Extradition Law Reform
Standing Committee on Justice and Human Rights
Brief submitted by:
British Columbia Gurdwaras Council (BCGC) and Ontario Gurdwaras Committee (OGC)

Executive Summary

This brief highlights the unfair procedures and lack of human rights protections under Canada's current extradition framework, with a particular focus on how this uniquely impacts racialized communities, including the Sikh community in Canada. As it currently stands, Canada's extradition process is a highly discretionary and politicized process which prioritizes administrative efficiency and the executive's authority in matters of foreign affairs over individual *Charter* rights and Canada's international human rights obligations. It is imperative that Canadian legislators address these gaps proactively to accord with the purpose of the *Charter* to *prevent* violations rather than merely enabling *ex post facto* review.[1] This is even more important in those cases where Canada considers surrendering persons sought to another country where they may face significant deprivations of their life, liberty and security.

This brief provides a textured look at how the lack of adequate human rights protections leaves members of some racialized communities especially vulnerable to prospective human rights abuses. In doing so, this brief ensures that the Extradition Law Reform study is well informed of the concrete impacts and risks facing marginalized communities in Canada as a result of the current legislation.

The current procedure raises a number of concerns, particularly amongst racialized Canadians impacted by the discriminatory effects of "counter-terrorism" discourse around the world. This is especially concerning in the face of prospective extradition to countries with abhorrent human rights records where persons sought may face the likelihood of unfair trials, mistreatment, politicized criminal proceedings, torture, and/or other oppressive treatment. These concerns are further accentuated in light of Canada's wrongful extradition of Hassan Diab in 2014, the torture of Régent Boily despite diplomatic assurances in place, the SCC's problematic conclusions in *Badesha*[2] and repeated public statements by Indian officials that they intend to initiate extradition proceedings against Sikh activists in Canada.[3]

Parliament must ensure there are adequate safeguards in place to ensure that Canada's extradition process is not misused to violate *Charter* rights for political reasons. This is important as some of Canada's current extradition partners use broad anti-terror legislation in a highly politicized manner—targeting political dissidents and minority communities. Given the expansive authority of the executive to make decisions impacting *Charter* rights, it is important that there is no risk—or even a perception—that such decisions may be influenced by electoral calculations, partisan concerns, foreign interference, short-term foreign policy interests or other extrinsic reasons without judicial oversight. Failing to address this vulnerability will harm Canada's global reputation and bring the administration of justice into disrepute.

To remedy this, Canada's extradition legislation and procedure should incorporate meaningful *Charter* protections and judicial oversight into the process rather than leaving the decision to politicians and bureaucrats. In this regard, the BCGC and OGC strongly endorse the recommendations proposed by the *Halifax Colloquium on Extradition Law Reform*.[4] These recommendations are an important step towards ensuring that Canada's extradition regime effectively balances administrative efficiency and international comity with Canada's international human rights obligations and the need for robust *Charter* protections for some of the most vulnerable individuals within Canada's justice system.

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[1] *Hunter et al v Southam Inc.,* [1984] 2 SCR 145.

[2] *India v Badesha,* 2017 SCC 44 [*Badesha*].

[3] Rahul Kalvapalle, "India could seek extradition of alleged Sikh militant based in Surrey, BC," *Global News* (5 May 2018), online: https://globalnews.ca/news/4189882/hardeep-singh-nijjar-fir-india-canada/; "Punjab police seeks extradition of Canada-based Khalistani Hardeep Nijjar," *Business Standard* (13 August 2022), online: https://www.business-standard.com/article/current-affairs/punjab-police-seeks-extradition-of-canada-based-khalistani-hardeep-nijjar-122081300404_1 html.

[4] Robert J Currie et al, *Changing Canada's Extradition Laws: The Halifax Colloquium's Proposals for Law Reform,* (Halifax, 2021).

Balancing international cooperation with meaningful human rights protections

Extradition proceedings are undeniably an important tool to combat international and transnational crime. The challenge for Canadian responses to such crime however, is in squaring the process with the *Charter* protections that are necessary when life, liberty, and security of a person sought are so evidently at stake. While the *Charter* enables robust protections for accused persons in criminal proceedings domestically, the same protections have been seriously diluted under the current legal regime for extradition—leaving persons sought dangerously vulnerable to mistreatment or worse.

The central flashpoint of this tension lays in the judicial deference shown to the political executive in extradition proceedings due to its authority to manage foreign relations. In this context, the SCC has described the Minister's decision to order the surrender of a person sought as "largely political in nature" despite the legal and human rights implications of this decision.[5] As a result, the SCC has instructed that the Minister's decision be granted a high degree of deference. While a good deal of jurisprudence has gradually developed to maintain and protect section 7 rights of accused individuals in international contexts, the continued deference to the Minister on this question leaves a dangerous grey zone of vulnerability in extradition proceedings—particularly in a political climate where the record shows evidence of foreign states explicitly seeking to manipulate public narratives in Canada and exerting both diplomatic and covert pressure on Canada to secure their own foreign policy objectives.

Diplomatic Assurances: A flawed compromise between Charter rights and facilitating cooperation

The SCC has held that transferring an individual to a jurisdiction where they face a substantial risk of torture[6] is clearly a violation with clear causal connection to state action.[7] Accordingly, the Court has found it impermissible to transfer individuals in cases that they face the substantial risk of torture or the death penalty. In the case of extradition, the Court has held that extradition in these circumstances must be contingent on diplomatic assurances that no such violation would occur. In *Badesha,* the SCC sought to further address these complexities involved in balancing *Charter* protections, criminal prosecution, and deference for the executive's handling of foreign policy. Dealing with two Canadian citizens requested by India, the Minister of Justice ordered their surrender contingent on assurances from India regarding their treatment. The BCCA found the Minister's decision unreasonable due to India's dismal human rights record and the inadequacy of the measures taken in the assurance to concretize India's "good intentions" into "realistic protection."[8] The SCC reviewed the Minister's decision and concluded that while some inquiry is required into the human rights record of the requesting state, this would ultimately be tempered by the "high degree of deference accorded to ministers of the Crown in matters of foreign affairs and international cooperation."[9]

One of the central flaws in Canada's extradition proceedings is this overwhelming deference granted to the Minister which effectively hollows out any meaningful judicial review or oversight of the surrender decision. As Professor Harrington notes, the "real test lies in the application of this exhortation, and a court's willingness to scrutinize a government's assessment so as to ensure a degree of robustness in judicial review that is in keeping with the absolute nature of the right to be free from serious mistreatment."[10] In this regard, Professor Harrington identifies several grave problems in the Court's weighing of the factors in *Badesha,* specifically. While India is a party to the ICCPR and ICESCR—binding it to the prohibition on torture—the Court failed to note that India has refused to comply with the ICCPR's monitoring process under article 28. In fact, Harrington notes that the last report submitted was

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[5] *Lake v Canada (Minister of Justice),* 2008 SCC 23 [*Lake*] at 22.

[6] Art 1, *Convention Against Torture:* Torture is the unlawful use of psychological or physical techniques to intentionally inflict severe pain and suffering on another, when such pain or suffering is inflicted by or with the consent of public officials

[7] *Suresh v Canada (Minister of Citizenship and Immigration),* [2002] 1 SCR 3 at 60-64.

[8] *India v Badesha,* 2016 BCCA 88 at 65.

[9] Joanna Harrington, "Extradition, Assurances and Human Rights: Guidance from the Supreme Court of Canada in India v Badesha" (2019) 88 *The Supreme Court Law Review: Osgoode's Annual Constitutional Cases Conference* 273 at 275.

[10] Harrington, *supra* note 10 at 288.

in 1995. Additionally, she points out that despite being a signatory since 1997, India has not become a party to the 1984 *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* and is therefore not subject to international security or monitoring by the Committee Against Torture as a result. Considering this wanton disregard of its international responsibilities, Harrington points out that this is "hardly a sign of an Indian commitment to respecting its treaty obligations."[11]

The problem which flows from *Badesha* is that it reiterates that when diplomatic assurances are required to prevent a *Charter* violation, a reviewing court is only expected to consider "whether the Minister has reasonably concluded that, based on the assurances provided, there is no substantial risk of torture or mistreatment."[12] Rather than giving real weight to the meaningful *prevention* of *Charter* rights, this standard of review grants so much deference to the Minister that the degree of judicial review is merely whether the Minister's decision "falls within a range of reasonable outcomes." The justification for this relies on the logic that such a decision sits at the "extreme legislative end" of administrative decision-making due to its political nature and the Minister's "superior expertise in international relations and foreign affairs."[13] In effect, the Crown merely has to demonstrate that the Minister *considered* the relevant facts and reached a "defensible conclusion based on those facts" regardless of the gravity of the human rights concerns at hand.[14] In practice, this means that the Minister enjoys what is probably the most deferential standard of review in making surrender decisions: "a reasonable decision that there is no substantial risk of torture or mistreatment is, in reality, fairly low."[15]

Further, the problem with diplomatic assurances is their non-binding nature as was demonstrated in *Boily.*[16] Arbour J offers a powerful critique of the diplomatic assurances system, noting that the legally non-binding nature of the agreements on a matter "that is at the core of several legally binding UN instruments threatens to empty international human rights law of its content."[17] She offers three important observations in this vein:

- Even if monitoring mechanisms *are* put into place, they often would not act as effective deterrents considering the fact that practices such as torture most often occur in secret, in contexts where the victim has limited capacity to recourse.
- In scenarios involving parties that are already violating *binding* international human rights agreements on an ongoing basis, it is difficult to effectively argue that such a government can be expected to respect a legally non-binding assurance.
- Even if binding assurances are made, to do so creates a *tiered system of human rights* where a select few (likely Canadian/Western citizens) are granted special protections while the vast majority remain vulnerable to the potential horrors of custodial mistreatment.

It is obviously important for government to have some flexibility and creativity in order to navigate the oftentimes anarchic sphere of international politics. It is crucial however, to keep in mind that this authority exists on a spectrum. Extradition to a jurisdiction with the risk of torture or the death penalty should not be considered a "high level" policy question that should outweigh public policy and public interest consideration or individual *Charter* rights.[18] To the contrary, it is a *highly individualized, discretionary decision that directly determines whether the accused will be deprived of the right to life, liberty, or security of the person*. This should be subject to an exacting standard of review given the grave implications of the decision. Granting such a great degree of deference on such a highly specific and substantial decision opens up dangerous possibilities with an impossibly high threshold to overturn inappropriate decisions that do not comport with Canada's international obligations.

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[11] *Ibid* at 283.

[12] *Badesha*, *supra* note 2 at 46.

[13] *Ibid* at 39.

[14] *Lake, supra* note 5 at 41.

[15] Robert J Currie & Joseph Rikhof, *International & Transnational Criminal Law,* 3rd ed (Toronto: Irwin Law Inc., 2020) at 599.

[16] *Boily v Canada*, 2022 FC 1243.

[17] L Arbour, "In our name and on our behalf," 55 Intl & Comp L Q 511 (2006).

[18] *Black v Canada (Prime Minister),* 2001 CanLII 8537 (ON CA) at 52.

Case Study: Sikh activism and Indian responses around the world

Canada's unfair extradition procedure and the highly deferential standard of review leaves racialized communities and other marginalized groups highly vulnerable to foreign states who may abuse Canada's procedure to stifle political dissent and silence government critics around the world. This is evident in the case of India, one of Canada's many extradition partners, which has consistently sought to repress Sikh political advocacy for Khalistan within India itself, alongside attempts to delegitimize and suppress dissidents living outside of its borders. While using broad anti-terror legislation and extrajudicial violence domestically, Indian agencies have engaged in foreign interference and bad faith interactions with other states in order to secure custody of Sikh activists in the diaspora. Although this is a highly specific analysis of one requesting state, this case study *shines light on the cracks* in Canada's general structure which may be exploited by any number of bad faith actors—illustrating the urgent need for reform.

In recent years, there has been a marked uptick in the frequency of Indian officials and security agencies levelling allegations about "Sikh extremism" in Canada. These public statements overlap with instances of foreign interference by Indian intelligence operatives, including strategically placed media stories and targeted messaging in order to influence Canadian policy decisions. These developments particularly shot into the national spotlight following the Liberal government's trip to India in February 2018, when the National Security and Intelligence Advisor (NSIA) alleged that "factions within the Indian government" acted deliberately in order to embarrass the Canadian government and undermine the reputation of respected public institutions due to its purported support for Sikh activists in Canada.[19]

Since the annexation of the *Sirkar-i-Khalsa* and colonization of Punjab by the British in 1849, the Sikh *panth* (community) has continuously mobilized to reestablish its sovereignty. In this vein, the Sikh *panth* revitalized its indigenous self-governing mechanisms in 1986 and declared the intention to secede from India in order to establish an independent state, Khalistan. In response, Indian security forces sought to repress this mobilization by rejecting any political settlement on self-determination and instead, used force to crush Sikh dissent militarily in order to maintain political hegemony over the region. India and Canada originally signed their extradition treaty during the height of this insurgency, specifically keeping the proposed extradition of Sikh activists in mind.[20]

While the current context has changed drastically since the peak of the insurgency in the early 1990s, recent years have seen a marked rise in discontent and conflict in the region again, including political advocacy calling for a referendum on the secession of Punjab. In response to this renewed increase in Sikh political activism in Punjab in recent years, Indian security forces have been clamping down on activists in Punjab and the diaspora. According to a 2018 report by the Intelligence and Analysis Section of the Canada Border Services Agency, a significant rise in refugee claims was noted that year—particularly among Indian nationals. The report stated that "a frequent basis of claim cited by Indian nationals is the fear of arbitrary arrest or abuse by the police based on accusations of supporting militant organizations. It should be noted the vast majority of these claims are filed by Indian Sikhs." Citing renewed support for independence in Punjab, the report suggests that "as government pushback against the Sikh community continues, fear of arbitrary arrest and abuse by authorities will likely prompt more Indian Sikhs to leave the country."[21]

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[19] House of Commons, *Special report into the allegations associated with Prime Minister Trudeau's official visit to India in February 2018* (December 2018) [*Special Report*].

[20] *Extradition Treaty Between the Government of Canada and the Government of India*, 6 February 1987, Can TS 1987 No 14 (entered into force 10 February 1987)

[21] John Ivison, "How a trickle of Sikhs fleeing India for Canada became a torrent," *National Post* (13 November 2018), online: https://nationalpost.com/news/politics/jeff-danzigers-editorial-cartoon-11.

"Counter-terrorism" and political repression in India

Writing about the nature of counter-terrorism legislation, Professor Saul noted that in the aftermath of 9/11, some states enacted broad counter-terrorism legislation to "suit their own political purposes, to camouflage assaults on fundamental civil and political rights or deviate from ordinary fair trial protections."[22] This concern was shared by Human Rights Watch, noting how numerous states cynically attempted to capitalize on the atmosphere to "intensify their own crackdowns on political opponents, separatists and religious groups, or to suggest they should be immune from criticism of their human rights practices."[23] India is undeniably one of those states in terms of how its national security apparatus and counter-terror legislation functions as a political tool to inhibit the activities of political dissidents and minorities. In its 2021 world report, Human Rights Watch outlined how the Indian state has "brought politically motivated cases, including under broadly worded sedition and counterterrorism laws" against political activists and dissidents, exhibiting a determination to "punish peaceful criticism using draconian laws, while sending a broader message that chills dissent."[24]

In response to a renewed increase in Sikh political activism in Punjab, Indian security forces have been clamping down on activists in Punjab and the diaspora. Over 200 Sikh activists have been arrested under draconian measures of the Indian penal code in recent years. Those arrested are predominantly young Sikhs, active in democratically organizing their communities to advocate for an independent Khalistan.[25] In an analysis of 34 incidents in which India's counter-terrorism provisions under the *Unlawful Activities (Prevention) Act* (*UAPA*) were invoked to detain 104 Sikh activists in one year alone, only three convictions were secured in the courts—all of which were later overturned on appeal.[26] This demonstrates the inappropriate use of criminal law for a political purpose. Once activists are inducted into the Indian penal system, they can face several years of incarceration without bail due to their alleged "terror" affiliations and the legislative framework of bail under *UAPA*. This prolonged incarceration takes place before activists are even tried or convicted of any crime. In other words, Indian security forces have been using anti-terror legislation to arbitrarily detain and incarcerate Sikh activists—removing them from their communities—as a political tool to restrict activism rather than ensuring "law and order" as it is claimed. This is echoed by experts who note that security agencies are "not interested in conviction because they know that the evidence they produce will ultimately result in acquittal"; instead they use the anti-terror provisions to keep people in jail for five years or more because the bail provisions are unusually strict.[27] Once released, these activists often face continued harassment, pressure to become police informants,[28] and are frequently rearrested when their activism doesn't come to a halt.[29]

Further analysis of the case files illustrates a pattern of allegations against activists to secure arbitrary detentions: stock witnesses used in numerous cases from a single police station are cited for information regarding alleged links with foreign Sikhs, intention to commit terrorist acts, and procuring funding.[30] In a 2014 judgement exonerating four Sikh activists who had been incarcerated for seven years, the court reprimanded the prosecution using "stock witnesses" who appeared as prosecution witnesses numerous

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[22] Ben Saul, "Terrorism as a Transnational Crime," in in N Boister & Robert J Currie, eds., *Routledge Handbook of Transnational Criminal Law* (London: Routledge, 2015) at 403.

[23] Human Rights Watch, "Opportunism in the Face of Tragedy: Repression in the name of anti-terrorism," online: www.hrw.org/campaigns/september11/opportunismwatch.htm.

[24] Human Rights Watch, *World Report 2021: Events of 2020* (New York, 2021), online: https://www.hrw.org/sites/default/files/media_2021/01/2021_hrw_world_report.pdf

[25] Khalistan Centre, *Who Speaks for Khalistan: Narrating Sikh Liberation* (Surrey, 2020), online: https://www.khalistan.org/publications at [*WSFK*] page 30.

[26] Jaspal Singh Manjhpur, *Report regarding registered cases under the Unlawful Activities (Prevention) Act in Punjab* (Chandigarh, December 9, 2017).

[27] Sanjeev Verma, "Why 'state' failes to prove charges under UAPA?", *Times of India* (27 July 2020).

[28] "Punjab Police Implicates Sikh Activists in False Opium Recover Case" *Sikh Siyasat News* (13 June 2007).

[29] "Of Two Arrested Sikhs; One Released, Other Framed in UAPA Case by Ludhiana Police" *Sikh Siyasat News* (24 April 2017).

[30] Manjhpur, *supra* note 27.

times in police cases from the same police station.[31] Torture of such activists also remains systemic in Indian prisons. Kulwant, Singh was admitted to an Amritsar hospital with life threatening injuries as a result of electric shock injuries on his ears and testicles and subsequently died in custody under suspicious circumstances before the perpetrators could be held accountable.[32] Another activist, Jaspreet Singh, was arrested under *UAPA* for possessing material relating to a proposed referendum; he was admitted to the hospital after suffering severe spinal injuries and electric shocks in police custody.[33] In a detailed report regarding the use of counter-terrorism rhetoric against Sikh activists, Jaskaran Kaur brings together how torture and intimidation, along with allegations of international funding and fabricated evidence are used to frame criminal charges[34]:

> Further, the Punjab police… frequently tortured the detainees. Torture methods included electric shocks, tearing the legs apart at the waist and causing pelvic and muscle injury, and pulling out the hair and beard of the detainees, among other techniques. The police also threatened and detained immediate family members of the targeted individual… The Indian police constructed and presented elaborate stories of thwarted militant crimes… and the discovery of an international network to revive militancy in Punjab. These stories… served to conceal the escalation in human rights abuses committed in the name of national security. Further, the exaggerated stories, in direct contrast to testimonies of detainees and their families, indicate the police fabricated evidence to support criminal charges.

The recent case of Jagtar Singh ("Jaggi") Johal is particularly illustrative in this regard as it demonstrates the patterns by which Indian authorities subject Sikh activists—including foreign nationals—to mistreatment and torture during proceedings marred by fabricated evidence and a lack of due process. Johal, a British citizen visiting Punjab for his wedding, was abducted by plainclothes police officers on November 4, 2017 and held incommunicado. In May 2022, the United Nations Human Rights Council's Working Group on Arbitrary Detention examined Johal's case. The Working Group's Opinion deemed Johal's continued pretrial detention arbitrary and lacking a legal basis. The Working Group concluded that Johal's liberty was deprived on discriminatory grounds as he was "targeted because of his activities as a Sikh practitioner and because of his activism in writing public posts calling for accountability for alleged actions committed against Sikhs by the authorities".[35] The Working Group further observed that Johal was denied the ability to access legal counsel or consular services, and subjected to torture which led to a forced confession. Johal has been allegedly implicated in 10 different cases, some of which have not even resulted in formal charges being laid despite being detained for over five years.

Previous Extradition Proceedings to India

India has a demonstrably poor human rights record which includes endemic torture in custody, failures to honour human rights monitoring requirements and a track record of violating diplomatic assurances given to other countries. This is all the more concerning when security agencies routinely use fabricated evidence and criminal proceedings as a political tool to suppress dissent through the use of prolonged trial proceedings. These problems are similarly reflected in past extradition requests made by India.

Kulbir Singh Barapind - The case of Sikh student leader, Kulbir Singh Barapind, is illustrative of the risks of accepting diplomatic assurances given by India. Barapind was an active member of a Khalistani student group in Punjab who eventually fled persecution in India and entered the US in 1993. He would

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[31] *State v Ravinder Singh et al,* (2014) SC 232 at para 36.

[32] Yudhvir Rana & Shivani Mehral, "Cops torture suspected terrorist," *Times of India (*August 6, 2010), online: https://timesofindia.indiatimes.com/city/chandigarh/Cops-torture-suspected-terrorist/articleshow/6264106.cms.

[33] IP Singh, "Terror accused in hospital, kin allege torture by police in custody," *Times of India* (August 6, 2016), online: https://timesofindia.indiatimes.com/city/chandigarh/Terror-accused-in-hospital-kin-allege-torture-by-police-in-custody/articleshow/53818413.cms

[34] Jaskaran Kaur, *Punjab Police: Fabricating Terrorism through Illegal Detention and Torture.* (Santa Clara: ENSAAF, 2005), 4.

[35] Opinion No. 80/2021 adopted by the Working Group on Arbitrary Detention. A/HRC/WGAD/2021/80. UN Human Rights Council, 2022.

later be extradited back to India in 2006 after receiving Indian assurances that he would not be tortured. Despite India's assurances—and the fact that an Indian court acquitted him of all charges and released him in 2008—Indian security forces arrested him again in 2008 and "subjected him to beatings, electric shocks, and other forms of prolonged torture."[36] In a public statement responding to Barapind's plight, Human Rights Watch highlighted the importance of foreign government taking India's poor record on torture into account when assessing whether to extradite individuals to the country.[37]

West Midlands Three - In December 2020, three UK-based Sikh activists were arrested after extradition proceedings were certified at India's request. The trio was accused of being involved in the 2009 assassination of a right-wing leader of the Rashtriya Swayamsewak Sangh, linked to the ruling BJP. These proceedings were certified despite a thorough investigation by West Midlands Police concluding that no charges would be laid in 2011. The three contend that they had not been in Punjab at the time of the offence but that they did travel to Punjab between 2005 and 2008, in order to document atrocities committed against Sikhs. This is why they believe they were targeted. The government lawyer representing India ultimately withdrew the request on September 22, 2021, acknowledging in court that there was insufficient evidence to substantiate the extradition request although he noted that "India may in future seek the extradition of these requested persons for these offence or other matters".[38] Distinguished human rights lawyer, Gareth Peirce, noted that the prosecution failed to inform the court that there had already been trials of other men in India that had already been exonerated as the evidence in this case was found to have been fabricated and witnesses coerced by police.[39]

Kuldeep Singh - Kuldeep Singh was arrested pursuant to an extradition request by India on October 15, 2019. He was charged with several counts of funding and conspiracy under India's *UAPA*. Ultimately, Singh was discharged and extradition was not granted on the basis that the evidence presented was insufficient to commit him. Specifically, the out-of-court statements of the jointly indicted co-accused were not admissible within the extradition proceedings and consequently, there was insufficient evidence to establish a *prima facie* case in respect of the charges.[40] The evidence presented against Singh included summaries of the interviews conducted with the two co-accused by police. The court took note that the summaries were made by police officers, without the signatures of the co-accused, and no record of a lawyer being present or even consulted. Further, the questions asked and the precise answers given by the co-accused in the alleged interview were not recorded. Ultimately, the appeal was refused as the majority concluded that it would be "manifestly unfair to rely on untested unsworn, inadmissible hearsay evidence, particularly so when such evidence is the sole evidence relied upon against the respondent."[41]

Indian Foreign Interference and Influence in Canada

In response to ongoing political mobilization by Sikhs around the world, Indian officials have attempted to amplify targeted messages against Sikh activism in order to sway the international community, including Canadian policy makers. By conflating Sikh dissent with extremism, Indian officials continue to misuse their diplomatic resources to persuade international partners to criminalize, surveil, and repress Sikh activists around the world. There is ample evidence on the public record to establish that Indian political interference is an ongoing problem in Canada as explicit efforts have been made to covertly impact public policy and media coverage in Canada.

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[36] Nitisha Baronia, "Reviewing Extraditions to Torture" (2021) 73:5 Stan L Rev 1221 at 1225.

[37] Human Rights Watch, *India: Punjab Case Shows Need for Anti-Torture Law* (New Delhi, 2012), online at: https://perma.cc/W29M-586X.

[38] Naomi Canton, "India extradition case against three British Sikh men collapses," *Times of India* (23 September 2021), online: https://timesofindia.indiatimes.com/world/uk/india-extradition-case-against-three-british-sikh-men-collapses/articleshow/86437798.cms.

[39] Letter from MP Preet Gill to UK Home Secretary Priti Patel (22 September 2021), online: https://www.preetkaurgill.co.uk/post/preet-writes-to-home-secretary-demanding-answers-on-extradition-of-west-midlands-3.

[40] India v Singh, [2021] EWHC 3333 (Admin) at 42.

[41] *Ibid* at 54.

During PM Trudeau's 2018 trip to India, Canada's NSIA had reasons to believe that a false narrative was intentionally being fabricated and promoted by Indian intelligence operatives in order to discredit and embarrass the Canadian government for its perceived "soft approach" to Sikh activism in Canada. This effort took shape in an ongoing campaign leading up to the trip and attempts to amplify a singular, manufactured narrative which undermined Sikh activism as so-called "extremism" and criticized Canada's perceived lack of response to this issue.[42] In another case, a 2020 judgement of the Federal Court of Canada found that an Indian journalist engaged in espionage against Canada on behalf of Indian intelligence agencies for several years. The journalist was tasked by India's intelligence agency, the Research and Analysis Wing (R&AW), to interfere in Canadian electoral processes, government policy and media independence. He was instructed to "covertly influence Canadian government representatives and agencies on behalf of the Indian government" by providing "financial assistance and propaganda material". He was specifically tasked with convincing these politicians that funding from Canada was being sent to Pakistan to support terrorism.[43]

Further examples of Indian foreign interference in Canada include:

-surveilling and harassing Sikhs to cease democratic activities contrary to Indian interests[44];

-figures linked to the Indian Commission persuading voters not to support certain candidates in federal leadership campaigns[45];

-consular staff directly interfering in cultural activities in Canada in order to suppress voices advocating for self-determination[46];

-interfering in Canadian schools to influence the curriculum being taught to in order to omit criticism of India[47];

-directly interfering in political processes to influence voters, pressure political parties and manipulate Canada's electoral processes[48];

These examples illustrate that there is evidence on the record that Indian diplomats and intelligence agencies are actively engaging in conduct to manipulate public narratives in the media, intervene in electoral processes at various levels, and ultimately influence government decision-making in order to persuade Canadian policy makers to criminalize and prosecute Sikh political advocacy in Canada. Combined with strongly-worded diplomatic rhetoric making good relations with India *conditional* on a "crackdown" against Sikh activists in Canada, Indian intelligence agencies have clearly engaged in foreign interference in order to manipulate Canadian policy makers. Naturally, this is very alarming particularly given the highly political and discretionary nature of the Minister's ability to make surrender decisions in extradition proceedings with minimal judicial oversight. This is even more concerning given that Canada's recent *Indo-Pacific Strategy* identifies India as a critical partner in achieving its objectives and Indian officials have made explicit comments about "cracking down" on Sikh activism in Canada in a manner suggesting *quid pro quo*.[49]

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[42] *Special Report, supra* note 19.

[43] *AB v Canada (Citizenship and Immigration)*, 2020 FC 461 at para 18.

[44] Ajit Jain, "Ontario MPP Jagmeet Singh denied visa to visit India" *Globe & Mail* (27 June 2014) [*Visa Denied*]; Maloy Krishna Dhar, *Open Secrets: India's Intelligence Unveiled* (New Delhi: Manas Publications, 2005).

[45] John Ibbitson, "In Jagmeet Singh, a unifying figure with divisive potential," *The Globe and Mail* (11 July 2017), online: https://www.theglobeandmail.com/news/politics/in-jagmeet-singh-a-unifying-figure-with-divisive-potential/article35659994/

[46] Laura Stone & Arshy Mann, "Freeland criticizes Indian diplomats for interfering in Ontario cultural festival", *Globe & Mail* (26 March 2018).

[47] Samantha Beattie, "Indian consulate says teachers' lessons on farmer protests could 'poison' relations with Canada," *CBC* (19 June 2021).

[48] Jill Mahoney & Karen Howlett, "Then-Ontario PC leader Patrick Brown asked donor to give funds to girlfriend", *Globe & Mail* (23 April 2019); John Ibbitson, "In Jagmeet Singh, a unifying figure with divisive potential," *Globe & Mail* (11 July 2017).

[49] Robert Fife & Steven Chase," India's envoy calls on Canada to crack down on Canadian funding of Khalistan separatist movement," *Globe and Mail* (28 September 2022), online: https://www.theglobeandmail.com/politics/article-indias-envoy-calls-on-canada-to-crack-down-on-canadian-funding-of/.

Conclusions

Canada's ongoing extradition partnership with India highlights and exemplifies the numerous frailties within the current system, neglecting human rights obligations and leaving marginalized communities vulnerable to prospective human rights abuses. These problems exist at several stages of the extradition process: the lack of a presumptions of innocence at the committal phase, the *de facto* lack of review of the Minister's surrender decision, and how Canada enters into and reviews its extradition relationships in the first place.

Committal Phase - As it currently stands, once the Minister grants an Authorization to Proceed, extradition proceedings move ahead to a committal hearing. At this stage, requesting states simply have to present a "Record of the Case" (ROC) which only needs to summarize the evidence on which the request relies. The evidentiary threshold at this stage is concerning as it allows unsubstantiated and problematic evidence to ground decisions to commit persons sought for extradition. Furthermore, the jurisprudence on committal hearings has set out that courts must only engage in a limited weighing of the ROC which is *presumed to be reliable*.[50] While persons sought are theoretically permitted to challenge the reliability of the evidence, the presumption of innocence is reversed as they bear the onus of rebutting the presumption of reliability and will only be successful where courts find the evidence "so defective or appears so unreliable that the judge concludes it would be dangerous or unsafe to convict" or if the evidence could be shown to be "manifestly unreliable".[51]

In practice however, it is "essentially impossible meaningfully to challenge that evidence and bring out its weakness."[52] This is demonstrated by a study of 198 committal hearings in which only 16 successfully challenged the evidence—but only in those cases where evidence was lacking on the elements of the offence in the first place. In other words, "all the law truly seems to provide is the much narrower opportunity, in cases where there really is no evidence, to point it out. Other reliability issues with the requesting state's evidence, no matter how grave, are simply left for the requesting state's trial courts to sort out."[53] This was most alarmingly demonstrated in the *Diab* case, in which the hearing judge described the evidence to be "questionable", "problematic", "convoluted", "confusing", and "suspect" but nevertheless determined that despite very strong criticism and competing inferences, the evidence did not meet the threshold of being "manifestly unreliable in the context of an extradition."[54] Ultimately, Mr. Diab was wrongfully committed for extradition as the judge was restrained by Canada's extradition framework to presume the reliability of highly problematic evidence and leave the ultimate assessment to a trial judge in the requesting country despite its obvious shortcomings.

With these problems, Canada's extradition process is clearly susceptible to abuse by requesting states that routinely rely on fabricated evidence to prosecute political activists, dissidents and religious minorities, or worse—use criminal prosecution as a political tool to harass and intimidate and dissidents through prolonged detention and delayed trials. As seen in India's track record of misusing criminal proceedings and relying on fabricated evidence or forced confessions, Canada's legislative framework for extradition leaves minority communities particularly vulnerable as the current evidentiary threshold at the committal phase is so low for the requesting state that it is virtually impossible for persons sought to meaningful challenge the case brought against them.

Surrender Phase - Considering the evidence on the record that foreign agencies have attempted to influence Canadian policy through hostile and covert means—and the significant degree of deference given to the Minister of Justice to make a "political" decision when assessing the reliability of diplomatic assurances in the context of extradition—there is a clear vulnerability in Canada's legal

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[50] *United States of America v Ferras; United States of America v Latty,* 2006 SCC 33 [*Ferras*].

[51] *Ibid* at 40 and 54.

[52] Robert J Currie, "Wrongful Extradition: Reforming the Committal Phase of Canada's Extradition Law" (2022) 44:6 Manitoba LJ 1 at 28.

[53] *Ibid* at 27.

[54] *France (Republic) v Diab,* 2011 ONSC 337 at 118, 120-122.

framework. Given this context of foreign interference—and Canada's own economic and political interests in building relationships around the world—steps must be taken to separate the "politics" of the surrender decision and the constitutionality of such a decision vis-a-vis individual *Charter* rights. Leaving the Minister's decision-making process virtually unassailable through judicial review leaves Canada's apparatus open to perceptions that the *safety and security of minority communities may be bartered to achieve Canada's foreign policy objectives*. Accordingly, it is incumbent upon all parties to responsibly approach this area with care in order to pursue lawful penal sanction against those who violate the law while still maintaining robust human rights protections and a meaningful standard of review to give weight to the rights granted by the *Charter.*

Recommendations

It is imperative that Canada's extradition framework ensure that Canada maintains a role as a responsible member of the international community. This means international cooperation to ensure that those guilty of serious criminal offences are held accountable, while also ensuring that international norms and human rights principles are upheld throughout the process. This is especially important in a global context in which democratic institutions are being attacked and undermined by authoritarian forces around the world.

Lastly, it is important to keep in mind that the argument presented in this brief is not to suggest that those guilty of criminal activity should not be held accountable, but to the contrary that all parties involved should be held accountable for their actions: those guilty of criminal offences should face the requisite penal sanctions, and those with authority over criminal suspects—vulnerable to deprivations of life, liberty and security of the person—should be held accountable through clear *Charter*-based guidelines. The ramifications of these decisions should not be overlooked because their decision was deemed "political" rather than legal. Accordingly, the BCGC and OGC strongly endorse the recommendations proposed by the *Halifax Colloquium on Extradition Law Reform.* In particular, Canada's extradition process ought to implement the following recommendations:

- The committal process must incorporate the presumption of innocence by ensuring comprehensive disclosure and allowing accused persons to meaningfully test the strength and reliability of the evidence presented against them at this stage.
- Adequate consideration must also be given to questions of double criminality and specialty, in order to ensure alignment between both substantive jeopardy and sentencing regimes.
- Robust *Charter* protections and effective judicial oversight must be incorporated at the surrender stage of the process through a much higher standard of review, along with explicit consideration of Canada's international human rights obligations.
- Extradition should be explicitly barred in cases of transnational crime where Canada has jurisdiction to prosecute the alleged crime, especially where the requesting state has a poor human rights record.
- Reliance on diplomatic assurances should only occur in limited extraordinary circumstances, subject to stringent standards to ensure the reliability and enforceability of such assurances.
- Parliament should revoke extradition agreements and explicitly bar extradition to countries that have demonstrably poor human rights records, particularly those that have not ratified basic human rights agreements and conventions like the *UN Convention Against Torture.*

The **British Columbia Gurdwaras Council (BCGC)** and **Ontario Gurdwaras Committee (OGC)** are independent, non-partisan, non-profit organizations which collectively represent over thirty of the largest Sikh institutions across the country. Both organizations were established to facilitate dialogue and consensus-building within the community on key policy issues in order to collectively advocate for the political concerns of Sikhs in Canada, as well as upholding human rights and civil liberties in Canada's engagement with its international partners.