (9th Cir. 1954).

145. Section 19(a) of the Canadian Extradition Act, *supra* note 9.

146. Section 40 of the Canadian Supreme Court Act (1952) R.S.C. c. 259, at 5007, and See *Re Storgoff*, [1945] S.C.R. 526, 84 C.C.C. 1, 1945 Can. Abr. 414.