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Extradition to a State that Imposes the Death Penalty

SHARON A. WILLIAMS*

EXTRADITION LAW MAY BE CHARACTERIZED as the complex compendium of rules that assist states in seeking the return of fugitives from their criminal justice systems. This view of the extradition law and process is one of mutual assistance in criminal matters between states. Reciprocity is the key note with states having a mutuality of obligations.¹ At the same time extradition law performs the function of protecting a fugitive, through legal safeguards, from being returned to the extradited state.

This article will address the question of what Canada should do when faced with an extradition request for a person who is accused of, or has been convicted of, a capital offence in the requesting state. It will be assumed that all the other requirements of extradition are in order: for example, that the crime is extraditable, that there is double criminality, and sufficient evidence. The main focus will be on extradition based on the Canadian Extradition Act.² Canada does not extradite unless there is a treaty in force with the requesting state, save in two circumstances: first, where there is a special agreement with a foreign state pursuant to Part II³ of this Act and, sec-

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¹ This may be seen in the basic precept of extradition law that is contained in the extradition laws and treaties of many countries, that there be the threshold requirement of double criminality. As to reciprocity, see M. C. Bassiouni, *International Extradition: United States Law and Practice* C.7, at 325 (1987), and *International Extradition and World Public Order* 314 (1974).

² R.S.C. 1985, c. E-23. Hereinafter "Extradition Act."

³ These agreements are far more limited than extradition treaties. For example, they apply only to crimes committed after the agreement has entered into force, whereas

ond, where the rendition of fugitives to or from the Commonwealth under the Fugitive Offenders Act⁴ is concerned.

I. TREATY INTERPRETATION AND STATUTORY INTERPRETATION

As a preliminary step to dealing with the matter of human rights, the death sentence, and extradition from Canada, there are differences in approach between interpretation of Canada's extradition treaties and its Extradition Act. These become apparent when the role of extradition in the overall scheme of things is considered. From a purely international perspective, it is a treaty matter bearing on the rights and duties of states and the emphasis is thus on interstate co-operation. From the domestic law perspective, extradition may be viewed as part of the criminal process and perforce be interpreted in a fashion that stresses the fugitive's rights.

Generally speaking, the rule fundamental to the Vienna Convention on the Law of Treaties, 1969,⁵ is that of literal interpretation according to the ordinary meaning of the words used in the text. There is also the essential commitment that treaties are to be interpreted in good faith (*pacta sunt servanda*) "which is at once psychological and ethical, requiring adherence to ordinary meaning and context."⁶ A treaty must be interpreted in a manner that is calculated to give it effect and content rather than to deprive it of meaning.⁷

Applying this to extradition treaties, the approach of courts in Canada and in the United Kingdom has been that of liberal

extradition treaties, unless they provide expressly to the contrary, are pursuant to the Extradition Act, retrospective as well as prospective, and contain a more detailed schedule of offences. For an example of such an express limit on retrospectivity, see the Extradition Treaty between Canada and Israel, 1967, Can. T.S. No. 25. This type of Part II special agreement was done for the first time with the Federal Republic of Germany in 1974. However, the treaty entered into by both states in 1977 and in force on September 30, 1979 superseded this: see 1979, Can. T.S. No. 18. Note that this treaty will likely be amended in the near future to reflect German unification. In 1979 a Part II agreement was signed with Brazil and in 1985 with India. As of 1987 Canada has an extradition treaty with India.

4 R.S.C. 1985, c. F-32. Hereinafter "Fugitive Offenders Act."

5 UN Doc. A/Conf. 39/27, May 23, 1969; reprinted in (1969) 8 Int'l Leg. Mat. 679. Instrument of accession deposited by Canada, Oct. 14, 1970, pursuant to Order in Council, P.C. 1979-1339. Entered into force Jan. 27, 1980.

6 See S. A. Williams and A. L. C. de Mestral, *An Introduction to International Law* 359 (1987, 2nd ed.).

7 *Ibid.* See also M. McDougall, *The Interpretation of Agreements and World Public Order* 156 (1967).

interpretation in order to give effect to the treaty. As G.V. La Forest, now a judge of the Supreme Court of Canada, stated in *Extradition To and From Canada*, "treaties should receive a fair and liberal meaning and . . . in extradition matters the ordinary technical rules of criminal law should apply to a limited extent."⁸ In *Schmidt v. Her Majesty in Right of Canada, the United States of America and the Attorney General of Ontario*, he went on to state that:

I would add that the lessons of history should not be overlooked. Sir Edward Clarke instructs us that in the early 19th century the English judges by strict and narrow interpretation, almost completely nullified the operation of the few extradition treaties then in existence: see *A Treatise Upon the Law of Extradition* (4th ed. 1903), c. V. Following the enactment of the *British Extradition Act, 1870* (U.K.) 33 & 34 Vict., c. 52, upon which ours is modelled, this approach was reversed. The present system of extradition works because courts give the treaties a fair and liberal interpretation with a view to fulfilling Canada's obligations, reducing the technicalities of criminal law to a minimum and trusting the courts in the foreign country to give the fugitive a fair trial. . . .⁹

Necessarily, should a treaty provision, as implemented into Canadian law by the Extradition Act, violate a right under the Canadian Charter of Rights and Freedoms¹⁰ and not be saved by section 1 of the Charter, the provision will be struck down as would domestic legislation itself.¹¹

In the United States one writer has stated that "Where a provision is capable of two interpretations either of which would comport with the other terms of the treaty, the judiciary will choose the construction which is more liberal and would permit the relator's extradition, *because the purpose of the treaty is to facilitate extradition treaties between the parties to the treaty.*"¹² He further stated that "At times the judiciary will

8 (2nd ed., 1977), at 57.

9 [1987] 1 S.C.R. 500, 524.

10 Being Part I of the Constitution Act, 1982, entered by the Canada Act, 1982 (U.K.) c.11, proclaimed into force Apr. 17, 1982.

11 See *Schmidt*, *supra* note 9, at 518, where La Forest, J. states that "There can be no doubt that the actions undertaken by the Government of Canada in extradition as in other matters are subject to scrutiny under the Charter. . . ." See also at pp. 521-22 with reference to *Operation Dismantle Inc. v. The Queen*, [1985] 1 S.C.R. 441, per Dickson, C.J. at 455 and Wilson, J. at 464.

12 M. C. Bassiouni, *op. cit. supra* note 1, c.2, at 88 (emphasis added), citing as to the rule of liberal interpretation of extradition treaty terms, *Brauch v. Raich*, 618 F. 2d. 843 (1st Cir. 1980); *U.S. v. Wiebe*, 733 F. 2d. 539, 554 (8th Cir. 1984), and *Matter of Sidona*, 584 F. Supp. 1437 (E.D.N.Y. 1984).

interpret terms beyond their actual meaning to encompass their spirit and intent. . . ."¹³

This approach of liberal interpretation of extradition treaties may be labelled "co-operative" as it responds to the mutual interests of states in having a flexible extradition process and reciprocal co-operation.¹⁴ Halsbury's *Laws of England* states it in this way: "The words used in such [extradition] treaties are to be given their ordinary international meaning, general to lawyer and layman alike, and not a particular meaning which they may have attracted in certain branches of activity in England."¹⁵ In the case of *Government of Belgium v. Postlewaite*,¹⁶ Lord Bridge of Harwich addressed this issue and referred to the well known dictum of Lord Russell, C.J. in *Re Arton (No. 2)* where he stated that, "In my judgment those treaties ought to receive a liberal interpretation, which means no more than that they should receive their true construction according to their language, object and intent."¹⁷ Lord Bridge went on to hold that the judgment in *Arton* was good authority for the proposition that the court should not interpret any extradition treaty, unless so constrained by the language, in a way that would "hinder the working and narrow the operation of most salutary international arrangements."¹⁸ He also referred to Lord Widgery, C.J.'s statement in *R. v. Governor of Ashford Remand Centre, ex p. Beese*,¹⁹ in which he held that, because an extradition treaty is a contract between two sovereign states, it has to be construed as if it were a domestic statute. However, in apply-

13 *Ibid.*, 89, referring to L. Oppenheim, *International Law*, vol. 1, at 952-53 (8th ed., 1955). This rule was applied in *Melia v. United States*, 667 F. 2d 300 (2nd Cir. 1984).

14 See C. Warbrick "The Criminal Justice Act 1988 (1) the New Law on Extradition," [1989] *Crim. L.R.* 4, 5, note 19; and see especially the dissenting opinion of Schemers in *Bozano v. France*, App. No., 9990/82, Commission Report, (1987), 9 E.H.R.R. 297, 326-27.

15 (4th ed., 1977), vol. 18, at 88, para. 216, citing *R. v. Governor of Pentonville Prison, ex p. Eche*, [1974] *Crim. L.R.* 102 (D.C.).

16 [1987] 2 All E.R. 985 (H.L.). This case was referred to recently by the Judicial Committee of the Privy Council on appeal from the Bahamas in *United States Government v. Bowe*, [1989] 3 All E.R. 315, 326, as good authority for the liberal interpretation principle.

17 [1986] 10 B. 509 and 517.

18 *Ibid.*, 517.

19 [1973] 3 All E.R. 250, 254; [1973] 1 W.L.R. 969, 973.

ing that principle Lord Bridge held that states parties to bilateral extradition treaties have entered into reciprocal rights and duties for the purpose of bringing to justice those who have committed grave crimes and thus to "apply to extradition treaties the strict canons appropriate to the construction of domestic legislation would often tend to defeat rather than to serve this purpose."²⁰ Thus, *Postlewaite* indicates that the underlying intention of the high contracting parties should be sought in interpreting the treaty provision.²¹

This emphasis on interstate co-operation in an era of transnational and international crime may be seen as conflicting with the protective function of extradition law. One commentator has suggested that "The conflict between the cooperative and protective functions of extradition law creates a certain tension, something exacerbated by the different views among states about the exact place of extradition in the criminal process. To the extent that extradition is seen [as] simply part of the process of gaining custody of the fugitive, the protections appropriate are relatively slight and the matter may be regarded as administrative rather than judicial."²² The protective side of the extradition procedure clearly emphasizes the penal law aspects and provides protective safeguards for the fugitive.²³ The *Postlewaite* case discussed above, however, illustrates a preferment for the cooperative approach which can also be seen in other recent extradition cases dealing with evidentiary issues,²⁴ the political offence exception,²⁵ and the double criminality rule.²⁶

On this issue of interpretation, then, it appears that courts

²⁰ *Supra* note 16, at 992.

²¹ *Ibid.*

²² Warbrick, *supra* note 14, at 5 (footnotes omitted).

²³ For a recent case where the European Court of Human Rights held that extradition to Switzerland involved a violation of the European Convention on Human Rights, Article 5(1)(f), see *Bozano v. France*, E.C.H.R. Sec. A/111 (1987), 9 E.H.R.R. 297. Also see J. Quigley, "The Rule of Non-Inquiry and the Impact of Human Rights on Extradition Law," (1990) 15 N. Carol. J. Int'l L. and Comm. Reg. 401.

²⁴ *R. v. Secretary of State for the Home Office, ex p. Rees*, [1986] 2 All E.R. 321, and *Re Muir*, T.L.R., Dec. 11, 1987.

²⁵ *Cheng v. Governor of Pentonville Prison*, [1973] 2 All E.R. 204, and *Keane v. Governor of Brixton Prison*, [1972] 1 All E.R. 1163.

²⁶ See in particular, *Government of Denmark v. Nielsen*, [1984] 2 All E.R. 81, and *U.S. Government v. McCaffery*, [1984] 2 All E.R. 570.

in Canada, the United Kingdom, and the United States have in recent times laid emphasis on the co-operative intent of states parties to extradition treaties when called upon to interpret their provisions. It is only when the domestic statute is in question that the courts have been more protective; then the penal aspects have been stressed and ambiguities have been construed in favour of the fugitive.²⁷ In *Regina v. Governor of Pentonville Prison, ex parte Cheng*, Lord Simon of Glaisdale stated in the House of Lords decision that "It follows that the positive powers under the Act [i.e., to extradite] should be given a restrictive construction and the exceptions from those positive powers a liberal construction."²⁸ He further stated that "Since the common law, as so often, favours the freedom of the individual, the rules enjoining strict construction of a penal statute or of a provision in derogation of liberty . . . merely reinforce the presumptions against change in the common law."²⁹

It is re-emphasized here that should the treaty obligation or the Extradition Act itself violate a Charter right, it will have no force or effect, unless it falls with the "reasonable limitation" rule of section 1 of the Charter. It is fundamental that international treaty expediency will not take precedence over the Charter of Rights.

II. DEATH SENTENCE EXCEPTION AND THE FUGITIVE IN CANADA

A. EXTRADITION PURSUANT TO THE EXTRADITION ACT AND TREATIES

Several of Canada's extradition treaties, including the 1976 Treaty with the United States,³⁰ and those with Austria,³¹

²⁷ See *Re Aronson*, [1989] 3 W.L.R. 436, 466. See also Halsbury's *Statutes of England* (annotated), Extradition Act, 1989, c. 33, at 33/2.

²⁸ [1973] 2 All E.R. 204, 217; [1973] A.C. 931, 954.

²⁹ *Ibid.*

³⁰ 1976 Can. T.S. No. 3; 27 U.S.T.S. 983, Art. 6. Note also by way of comparative analysis, that the European Convention on Extradition, 1957, E.T.S. No. 24, 597 U.N.T.S. 338, Art. II, also so provides. See Bassiouni, *op. cit. supra* note 1, at 491-93. The Eighth United Nations Congress on the Prevention of Crime and Treatment of Offenders recently recommended that the Model Treaty on Extradition likewise contain such an article: see Report of the Congress, Cuba, Oct. 5, 1990.

³¹ 1969 Can. T.S. No. 24.

Israel,³² Germany,³³ and Sweden³⁴ provide that where the extradition offence is punishable by death under the laws of the requesting state and the laws of the requested state do not allow this punishment for that offence, the requested state may refuse extradition unless the requesting state provides such assurances as the requested state considers sufficient that the death penalty shall not be imposed, or if imposed, shall not be carried out.

The Extradition Act does not deal with the question of penalties. However, two observations are pertinent. The first is that its section 3 provides that, with respect to any conflict between the sections of the Act and the articles of one of Canada's extradition treaties, the treaty will prevail. This is an exception to the usual rule in Canada that the domestic statute will take precedence. However, as was indicated in the previous section, if these treaty provisions run counter to the guarantees provided to the individual in the Charter of Rights and Freedoms,³⁵ the provisions of the Charter will prevail.³⁶

The second observation is that, even though the Act does not specifically address the refusal to extradite by the Minister of Justice on account of the potential of the death penalty in the requesting state, a broad interpretation of the specialty rule would encompass this question and be a ground for challenge by the fugitive and by the requested state if the fugitive had been extradited on the basis that assurances were given that the death penalty, if handed down, would not be carried out. Bassiouni³⁷ has suggested that if the requested state wishes to impose the condition, it must explicitly indicate it when granting the extradition request. If it does not do so, the requesting/prosecuting state may consider it only as "a recommendation for leniency."³⁸ He concluded by saying that "It is not yet well established if such a condition is binding on the requesting state, as it may be considered an infringement of its sover-

32 1969 Can. T.S. No. 25.

33 *Supra* note 3.

34 1976 Can. T.S. No. 8.

35 *Supra* note 10.

36 *Ibid.*, s. 52.

37 *Op. cit. supra* note 1, at 366, citing *In re Cortés*, [1934] A.D. 356 (Argentina, Camara Federal de la Capital).

38 *Ibid.*, citing *In re Oberbichler*, [1934] 7 A.D. 354 (Italy, Court of Criminal Cassation).

eighty. However, if the requesting state accepts the condition, it would become part of the principle of specialty."³⁹

A full discussion of the specialty rule is not possible here, but it is central to the extradition process,⁴⁰ as it protects the fugitive from unexpected charges and even unexpected penalties once extradited. It also fulfils the function of protecting the requested state from abuse of its extradition processes.⁴¹

This issue of the death penalty exception is not only of academic interest to Canada, which has a longstanding extradition basis with the United States and, for obvious geographical reasons, the majority of whose extradition requests come from the United States, a country in which many states have not abolished the death penalty. Thus, Canada has an interest in the efficacy of the process and of continued co-operation in criminal matters including extradition. Nevertheless, the human rights protections of the fugitive found in Canada cannot be denied. It is a difficult task to strike the appropriate balance between the two.

B. COMMONWEALTH RENDITION UNDER THE FUGITIVE OFFENDERS ACT

The Canadian Fugitive Offenders Act is based upon the 1881 British Fugitive Offenders Act⁴² which, it is crucial to

³⁹ *Ibid.*

⁴⁰ The rule requires that once the surrender of the fugitive has occurred, the requesting state may only prosecute him or her for the offence for which extradition was granted unless the fugitive has had a reasonable opportunity of leaving the requesting/prosecuting state. The rule may be found in domestic legislation such as section 33 of Canada's Extradition Act or in bilateral or multilateral extradition treaties. It is, however, a matter of debate whether it can be classified as a rule of customary international law and may thus be raised by the fugitive even where statutory or treaty provision is absent. In support of the view, see P. Gully Hart and D. Poncet, "Rapport sur le principe de la specialité en matière d'extradition," unpublished paper presented at a Conference on Extradition, Siracusa, Sicily, Dec. 2, 1989. Note the view expressed by La Forest, J. in *Parisien v. The Queen*, [1988] S.C.R. 950, 957, where he stated: "This is seen by some as a customary rule of international law, but it seems to me to arise out of a proper construction of the treaty." See also S. Z. Feller, "Reflections on the Nature of the Specialty Principle in Extradition Relations," (1977) 12 *Israel L. Rev.* 466, 487.

⁴¹ As to both the fugitive and the requested state being beneficiaries of this rule, see American Law Institute, *Restatement (Third) of the Foreign Relations Law of the United States*, C.7, s. 477, para. (b) (1987).

⁴² 55 and 45 *Vict.*, c. 69; replaced by the Extradition Act, 1989, c. 33. As G. V. La Forest, as he then was, noted in *Extradition To and From Canada* 153, note 1 (2nd ed., 1977): "The repeal of the British Act by Great Britain in 1967 had no effect in Canada because of the Statute of Westminster."

note, contains no death penalty exception. The British statute was enacted at a time when it was felt that there was no need for the same safeguards for the fugitive and no need for the rigid formality of the extradition process with "foreign" states.⁴³ This creature of the British Empire enabled fugitives to be renditioned from one part of the Empire to another without the same potential roadblocks that could be raised in an extradition hearing. It should, however, be borne in mind that then the fugitive never left the jurisdiction of the highest appellate court, the Judicial Committee of the Privy Council. In effect, the British imperial parliament sitting in Westminster held the responsibility for the administration of justice in the Empire.⁴⁴ This simplified procedure was founded on a special and close relationship.

The Fugitive Offenders Act that still applies in Canada does not, therefore, impose the traditional safeguards found in extradition law, such as specialty, the political offence exception, and double criminality. There are no treaties and no list of scheduled offences. The omission of these formal safeguards clearly illustrates the different principles and assumptions that rendition between Commonwealth countries was based on. With the change from Empire to Commonwealth and the resulting change in constitutional status of the member countries, many questions arose as to whether the 1881 Fugitive Offenders Act was appropriate and in fact whether it still applied to all Commonwealth countries.⁴⁵

43 See *Re Harrison* (1918), 25 B.C.R. 433, 437; *Ex parte Lillywhite* (1901), 19 N.Z.L.R. 502, 505.

44 See P. O'Higgins, "Extradition Within the Commonwealth," (1960) 9 Int'l & Comp. L.Q. 486; "Recent Practice under the Fugitive Offenders Act," [1965] Crim. L. Rev. 133; and R. Clute, "Law and Practice in Commonwealth Extradition," (1959) 8 Am. J. Int'l L. 8, 15-22.

45 Under the existing Canadian Fugitive Offenders Act, ss. 2 and 3, the Act applies to any part of Her Majesty's realms and territories. If this is correctly interpreted as meaning those countries that recognize the Queen as the head of state, there are a large number of Commonwealth countries to which rendition is not possible. In the case of *Madras v. C. G. Menon*, [1954] A.I.R. 517 (S.C.), (1954) I.L.R. 46, the Supreme Court of India held that the fugitive could not be renditioned to the United Kingdom as India was no longer one of Her Majesty's Dominions. It is interesting to see that this case would appear to have had no effect on the reverse situation, the surrender of fugitives from the United Kingdom to India. See O'Higgins, "Recent Practice," *supra* note 44, at 134, and J. N. Saxena, "India: The Extradition Act, 1962," (1963) 12 Int'l & Comp. L.Q. 116. Note the interesting recent case of *R. v. Brixton Prison Governor ex parte Kahan*, [1989] 2 All E.R. 368, concerning a request by Fiji for rendition from the United Kingdom, where it was held that Fiji

Another fact of international life cannot be ignored; there has been a diminution of shared political and social objectives between the member states of the Commonwealth, whose overall complexion has clearly and drastically changed since 1881. The constituent members cannot be seen to be aligned on all issues and certainly the United Kingdom does not exercise dominion and control. For most countries in the Commonwealth, appeal to the Privy Council no longer exists.

In 1966 a Commonwealth conference was held in London, England, and the following year the United Kingdom replaced the 1881 Act with the 1967 Fugitive Offenders Act, as did a number of other Commonwealth countries. Canada did not follow suit. The new Commonwealth scheme adopted by the United Kingdom and others provided for the specialty and the double criminality rules mentioned earlier. However, on the death penalty, silence was maintained. The only relevant provision in the 1967 United Kingdom Act was section 3 (1), which stipulated that a relevant offence for rendition purposes (1), when the United Kingdom was the requested state, was one against the law of a designated Commonwealth country and, however described by that law, fell within any of the descriptions set out in Schedule 1 to the 1967 Act, and was punishable under that law by a term of twelve months' imprisonment or any other greater punishment, and (2), in the case of an offence against United Kingdom law, was punishable by that law with imprisonment of the same term or any greater form of punishment.

Section 3 of the Canadian Fugitive Offenders Act provides that rendition may occur for an offence punishable in the place where it was committed by imprisonment with hard labour for a term of twelve months or any greater punishment. It would not therefore on its face prevent rendition when the death penalty might be applied, as that penalty would appear to fit the category of "any greater punishment." Even though in *Re Fugitive Offenders Act and Hon Kwing Shum*⁴⁶ Cattanach, J. of the Federal Court Trial Division held that the term

was entitled to so request, albeit that its membership in the Commonwealth had lapsed when it became a Republic, as it was still a "designated Commonwealth country" in the pertinent United Kingdom list.

⁴⁶ June 2, 1977 (unreported), cited by La Forest, *op. cit. supra* note 42, at 155.

“any greater punishment was tied to it being a term greater than twelve months with hard labour and not simply a longer term,” he did state that he would find it hard to believe that capital punishment or life imprisonment would not fall within this category.⁴⁷

The only relevant section is section 17, which provides for the refusal of rendition because it would be unjust. It states:

Whenever it appears to the court that by reason of the trivial nature of the case, or by reason of the application for the return of a fugitive not being made in good faith, in the interests of justice, or that, for any reason, it would, having regard to the distance, to the facilities for communication, and to all the circumstances of the case, be unjust or oppressive or too severe a punishment to return the fugitive either at all or until the expiration of a certain period, the court may: (a) discharge the fugitive, either absolutely or on bail; (b) order that he shall not be returned until after the expiration of the period named in the order; or (c) make such other order in the premises [sic], as to the court seems just. R.S., c. 127, s. 17.

However, La Forest has suggested that “that section . . . should not be expected to bear the whole burden of what has *now become an obsolete and defective piece of legislation*.”⁴⁸ In the extradition process, Canada has the opportunity to put into its extradition treaties a provision that mentions the death penalty exception. In the case of rendition, apart from reliance upon the judiciary under section 17, there is nothing. Some Commonwealth countries such as Jamaica still retain the death penalty. For these reasons, even though review of the decision of the governor general to rendite would be reviewable by the courts and if not compatible with the Charter of Rights be struck down, it would be preferable to take the same statutory and even treaty approach with regard to all countries, Commonwealth or otherwise.

The Law Reform Commission of Canada stated in 1984 that “we have seen enough to convince us of the need to modernize our statutes concerning these subjects. However, before that can be done, the federal government will have to seek answers to questions such as. . . Does Canada need two Acts? Would not one suffice? Is there any longer a need to differentiate

⁴⁷ *Ibid.*

⁴⁸ *Ibid.*, 157 (emphasis added).

between 'extradition' and 'rendition'?"⁴⁹ And it recommended "that the *Extradition Act* and the *Fugitive Offenders Act* be amended to provide for uniformity of treatment of persons under both Acts."⁵⁰

The Charter of Rights has already been seen to play a large part in assessing Canada's extradition legislation.⁵¹ There is a need to treat fugitives in the extradition and rendition processes in the same way. The sections of the Charter dealing with the right to life, liberty, and security of the person, and the right not to be deprived thereof except in accordance with the principles of fundamental justice,⁵² and its provisions dealing with equality before and under the law, equal protection and equal benefit of the law without discrimination,⁵³ apply.

C. CONCLUSIONS

Thus, the current Canadian position to be debated may be summed up as follows. First, do Canada's Extradition Act and treaties with countries that retain the death penalty violate the provisions of sections 7 and 12 of the Charter of Rights? Section 7 was mentioned above. Section 12 provides that everyone has the right not to be subjected to any cruel and unusual punishment or treatment.

Second, does Canada's Fugitive Offenders Act and potential agreement for extradition without treaty under Part II of the Extradition Act violate the same Charter rights? Clearly, should the extradition process be seen as excepting extradition where the death penalty may be imposed based on these Charter provisions, the Fugitive Offenders Act and non-treaty extradition must be similarly viewed. Fugitive offender and Part II fugitives would be denied fundamental justice and be subjected to inequality before and under the law if this were not to be so. Why should X being renditioned to a Common-

49 Working Paper 37, *Extraterritorial Legislation*, 137.

50 *Ibid.*, 137, Rec. 63.

51 See, for example, the trilogy of *United States v. Schmidt*, *supra* note 9; *Republic of Argentina v. Hector Mellino*, [1987] 1 S.C.R. 536; and *United States v. Allard and Charette*, [1987] 1 S.C.R. 564. See also *United States v. Cotroni*, [1989] S.C.R. 1469.

52 Section 7.

53 Section 15.

wealth country with the death penalty, not have the same protection as Y being extradited to the United States?

A Charter argument was raised in the case of *Her Majesty the Queen on behalf of Great Britain v. Taylor*.⁵⁴ This case dealt with the lack of a double criminality requirement in the Fugitive Offenders Act, as contrasted with the Extradition Act. Mr. Taylor argued, *inter alia*, that under the Fugitive Offenders Act his Charter rights guaranteed by sections 7 and 15 were being infringed.⁵⁵ Judge Scullion held that there was no such breach of his rights under the Charter "so fundamental as to cause [him] to declare the [FOA] or parts thereof of no force and effect under section 52 of the Charter."

In view of the foregoing analysis, it is remarkable that Judge Scullion in 1988 was able to come to the conclusion that there is no need today for the same safeguards in rendition as in extradition. To illustrate this, one need only turn to his reference to the need for safeguards when extraditing to a country where the laws and judicial systems are fundamentally different as opposed to renditing to a Commonwealth country sharing "a great deal of that common legal and political heritage." Albeit that in the nineteenth and early twentieth centuries this was the case, it is not so today, as evidenced by the perceived need for the same safeguards noted by the Commonwealth scheme of 1967.

III. EXTRADITION⁵⁶ AND THE DEATH PENALTY: A VIOLATION OF SECTIONS 7 AND 12 OF THE CHARTER OF RIGHTS?

The heart of the debate on this question centres on whether these sections of the Charter of Rights apply to cases where an extradited individual will suffer adverse consequences because of the punishment imposed in the requesting/receiving state. There are two main issues that must be considered. The first is

54 Judgment delivered by Judge C. Scullion, June 29, 1988 (Ont. Prov. Ct.), (unreported). See also the application for *habeas corpus* that was dismissed by Boland, J., Ontario Court (General Division), Oct. 30, 1990.

55 He also argued s. 11.

56 From now on the term "extradition" will be used to cover rendition as well as extradition without treaty pursuant to Part II of the Extradition Act, as in this writer's view all must be treated in the same way. See *supra*.

the intraterritorial or extraterritorial scope of the Charter in relation to these cases. The second may in turn be divided into two parts: Is a decision of the Minister to extradite to a state that retains the death penalty, a violation of section 12 of the Charter in that the fugitive will be subjected upon return to cruel and unusual treatment or punishment? And if extradition is held not to be contrary to section 12, will section 7 still be violated in that the extradition will deprive the fugitive of the right to life, liberty, and security of the person? The basic point here is necessarily whether the decision to extradite conforms to the principles of fundamental justice.

In order to probe these questions it will be very useful to analyse first of all the recent decision of the European Court of Human Rights in *Soering v. United Kingdom*,⁵⁷ as it deals with a relatively similar situation.

A. IMPACT OF THE SOERING CASE

Decisions of the European Court of Human Rights in Strasbourg based on the European Convention for the Protection of Human Rights and Fundamental Freedoms⁵⁸ and its relevant protocols are not binding on Canada, as it is not, and as a non-European country cannot be, a member⁵⁹ of the Council of Europe under its current constitution. However, since the Canadian Charter of Rights utilizes the language, in part, of the European Convention, most certainly the decisions of the European Court of Human Rights will be of persuasive value in Canada. Already, Canadian courts, including the Supreme Court of Canada, have had occasion to refer to the Convention and the Court's decisions. As well, on August 19, 1976, the

57 (1989), 161 Eur. Ct. H.R. (Ser. A.); reprinted in (1989), 11 Eur. H. Rts. Rep. 439, and in (1989) 28 Int'l Leg. Mat. 1063.

58 (1950) 213 U.N.T.S. 221.

59 Member states are as follows: Austria, Belgium, Cyprus, Denmark, Finland, Germany, France, Greece, Iceland, Ireland, Italy, Liechtenstein, Luxembourg, Malta, the Netherlands, Norway, Portugal, San Marino, Spain, Sweden, Switzerland, Turkey, and the United Kingdom. S. Breitenmoser and G. Wilms, "Human Rights v. Extradition: The Soering Case," (1990) 11 Mich. J. Int'l L. 845, note 2, suggest that several Eastern European states are in the process of applying to become parties to the Convention, as a precondition for membership generally in the Council of Europe. They state that this is because the Council of Europe restricts its membership to those states who are committed to the rule of law and the enjoyment of human rights and freedoms.

International Covenant on Civil and Political Rights⁶⁰ and Optional Protocol⁶¹ came into force in Canada. Likewise, Canadian courts have not been reticent in citing applicable Covenant articles to assist in the interpretation of similar language in the Canadian Charter.⁶²

In this regard the recent unanimous judgment of the European Court of Justice in *Soering v. United Kingdom*⁶³ is especially important, for it concerned a request by the United States of America to the United Kingdom for the extradition of the fugitive Jens Soering on charges of capital murder. Following his committal for surrender by the extradition judge, Mr. Soering applied for a writ of *habeas corpus* and for leave to apply for judicial review. Both applications were refused by the Divisional Court. This case eventually went to the European Court and the judgment rendered on July 7, 1989 will, as two commentators have aptly stated, "have some accelerating effect on future discussion of extradition law and the value of human rights in such proceedings."⁶⁴

1. *Facts of the Soering Case*

Jens Soering was born on August 1, 1966, and was a German national. The United States extradition request was for two charges of murder committed in the Commonwealth of Virginia in March 1985. The victims, William and Nancy Haysom, were killed as a result of multiple and massive slash wounds to the neck, throat, and body; they were the parents of Jens Soering's girlfriend, Elizabeth Haysom, who was a Cana-

60 1976 Can. T.S. No. 47.

61 *Ibid.*

62 See S. A. Williams and A. L. C. de Mestral, *An Introduction to International Law* 34-35 (2nd ed., 1987); M. Cohen and A. Bayefsky, "The Canadian Charter of Rights and Freedoms and Public International Law," (1983) 61 Can. Bar Rev. 265; L. C. Green, "The Canadian Charter of Rights and International Law," (1982) 20 *Canadian Yearbook of International Law* 3, and J. Claydon, "The International Law of Human Rights and Canadian Courts," *Proceedings of the 1981 Conference of the Canadian Council on International Law* 2.

63 *Supra* note 57. Also see the affirmation of *Soering* in *The Netherlands v. Short*, translated from the Dutch and reprinted in (1990) 29 Int'l Leg. Mat. 1375 (Netherlands Supreme Court).

64 Breitenmoser and Wilms, *supra* note 59, at 847. R.B. Lillich in "The Soering Case," (1991) 85 Am. J. Int'l L. 128, 141, has commented that its true significance will unfold as other states react to it.

dian citizen. Both Soering and Elizabeth Haysom were students at the University of Virginia. In October 1985 both disappeared from Virginia, but were arrested in April 1986 in England for cheque fraud.

In June 1986 Soering was interviewed in England by a police investigator from Virginia. The investigator recorded in a sworn affidavit that Soering had admitted the killings; his motive was that he was in love with Elizabeth Haysom but her parents were opposed to the relationship. The United States of America requested in August 1986 the extradition of Soering and Elizabeth Haysom under the 1972 United Kingdom-United States Extradition Treaty.⁶⁵ Soering was charged with two counts of alleged capital murder and two counts of the separate non-capital murders of the parents. Elizabeth Haysom was surrendered to the United States in May 1987. In August 1987 she pleaded guilty as an accessory to the murder of her parents and was sentenced on October 6, 1987, to ninety years' imprisonment.

Concerning Soering, on September 12, 1987, he was arrested following the issue of a warrant by a magistrate at Bow Street Magistrate's Court. The British Embassy in Washington requested from the United States authorities an assurance concerning the death penalty based on Article 4 of the Extradition Treaty. This article is in similar terms to Article 6 of the Canada-United States Extradition Treaty.⁶⁶ The request read as follows:

Because the death penalty has been abolished in Britain, the Embassy has been instructed to seek an assurance, in accordance with the terms of . . . the Extradition Treaty, that, in the event of Mr. Soering being surrendered and convicted of the crimes for which he has been indicted . . . the death penalty, if imposed, will not be carried out.

Should it not be possible on constitutional grounds for the United States to give such an assurance, the United Kingdom authorities ask that the United States Government undertake to recommend to the appropriate authorities that the death penalty should not be imposed or, if imposed, should not be executed.⁶⁷

⁶⁵ 28 U.S.T., 227; 230 T.I.A.S. No. 8468.

⁶⁶ See *supra* 30.

⁶⁷ See *supra* note 57, para. 15.

Meanwhile, the Federal Republic of Germany, as the state of Mr. Soering's nationality,⁶⁸ also requested his extradition to Germany under the 1872 Treaty for the Mutual Surrender of Fugitive Criminals, as amended by an Agreement of 1960 and an Exchange of Notes in 1978,⁶⁹ between the Federal Republic of Germany and the United Kingdom. In the United Kingdom, the Secretary of State was advised by the Director of Public Prosecutions that, although the German request supported the jurisdiction over the crime aspect, the evidence submitted did not amount to a *prima facie* case⁷⁰ and that an extradition magistrate in the United Kingdom, therefore, under the terms of the Extradition Act, 1870, would not be able to commit the fugitive for surrender to Germany. The only evidence the German government had were admissions made by Soering to a German prosecutor (Staatsanwalt) from Bonn when he was interviewed in prison in Britain.⁷¹ Furthermore, the Director of the Office of International Affairs, Criminal Division, United States Department of Justice, was informed by the Attorney of Bedford County, Virginia, that there was no means of compelling witnesses from the United States to appear in a German criminal court.⁷² The United States concluded that the British should give preference to the United States request over the German one.⁷³

The result was that the United Kingdom on May 20, 1987, informed the Federal Republic of Germany that, as they had received the American request first and it was supported by *prima facie* evidence, the court would continue to consider that request in the normal way.⁷⁴ It was also stressed that sur-

68 *Ibid.*, para. 16. Most civil law states use the nationality basis of criminal jurisdiction extensively. See J. G. Castel and Sharon A. Williams, "The Extradition of Canadian Citizens and Sections 1 and 6(1) of the *Canadian Charter of Rights and Freedoms*," (1987) 25 *Canadian Yearbook of International Law* 263.

69 These agreements are incorporated into United Kingdom law by Orders in Council (the Federal Republic of Germany (Extradition) Order 1960, S.I. 1960/1375 and the Federal Republic of Germany (Extradition) (Amendment) Order 1978, S.I. 1978/1403).

70 The test for the *prima facie* case "is whether, if the evidence before the Magistrate stood alone at the trial, a reasonable jury properly directed could accept it and find a verdict of guilty": see *Schtraks v. Government of Israel*, [1964] A.C. 556.

71 *Supra* note 57, para. 16.

72 *Ibid.*, para. 17.

73 *Ibid.*

74 *Ibid.*, para. 19.

render to the United States would be subject to receiving satisfactory assurances concerning the death penalty. The affidavit of the Attorney of Bedford County of June 1, 1987, which was transmitted to the United Kingdom under the cover of a diplomatic note, is worth quoting; it reads as follows: "I hereby certify that should Jens Soering be convicted of the offence of capital murder as charged in Bedford County, Virginia . . . a representation will be made in the name of the United Kingdom to the judge at the time of sentencing that it is the wish of the United Kingdom that the death penalty should not be imposed or carried out."⁷⁵ This assurance seems to have addressed only the second paragraph of the 1986 British request.⁷⁶

2. Court Proceedings in the United Kingdom

The committal proceedings took place on June 16, 1987, at the Bow Street Magistrates' Court. The Chief Magistrate committed Soering to await the Secretary of State's order for extradition to the United States. Following his committal for surrender, Soering applied to the Divisional Court for a writ of *habeas corpus* and for leave to apply for judicial review. On December 11, 1987, both applications were refused.

Some aspects of these proceedings merit further consideration. Soering had argued in support of his application for judicial review that the assurances concerning the death penalty given by the United States were worthless and that no reasonable Secretary of State could have regarded them as satisfying Article 4 of the Extradition Treaty. Lord Justice Lloyd agreed with Soering that "the assurance leaves something to be desired."⁷⁷ He stated further that:

Article IV of the Treaty contemplates an assurance that the death penalty will not be carried out. That must presumably mean an assurance by or on behalf of the Executive Branch of Government, which in this case would be the Governor of the Commonwealth of Virginia. The certificate sworn by Mr. Updike, far from being an

75 *Ibid.*, para. 20. This assurance was requested in a similar fashion in further affidavits by the same person, Mr. James Updike, the Attorney of Bedford County.

76 *Supra* note 57.

77 *Ibid.*, para. 22, quoted by the European Court of Human Rights.

assurance on behalf of the Executive, is nothing more than an undertaking to make representations on behalf of the United Kingdom to the judge. I cannot believe that this is what was intended when the Treaty was signed.⁷⁸

Lord Justice Lloyd did not therefore put much weight on the assurance but said that on account of the federal nature of the United States, it might have been difficult to get more. Having said this, he went on to hold that judicial review was refused at that stage because the claim was premature; the Secretary of State had not decided at that time to accept the assurance as satisfactory. This position is in keeping with the *Kindler*⁷⁹ and *Ng*⁸⁰ decisions so far in Canada, in that the courts will not review an administrative decision until it has been made.

On June 30, 1988, the House of Lords rejected Soering's petition for leave to appeal against the decision of the Divisional Court and, following a further rejection by the Secretary of State of a petition by the fugitive requesting him to exercise his discretion not to make the order for surrender under section 11 of the 1870 Extradition Act, Soering was ordered surrendered to the United States.

At that juncture, instead of seeking review of the administrative decision of the Secretary of State, Soering followed the route to the European Court of Human Rights in Strasbourg, the United Kingdom having ratified the European Convention on Human Rights. The United Kingdom has not enacted implementing legislation.⁸¹ In any judicial review proceedings before the British Courts, he could have asked the court to review the exercise of the discretion to extradite him on the ground that it was tainted with illegality, irrationality, or procedural impropriety.⁸² In determining what is "irrationality,"

78 *Ibid.*

79 See *infra*, 139-41.

80 See *infra*, 139-41.

81 See C. Warbrick, "Reasonableness and the Decision to Extradite: Re Kirkwood," [1984] Public Law 539, 543, where the author argues that the orthodox view that a treaty has no internal effect until implemented "should not carry the same weight in relation to assessing an exercise of a ministerial power." As to the so-called constitutional orthodoxy that a ratified but unimplemented treaty is not part of domestic law, see *Malone v. Commissioner of Police for the Metropolis (No. 2)*, [1979] 2 All E.R. 620, 638 (per Sir Robert Megarry, V.C.).

82 *Council of Civil Service Unions and Others v. Minister for the Civil Service*, [1984] 3 All E.R. 935 (C.A.). B. Robertson, "Extradition, Inhuman Treatment, and the Death Penalty," (1990) 154 Justice Peace 231, 232, has argued that because this

the so-called "Wednesbury principles" of reasonableness would have been used.⁸³ The test in an extradition case may be summed up as identifying whether "no reasonable Secretary of State could have made an order for return in the circumstances." This could be viewed from the perspective of acceptance of the assurance and whether there was a serious risk of inhuman or degrading treatment if returned.⁸⁴

According to the case of *R. v. Home Secretary, ex parte Bugdaycay*,⁸⁵ a case dealing with a refusal to grant asylum, the House of Lords explained that the courts will apply the principles of reasonableness extremely strictly in a case where the life of the applicant is at risk. As the Court stated, "the court must, I think, be entitled to subject an administrative decision to the most rigorous examination, to ensure that it is in no way flawed, according to the gravity of the issue which the decision determines. The most fundamental of all human rights is the individual's right to life and, when an administrative decision under challenge is said to be one which may put the applicant's life at risk, the basis of the decision must surely call for the most anxious scrutiny."⁸⁶ Lord Templeman added: "In my opinion where the result of a flawed decision may imperil life or liberty a special responsibility lies on the court in the examination of the decision-making process."⁸⁷

One final point can be drawn from *R. v. Secretary of State for the Home Department, ex parte Kirkwood*,⁸⁸ namely that the courts of the United Kingdom will not review a decision of the Secretary of State by reason only of the fact that he or she

judicial review existed, Soering had not exhausted his local remedies, required by Art. 26 of the European Convention. The Strasbourg court did not address this issue.

83 *Associated Provincial Picture Houses Ltd. v. Wednesbury Corporation*, [1948] 1 K.B. Rep. 223 (C.A.).

84 *Supra* note 57, para. 35.

85 *Ibid.*

86 [1987] 1 All E.R. 840, 952, per Lord Bridge.

87 *Ibid.*, 956.

88 [1984] 2 All E.R. 390; [1984] 1 W.L.R. 913 (Q.B.D.), and *Re Kirkwood and re an application for a writ of habeas corpus ad subjiciendum*, Feb. 14, 1984, unreported. In *Kirkwood*, as in *Soering*, the United States had not guaranteed that the death sentence would not be carried out, but had only promised to present the United Kingdom's wish to the court in California. Kirkwood also applied to the European Commission: see *Applic. no. 10479/83*.

failed to consider the question of breach of the European Convention on Human Rights.⁸⁹

3. *Application before the European Court of Human Rights*

The European Court of Human Rights was seized of the case following an application by Soering to the European Commission on Human Rights.⁹⁰ The Commission had indicated⁹¹ to the United Kingdom government that it was desirable in the interests of the parties and the proper conduct of the proceedings, not to extradite until the Commission had examined the application and subsequently until the case had been referred to the court. On November 10, 1988, the Commission declared the application admissible and on January 19, 1989, produced its report. The case was brought by the Commission before the Court on January 25, 1989, by the United Kingdom on January 30, 1989, and by the Federal Republic of Germany on February 3, 1989.

The object of the request by the Commission and of the two governmental applications to the Court was to obtain a decision as to whether the facts of the case disclosed a breach by the United Kingdom of its obligations under Articles 3, 6, and 13 of the Convention.⁹² Article 3 provides that "No one shall be subjected to torture or to inhuman or degrading treatment or punishment"; Article 6.3 that "Everyone charged with a criminal offence has the following minimum rights ... (c) to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require"; and Article 13 that "Everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority notwithstanding

89 The courts in *Kirkwood* relied upon *R. v. Secretary of State for the Home Department, ex parte Fernandes*, [1981] Imm. A.R. 1, a deportation case, where the Court of Appeal held that the Home Secretary was under no duty to take into account the European Convention. See also *R. v. Chief Immigration Officer, ex parte Bibi*, [1976] 1 W.L.R. 979. *Kirkwood* also relied upon Art. 7 of the International Covenant on Civil and Political Rights, *supra* note 60.

90 Applic. no. 14038/88 of July 8, 1988, pursuant to Art. 25 of the Convention.

91 In accordance with Rule 36 of the Commission's Rules of Procedure.

92 Pursuant to Rule 33, s. 3(d), of the Rules of Court, the applicant stated that he wished to take part in the proceedings.

that the violation has been committed by persons acting in an official capacity.”

The Court held unanimously that Article 3 would be violated if the decision to extradite Soering to the United States were implemented; as to Article 6.3(c), it had no jurisdiction to entertain the complaint; and that there was no violation of Article 13.⁹³ Considering that the finding regarding Article 3 amounted in itself to just satisfaction, the Court did not view itself as empowered to make accessory directions as to enforcement of judgment. The reasoning behind the judgment of the court will be discussed in the sections that follow, as it is of great comparative interest to Canadians.

B. APPLICABILITY OF SECTIONS 7 AND 12 OF THE CANADIAN CHARTER OF RIGHTS IN CASES OF EXTRADITION

1. *Respective Roles of the Minister of Justice and Judiciary*

Canadian courts have taken the view that the discretion set out in a bilateral treaty concerning non-extradition where the death penalty exists, lies with the Minister of Justice. The essential difference between committal for surrender by the extradition judge and the decision to surrender by the Minister has been made. The extradition judge can only receive evidence relevant to his or her function under the Act.⁹⁴ In *Argentina v. Mellino*,⁹⁵ La Forest, J. stated that “the sole purpose of an extradition hearing is to ensure that the evidence establishes a *prima facie* case that the extradition crime has been committed.”⁹⁶ In this case, and also in *U.S.A. v. Schmidt*,⁹⁷ he stressed that the extradition judge and hearing play a modest role in the overall process, barring statutory or treaty excep-

93 The Commission's Report that is annexed to the judgment indicates that the Commission was of the view that there had been a breach of Art. 13 (7 votes to 4) but no breach of Art. 3 (6 votes to 5) or Art. 6.3(c) (unanimously). Note in particular the 6:5 vote on Art. 3, which was based on the rights of the accused to resort to several levels of appeal. The commission declined to find that a period of years on death row, thus caused, attained the degree of severity required.

94 See section 18.

95 (1987), 33 C.C.C. (3d) 334, 349 (S.C.C.). This was an extradition case not dealing with the death penalty but s. 11 of the Charter.

96 [1987] S.C.R. 500.

97 *Supra* note 9.

tions. Neither the Extradition Act nor treaty with any state gives the extradition judge the role of either adjudicating on the death penalty exception, or hearing evidence on the issue and reporting it to the Minister. This is in contrast with the extradition judge's role concerning the political offence exception; that judge today takes evidence on that matter pursuant to section 15 of the Act. In *U.S.A. v. Ng*,⁹⁸ the Alberta Court of Appeal recently held that the death sentence could be distinguished from the political offence exception because "This evidence is, then, of a much different character than evidence which goes to the exercise of a ministerial discretion and the inclusion of a specific empowering provision militates strongly against our implying one."⁹⁹ In the earlier case of *U.S.A. v. Kindler*,¹⁰⁰ the same position had been taken, namely that any question of non-extradition by reason of the death penalty is to be left to the Minister of Justice.

These decisions interpreting the Extradition Act and bilateral treaty provisions like Article 6 of the Canada-United States Treaty which was in issue in *Ng* and *Kindler*, are correct. Under current Canadian law, there is a division of function between the judiciary and the executive; their roles are clearly different. The extradition judge must make sure that all the nuts and bolts of extradition are in place, such as the crime being extraditable, double criminality, and sufficiency of evidence. On the other hand, when a fugitive has been committed for surrender and has unsuccessfully sought *habeas corpus* or review by the provincial Court of Appeal or even by the Supreme Court of Canada, the Minister makes the final determination under section 25 of the Act, taking into account a wide variety of matters. Thus, at the ministerial stage, the fugitive may present to the Minister evidence on the death penalty issue, both by way of oral¹⁰¹ and written argument.

98 (1989), 97 A.R. 241 (Alta. C.A.), upholding the decision of the extradition judge, Trussler J.

99 *Ibid.*, 243.

100 22 C.C.C. (3d) 90 (Qué. S.C.). In *Bouthillier v. U.S.*, (Qué. Superior Ct.), Case No. 500-36-00813-900, Feb. 1, 1991 (unreported), it was held by Pinard, J., sitting on a *habeas corpus* application, that the decision as to whether a minimum punishment of imprisonment was cruel and unusual was within the province of the executive, subject then to judicial review.

101 In *Kindler* the Minister of Justice declined to hear *viva voce* evidence by Kindler himself. It was thought that it would be inappropriate for the Canadian Minister of Justice to be reconsidering credibility as to guilt or innocence.

If the Minister of Justice decides to extradite with or without assurances concerning the death penalty, the fugitive may seek judicial review of that decision.¹⁰² In effect, this gives the fugitive a protracted period between the initial extradition judge's committal for surrender and review of the Minister of Justice's decision by the Federal Court, Trial Division, Court of Appeal and finally the Supreme Court of Canada.¹⁰³

This area of extradition law is far from being solely of academic interest in Canada, as most of its extradition traffic lies with the United States of America. Therefore, the reference to the Supreme Court of Canada by the Governor in Council on the issue of the death penalty is of fundamental importance. The questions presented to the Court are as follows:¹⁰⁴

- 1 Would the surrender by Canada of an extradition fugitive to the United States of America, to stand trial for wilful or deliberate murder for which the penalty upon conviction may be death, constitute a breach of the fugitive's rights guaranteed under the Charter of Rights and Freedoms?
- 2 Did the Minister of Justice, in deciding pursuant to Article 6 of the *Extradition Treaty between Canada and the United States of America*, to surrender the fugitive Charles Chitat Ng without seeking assurances from the United States of America that the death penalty would not be imposed on the said Charles Chitat Ng or, if imposed, that it would not be executed, commit any of the errors of law and jurisdiction alleged in the Statement of Claim filed in the Federal Court of Canada (Trial Division) by the said Charles Chitat Ng on October 30, 1989, having regard to the said Statement of Claim, the reasons given by the Minister of Justice for the said decision and to any other material which the Court, in its discretion, may receive and consider?

Other constitutional questions have been stated by Cory, J. of the Supreme Court of Canada. These are:

- 102 The courts may review the exercise of a ministerial discretion on the basis of the Charter of Rights: see *Operation Dismantle v. The Queen*, *supra* note 11.
- 103 It is clear that new legislation is needed in Canada to update the Extradition Act and Fugitive Offenders Act from many perspectives. It must include a streamlining of the extradition review process and judicial review of the Minister of Justice's decision. There is too much duplication.
- 104 By Order-in-Council P.C. 1990-1082, dated June 7, 1990, promulgated pursuant to s. 53(1) of the Supreme Court Act, R.S.C. 1985, c. S-26. Oral hearing before the Supreme Court of Canada scheduled for Feb. 21, 1991.

- 3 Is s. 25 of the *Extradition Act*, R.S.C., 1985, c. E-23, to the extent that it permits the Minister of Justice to order the surrender of a fugitive for a crime for which the fugitive may be or has been sentenced to death in the foreign state without first obtaining assurances from the foreign state that the death penalty will not be imposed, will not be executed, inconsistent with ss. 7 or 12 of the *Canadian Charter of Rights and Freedoms*?
- 4 If the answer to question 1 is in the affirmative, is s. 25 of the *Extradition Act*, R.S.C., 1985, c. E-23, a reasonable limit of the rights of a fugitive within the meaning of s. 1 of the *Canadian Charter of Rights and Freedoms*, and therefore not inconsistent with the *Constitution Act*, 1982?¹⁰⁵

In the *Kindler* case, when the Minister of Justice decided to surrender without seeking assurances, Kindler sought review by the Federal Court, Trial Division. At that level, Rouleau, J. denied *certiorari* to quash the Minister's decision.¹⁰⁶ The appeal to the Federal Court of Appeal likewise failed. In the *Ng* case, Ng was committed for surrender on twelve counts of murder, one count of attempted murder, two counts of conspiracy to commit murder, three counts of kidnapping, and one count of burglary, by Trussler, J. the extradition judge, whose decision was upheld on appeal by the Alberta Court of Appeal. The Minister of Justice, as in *Kindler*, decided to surrender without seeking assurances. The *Ng* case has not gone through the Federal Court review process. The outcome of the reference to the Supreme Court of Canada in this matter will clarify a number of matters that are now uncertain.

2. *Extraterritorial or Intraterritorial Application of the Charter*

The applicability of the Charter provisions to extradition cases is raised in the reference, as it is essential to decide whether the sections in question are to be applied extraterritorially to conduct by other states abroad and hence prohibit extradition, or whether their scope is merely intraterritorial to Canada. If the latter perspective is taken, can these sections prevent extradition on the basis that by extraditing to Canada would put the person in a real risk of violation of right that would be protected under the Charter in Canada? At the outset, it can be said that none of the justices on the Supreme

105 See factum of the Attorney-General of Canada at p. 3.

106 *Joseph J. Kindler v. John Crosbie, Min. of Justice*, [1987] 2 F.C. 145.

Court of Canada has suggested extraterritorial application. The crux of the matter is deciding what is intraterritorial application.

It is worth repeating that extradition decisions by the Minister of Justice are subject to scrutiny by the courts under section 32 of the *Charter*. Nevertheless, it is crucial to note the judgment of La Forest, J. in *Schmidt* where he stated that "there cannot be any doubt that the *Charter* does not govern the actions of a foreign country; see for example, *Spencer v. The Queen*, [1985] 2 S.C.R. 278. In particular the *Charter* cannot be given extraterritorial effect to govern how criminal proceedings in a foreign country are to be conducted."¹⁰⁷ The specific questions here are whether the *Charter* should be applied to extradition cases where the death penalty exists in the foreign state on the ground that this penalty has been abolished in Canada and thus would deny the fugitive of his or her right to life, liberty, and security of the person, and as well would subject the person to cruel and unusual treatment or punishment.

In *Schmidt* the Supreme Court of Canada held that the "pre-eminence of the Constitution must be recognized."¹⁰⁸ La Forest, J. stated that "the treaty, the extradition hearing in this country and the exercise of the executive discretion to surrender a fugitive must all conform to the requirements of the *Charter*, including the principles of fundamental justice . . . The real question is whether the fugitive in the circumstances of this case would, by virtue of her proposed extradition, be deprived of this right in a manner that did not conform to the principles of fundamental justice."¹⁰⁹ He went on to hold that:

I have no doubt either that in some circumstances the manner in which the foreign state will deal with the fugitive on surrender, whether that course of conduct is justifiable or not under the law of that country, may be such that it would violate the principles of fundamental justice to surrender an accused under those circumstances. To make the point, I need only refer to a case that arose before the European Court on Human Rights, *Altun v. Germany* (1983), 5 E.H.R.R. 611, where it was established that prosecution in the requesting country might involve the infliction of torture. Situations

¹⁰⁷ *Supra* note 9, at 518.

¹⁰⁸ *Ibid.*, 520.

¹⁰⁹ *Ibid.*

falling far short of this may well arise where the nature of the criminal proceedings or penalties in a foreign country sufficiently shocks the conscience as to make a decision to surrender a fugitive for trial there one that breaches the principles of fundamental justice enshrined in s. 7.¹¹⁰

The main focus is upon whether, in the particular circumstances of the case, surrender of a fugitive offends against the basic demands of justice. In *United States v. Allard and Charette*, La Forest, J. stated in a similar fashion that “[t]he only question that really arises, in this case, is whether the respondents will face a situation in the United States such that the mere fact of the Canadian government surrendering the respondents . . . constitutes an infringement of fundamental justice. . . . To arrive at [this conclusion] . . . it would be necessary to establish that the respondents *would face a situation that is simply unacceptable*.”¹¹¹ Clearly, he was correct when he stated that “the Courts must be extremely circumspect so as to avoid interfering unduly in decisions that involve the good faith and honour of [Canada] in its relations with other states. In a word, judicial intervention must be limited to cases of real substance.”¹¹²

In an age of easy travel, the potential escape of fugitives from justice is readily apparent. For the overall good of society, it is essential that the extradition system be effective. In *Schmidt*, La Forest, J. stated that what is needed is a process of surrender that is “untrammelled by excessive technicality or fastidious demands that foreign systems comply with [Canadian] constitutional standards.”¹¹³ Most importantly to the present debate, the learned justice said that “A decision to surrender . . . cannot be faulted as fundamentally unjust because the operation of the foreign law in the particular circumstances has not been subjected to scrutiny to see if it will

110 *Ibid.*, 522. For a review of the *Altun v. Germany* Application No. 10208/83, E.H.R.R. 611, dealing with the alleged violation of Article 3 of the European Convention, see Drzemczewski, “Aliens and the European Rights Convention: A General Survey,” (1984) 2 *Notre Dame Int'l & Comp. L.J.* 99, 114-22.

111 [1987] 1 S.C.R. 564, 572 (emphasis added). See also at 572 where he adds that the undoubted role of the courts to review the Minister's decision must be one that is exercised with caution.

112 *Ibid.*, 523. See also at 528, where La Forest, J. stated that “The courts should only intervene in compelling circumstances.”

113 *Ibid.*

conform to the standards of our system of justice."¹¹⁴ In *Neely v. Henkel (No. 1)*,¹¹⁵ the United States Supreme Court dealt with the matter of reconciling guarantees under the United States Constitution with extradition to Cuba; Harlan, J., giving the judgment of the Court, stated that "those [constitutional] provisions have no relation to crimes committed without the jurisdiction of the United States against the laws of a foreign country."¹¹⁶

In sum, La Forest, J. seems to be saying that the Charter should not be given extraterritorial application in extradition cases save in exceptional circumstances that shock the conscience.¹¹⁷ This view is in keeping with the decision of Pratte, J. in the Federal Court of Appeal in *Sukhwart Singh v. Minister of Employment and Immigration*,¹¹⁸ where it was held that section 7 of the Charter applied only to deprivation of the rights under that section by Canadian officials applying Canadian law and not to deprivation of those rights by another state's authorities on the return of the extradited person to his or her own country.

Lamer, J. (as he then was), in a separate judgment in *Schmidt*, stipulated that this was so.¹¹⁹ However, he then went on to state that in his view the Charter applies intraterritorially to extradition cases in Canada as a person is one "charged with an offence."¹²⁰ Wilson, J. concurred in the

¹¹⁴ *Ibid.* See also at 527.

¹¹⁵ (1901) 180 U.S. 109. For an analysis of U.S. case law dealing with the rule of non-inquiry, see Quigley, *supra* note 23, at 403-15. M. C. Bassiouni, "Extradition Reform Legislation in the United States, 1981-1983," (1984) 17 Akron L. Rev. 495, 571, has argued that this rule should be eroded in an appropriate case. See also *Gallina v. Fraser*, 177 F. Supp. 856 (D. Conn. 1959), aff'd 278 F. 2d 77 (2d Cir. 1960), cert. den. 364 U.S. 851 (which adds some qualifications based upon procedures and punishment too antipathetic to the court's sense of decency) and *Holmes v. Laird*, 459 F. 2d 1211 (D.C. Cir. 1972), cert. den. 409 U.S. 869. See also *Demjanjuk v. Petrovsky*, 776 F. 2d 571, 583 (6th Cir. 1985) and *Ahmad v. Wigen*, 726 F. Supp. 389 (E.D.N.Y. 1989) (extradition judge should determine whether treatment would violate universally accepted principles of human rights). Note M. C. Bassiouni, "The United States Model," in M. C. Bassiouni (ed.), *International Criminal Law Procedure* 405, 417 (1986).

¹¹⁶ *Ibid.*, 122.

¹¹⁷ *Supra* note 9, at 522.

¹¹⁸ [1983] 2 F.C. 347, 349 (F.C.A.) per Pratte, J.

¹¹⁹ *Ibid.* 530.

¹²⁰ This position is strange as the fugitive has not been charged in Canada but in the foreign state. Wilson, J. had reservations on Lamer, J.'s opinion on this point. See *ibid.*, 535.

unanimous disposition of the appeal in *Schmidt* but could not concur in the reasons of La Forest, J.; she saw no question of applying the Charter extraterritorially, and held that the fugitive can plead the Charter in extradition proceedings.¹²¹ She referred to the *Harbhajan Singh*¹²² case and stressed that it is the process in Canada that must comply with fundamental justice. It cannot be overlooked that in this deportation case Wilson, J. took a contrary approach to the *Sukhuwart Singh*¹²³ decision; although she did not specifically state that she disagreed with the validity of Pratte, J.'s position in that case, her view was described by Rouleau, J. in *Kindler v. MacDonald* as being "at odds with that adopted by the latter, and thus must be considered to strongly imply that the passage quoted can no longer be considered to be good law."¹²⁴

Even though *Harbhajan Singh* concerned deportation from Canada, it is still instructive as the Supreme Court of Canada held there that section 7 applies to everyone who is physically present in Canada. Thus, this case would seem to suggest that the fugitive faced with extradition is entitled to be dealt with in accordance with the principles of fundamental justice when the Minister of Justice deals with the matter. Should the fugitive have grounds for alleging that he or she has not been so treated, for example, that the Minister has not acted reasonably in seeking or getting assurances in satisfactory form pursuant to Article 6 of the Canada-United States Extradition Treaty,¹²⁵ then the *Singh* case coupled with *Operation Dismantle*¹²⁶ will provide grounds for judicial review. The foundation of Wilson, J.'s reasons is that the Charter sections are not being pleaded by the fugitive "as a defence in the projected trial [in the foreign state] but as a defence to the extradition court's grant of an order. . . . [The] argument in a nutshell is that the extradition court would be violating [the Charter] if it made such an order."

121 *Supra* note 9, at 531. Wilson, J. actually used the term "Canadian citizen" rather than "fugitive" but it is suggested that this was because the fugitive, Susan Schmidt, was a Canadian citizen.

122 *Harbhajan Singh v. Minister of Employment and Immigration*, [1985] 1 S.C.R. 177.

123 *Supra* note 118.

124 [1985] 1 F.C. 676, 701 (F.C.T.D.) (dealing with deportation from Canada).

125 *Supra* note 30.

126 *Supra* note 11.

From the case law mentioned above, then, it would appear that the scope of the Charter is viewed in different ways by the justices on the Supreme Court of Canada. La Forest, J. sees Charter rights concerning criminal prosecutions as applying only to criminal prosecutions in Canada; this is evidenced by his opinions in *Schmidt* concerning sections 7 and 11(h) of the Charter,¹²⁷ in *The Republic of Argentina v. Mellino*¹²⁸ concerning sections 7 and 11(b),¹²⁹ and in *United States v. Allard and Charette*¹³⁰ concerning sections 7 and 11(b). It is only in an exceptional case that the Charter should be applied to prevent extradition; his comments on the *Altun*¹³¹ case and the possibility of torture of the fugitive if returned, a situation that would be totally unacceptable, is the only indication from him that in a case with the right facts it may be appropriate to deny extradition.

The issue here is whether the shocking of the conscience test for applying section 7 would be met if the potential penalty in the foreign state were one that has been abolished in Canada. Further, would this test be met if the punishment in point can be classified as cruel and unusual; if it "shocks the communal conscience"?¹³²

Lamer, J. and Wilson, J. would clearly take a different view for different reasons. From the *Singh*¹³³ and *Schmidt*¹³⁴ cases, it is not difficult to surmise that Wilson, J. had difficulty with La Forest, J.'s reasoning that certain Charter provisions do not apply simply because the extradition process in Canada is not a criminal prosecution in Canada. She made the fundamental point that the Charter does apply; it is not extraterritorial application but merely giving effect to it in Canada; the extradition process must conform with the section 7 requirement of fundamental justice; the potential extraditee is classifiable as "everyone" in section 7. Wilson, J. eloquently put the position of the intraterritorial scope of the Charter in this

127 *Re autrefois acquit, autrefois convict.*

128 [1987] 1 S.C.R. 536.

129 Trial within a reasonable period of time.

130 [1987] 1 S.C.R. 564.

131 (1983) 5 E.H.R.R. 611.

132 See *Smith v. R.* (1987), 40 D.L.R. (4d) 435 (S.C.C.), per Wilson, J. See also *Bouthillier v. U.S.A.*, *supra* note 100.

133 *Supra* note 122.

134 *Supra* note 9.

way: "The effect is right here in Canada, in the Canadian proceedings, although it will, of course, have repercussions abroad. . . . If the participation of a Canadian court or the Canadian Government is required in order to facilitate extradition so that suspected criminals may be brought to justice in other countries, it seems to me that we must face up to the question whether such persons have the benefit of the *Charter* or not in the *Canadian proceedings*."¹³⁵

The better view is that the Charter does apply to extradition proceedings and can be pleaded. However, this will depend upon which sections are being invoked. In the case of some provisions, such as those dealing with delay in section 11(b), it would be hard to justify their application when the only delay is that of the foreign authorities.¹³⁶ The object of section 11(b) is to deal with delay caused by Canadian authorities.¹³⁷ Wilson, J. hits the nail on the head when she states in *Mellino*¹³⁸ that to seek to apply section 11(b) would interfere with international comity; Canadian courts should not demand from a foreign government reasons for a delay. Her basic reason was that "an assessment of the reasonableness or otherwise of a delay presupposes the right to demand an explanation for it. If this right is not there, no assessment can be made. It cannot be determined whether the foreign delay was reasonable or not. That delay cannot therefore be considered under s. 11(b)."¹³⁹

This type of analysis is particularly appropriate to the questions being considered in this article, the central issue of which is whether sections 12 and 7 of the Charter may be successfully raised by the fugitive in the death sentence context. One should consider first the overall applicability of the Charter in general terms to extradition cases and then a section-by-section analysis to see if certain sections apply subject to section 1.

¹³⁵ *Ibid.*, 532.

¹³⁶ Note, however, that in *Mellino*, *supra* note 128, at 559, La Mer, J. held that in a preliminary enquiry in Canada s. 11(b) would apply and thus by extension to extradition.

¹³⁷ Wilson, J., *ibid.*, 561.

¹³⁸ *Ibid.*

¹³⁹ *Ibid.*

3. *Section 12 of the Charter*

In the *Soering* case, the European Court, referring to Article 3 of the European Convention dealing with inhuman and degrading treatment, stated that "an individual may not be surrendered out of the protective zone of the Convention without the certainty that the safeguards which he would enjoy are as effective as the Convention standard."¹⁴⁰ The United Kingdom had argued that it could not be responsible for acts occurring outside its territorial jurisdiction regarding Article 3. It argued in particular that it would strain the language of Article 3 in an intolerable fashion to hold that by the surrender of a fugitive the extraditing/requested state has "subjected" her or him to any treatment or punishment in the receiving state.

A number of other arguments of comparative interest to Canada were also presented. Among these of especial note are, first, that to extend the application of Article 3 to the matters encompassed in *Soering* would lead to a conflict with the norms of international judicial process, in the sense that it involves in reality adjudication of the internal affairs of states not parties to the Convention and/or to proceedings before the institutions of the Council of Europe; second, that it would entail grave difficulties of evaluation and proof concerning the system of law of the foreign state and conditions of treatment and punishment there; and third, that there would be a serious risk of harm to the contracting state which "is obliged to harbour the protected person, and leaves criminals untried, at large and unpunished."¹⁴¹

In Canada all these concerns are applicable, as, even though the European conventional obligations are not involved, the Canadian Charter of Rights does give rise to the same issues. Does its section 12 apply directly to an extradition from Canada? The European Court of Human Rights held that "the Convention does not govern the actions of States not Parties to it, nor does it purport to be a means of requiring the Contracting States to impose Convention standards in other states."¹⁴² However, the Court went on to state that "These considera-

¹⁴⁰ *Supra* note 57, para. 82.

¹⁴¹ *Ibid.*, para. 83.

¹⁴² *Ibid.*, para. 86(1).

tions cannot absolve the Contracting Parties from responsibility under Article 3 *for all and any foreseeable consequences of extradition suffered outside their jurisdiction.*"¹⁴³ Just as the European Court in *Soering* held that, in interpreting the European Convention, "regard must be had to its special character as a treaty for the collective enforcement of human rights and fundamental freedoms,"¹⁴⁴ so one can say that the Canadian Charter has the purpose of guaranteeing rights and freedoms in Canada. Both the Convention and the Charter must be interpreted and applied so as to make their safeguards both practical and effective.¹⁴⁵

The European Court held appropriately that it is not normal for the Convention institutions to pronounce on potential violations of the Convention. It is different, however, when an extradition would violate Article 3 by reason of foreseeable consequences in the foreign state. After all, once the person is extradited, there is no going back.

The central issue, of course, is whether the potential of or the carrying out of the death sentence in the foreign state is a violation of the right not to be subjected to cruel or unusual treatment or punishment. This is an extremely difficult question. In *Soering* the European Court did not consider whether the death sentence per se violated this right, but rather viewed the subjection of the fugitive to the so-called "death-row phenomenon" if returned to the United States and sentenced to death, to be the applicable question. The Court was of the view that, under the terms of the Convention, there can be no exceptions made to Article 3 and that no derogation is permissible in time of war or national emergency under Article 15.¹⁴⁶ Thus, Article 3 "enshrines one of the fundamental values of the democratic societies making up the Council of Europe."¹⁴⁷ The right set forth in Article 3 is also contained in Article 7 of the International Covenant on Civil and Political Rights¹⁴⁸ to

¹⁴³ *Ibid.*, para. 86(3) (emphasis added). C. Warbrick, "Coherence and the European Court of Human Rights: The Adjudicative Background to the *Soering* Case," (1990), 11 Mich. J. Int'l L. 1073, 1092 takes the view that this is a negative duty, contingent upon the assessment of the likelihood of damage.

¹⁴⁴ *Ibid.*, para. 87, citing *Ireland v. United Kingdom* (1978), E.C.H.R. Series A, no. 25, at 90, s. 239. See also *The Netherlands v. Short*, *supra* note 63.

¹⁴⁵ *Ibid.*

¹⁴⁶ *Supra* note 57, para. 88.

¹⁴⁷ *Ibid.*

¹⁴⁸ 1976 Can. T.S. no. 47. Note also Art. 6(2) re the death sentence. Note also Art. 5 of

which Canada is a party, in Article 5(2) of the American Convention on Human Rights,¹⁴⁹ and in the United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment¹⁵⁰ which Canada ratified in 1987.

In determining whether the potential punishment is a violation of this fundamental right, it is necessary to look at each case on an individual basis. The protections in both the European Convention and the Canadian Charter are aimed at a balance between the demands of the community interests and the rights of the individual. It is necessary in identifying the circumstances of the case to consider whether it is in the interests of justice to bring the alleged or convicted criminal to justice by extradition and what would be the ramifications of not so doing.¹⁵¹ These factors must be taken into account. Notions of inhuman, cruel, and degrading treatment or punishment cannot be looked at in a vacuum.

In the *Soering* case, the European Court concentrated first on whether *Soering* would run a real risk of being sentenced to death if extradited to Virginia. It was only following an affirmative answer to that question that the Court declared that the actual source of the inhuman or degrading punishment was the subjection to the "death row phenomenon."

In any discussion of what constitutes cruel or ill treatment or punishment, there must be a minimum level of severity. In *Soering* the Court said the assessment of the minimum was relative, depending upon all the circumstances of the case, including the context and nature of the punishment, the manner and method of its execution, its duration, its physical

the Universal Declaration of Human Rights, 1948 UNGA Res. 217 (III), UN Doc. A/810, at 71.

149 OAS Official Records OEA/Ser. K/XVI/1.I, Doc. 65, Rev. 1, CORR. 2, Jan. 7, 1970.

150 Adopted by the UN General Assembly on Dec. 10, 1984, in force on June 26, 1987. Canada ratified it on June 24, 1987, and amended the Criminal Code to ensure compliance: s. 245.4. See Multiculturalism and Citizenship Canada, *Outlawing an Ancient Evil: Torture* (1989). Note the "Soering Understanding" placed by the United States in its ratification indicating that it will not alter U.S. law regarding the death penalty: see S. Exec. Rep. No. 30, 101st Cong. 2d Sess. 36 (1990), 10. See the statement by the U.S. Legal Advisor Sofaer to the Senate Committee on Foreign Relations, discussed in Lillich, *supra* note 64, at 148.

151 *Supra* note 57, para. 89.

or mental effects, and in certain cases the age and mental health of the person.¹⁵² Thus, the Court looked at a variety of factors that, taken together, would constitute cruel and unusual treatment or punishment. However, it must be understood that capital punishment is not prohibited in either the European Convention, the International Covenant on Civil and Political Rights, or the American Convention on Human Rights; all permit deprivation of life in execution of a sentence of a court following conviction of a crime providing for this penalty.¹⁵³ This is clearly the reason that Soering did not argue the violation of Article 3 by the death penalty itself. The Court was satisfied that, although Article 3 could not be interpreted as generally prohibiting the death penalty,¹⁵⁴ it might well be that subsequent practice in national penal policy could be understood as establishing the agreement of the states parties to abrogate the exception in Article 2(1) and thus to remove the limitation on Article 3. Protocol 6 to the European Convention¹⁵⁵ does just this by providing for the abolition of the death penalty in time of peace. It came into force in March 1985 and thirteen states, not including the United Kingdom, have ratified it. Further steps in the same direction have fol-

¹⁵² *Ibid.*, para. 100. See also *Ireland v. The United Kingdom*, Ser. A, no. 25, at 65, s. 162, and the *Tryrer* judgment of Apr. 25, 1978, Ser. A, no. 26, at 14-15, ss. 29 and 30.

¹⁵³ See Art. 2(1) of the European Convention and Article 6 of the Covenant. See also Art. 4(2) & (3) of the American Convention. Note, however, that the Human Rights Committee under the Covenant expressed its opinion that the ultimate aim of the Covenant was the abolition of the death penalty. See M. J. Bossuyt, Special Rapporteur of the Sub-Committee on the Prevention of Discrimination and the Protection of Minorities, "The Administration of Justice and the Human Rights of Detainees: Elaboration of a Second Optional Protocol to the International Covenant on Civil and Political Rights Aiming at the Abolition of the Death Penalty," ECOSOC Doc. E/CN.4/Sub.2/1987/20, June 29, 1987, at 6. For a detailed account of the death penalty in the world and the issues raised by the death penalty, see Bossuyt, *ibid.*, and Amnesty International, *The Death Penalty* (1987) and *When the State Kills* (1989). Also see the Report of the Secretary General of the United Nations on Capital Punishment, ECOSOC Doc. E/1985/43, Apr. 23, 1985.

¹⁵⁴ This interpretation would nullify Art. 2(1), *ibid.*, and would not therefore be in keeping with reading the Convention as a whole and the provisions as in harmony. See *Klass and Others Judgment*, Sept. 6, 1978, Ser. A, no. 28, at 31, s. 68. But note the concurring separate opinion of Judge de Meyer in *Soering* holding that the death penalty does violate European human rights law. See the *Fidan* case, 1987 Recueil Dalloz Sirez Jurisprudence 305 (Conseil d'État).

¹⁵⁵ E.T.S. No. 114. In the *Short* case, *supra* note 63, The Netherlands had ratified Protocol 6.

lowed. The United Nations General Assembly by a narrow vote in December 1989 adopted a Second Optional Protocol to the International Covenant aimed at abolishing the death penalty except during wartime.¹⁵⁶ Canada voted in favour of it.¹⁵⁷ However, both Protocol 6 and the Covenant amendment can only obligate those states that ratify them. They cannot be interpreted as generally applying to all states.

Thus, the position remains that the death sentence under the European, International Covenant, and American Convention systems is not ruled out. This does not mean, however, that the provisions on cruel and inhuman treatment or punishment cannot be raised. The keys to this puzzle must lie in how the sentence is to be imposed or executed, the proportionality of the sentence to the gravity of the crime committed, the conditions of detention before sentence execution, and so on. In *Soering*, the Court's final view was that, based upon the particular facts of the case, the decision by the United Kingdom to return him to the United States where he would face the "death-row phenomenon," constituted a violation of Article 3.¹⁵⁸ In this decision the arguments of *Soering* that were persuasive were that delays in appeal and review procedures in Virginia following a death sentence would expose him to increasing tension and psychological trauma; that his life and mental state would not necessarily be taken into account by the judge or jury in determining sentence; that in the extreme conditions on "death row" in the particular detention centre he would be the victim of violence and sexual abuse because of his age and nationality; and that he would suffer the constant spectre of the death sentence being carried out. *Soering* had also argued that he would not oppose deportation or extradi-

¹⁵⁶ UNGA Res. 44/128 of Jan. 30, 1990, annexing the Resolution on the Protocol, approved Dec. 15, 1989, by a vote of 59 in favour to 26 against with 48 abstentions. It will come into force when 10 states ratify it. Reprinted in 29 Int'l Leg. Mat. 1464 (1990). See also the Protocol to the American Convention on Human Rights to Abolish the Death Penalty, June 8, 1990, in (1990) 29 Int'l Leg. Mat. 1447.

¹⁵⁷ Bossuyt, *supra* note 153, at 27, where he lists the replies of abolitionist states to the proposed Optional Second Protocol. Canada is said to have believed in the merit of the Protocol and "[t]here was no doubt that the United Nations would be honouring human dignity by enshrining the principle of abolition of the death penalty in an international instrument": see *ibid.*, paras. 88 and 137.

¹⁵⁸ *Supra* note 57, para. 105. See Lillich, *supra* note 64, at 141, but also note the views of Quigley and Shank, "Death Row as a Violation of Human Rights: Is it Illegal to Extradite to Virginia?" (1989) 30 Va. J. Int'l L. 241, 270.

tion to the Federal Republic of Germany where the death penalty had been abolished, and that the refusal of the United Kingdom to do so accentuated the disproportionality of the Secretary of State's decision. The United Kingdom's view on this alternative destination had been that it was not material and, moreover, would lead to a double standard whereby a fugitive with an alternate destination would have European Convention protection but others would not.¹⁵⁹ The Court found this argument to have weight. However, it concluded that sending Soering to Germany would remove the danger of him going unprosecuted and punished, and also protect him from the "intense and protracted suffering on death row."¹⁶⁰ On this basis the Court held that the alternative destination was one factor applicable to the overall fair balance of interests and to the proportionality of the United Kingdom's contested extradition decision.¹⁶¹

For all of these reasons, the unanimous conclusion of the European Court was that extradition to the United States would expose Soering to a real risk of treatment that would go beyond the threshold set in Article 3. The alternative destination was a consideration that played a vital part in that decision, since the legitimate purpose of extradition for the horrible murders with which Soering was charged could be achieved by other means.

This decision will be instructive to the Supreme Court of Canada as it deals with the issues that doubtless will be raised in the extradition reference. At the outset, *Soering* must be distinguished from *Kindler* and *Ng* in that Canada has no alternative destination to send them to; there are no other states claiming legitimate bases of jurisdiction over their offences and seeking extradition. Canada cannot prosecute pursuant to section 6(2) of the Canadian Criminal Code since the offences were committed *in toto* outside of Canada and do not fall within any of the extraterritorial bases of jurisdiction exceptions in the Code. This must weigh heavily in the pro-

159 Para. 110.

160 *Ibid.*

161 *Ibid.* Note Short, *supra* note 63, at 1380, for a discussion of the secondary line of jurisdiction that The Netherlands had over the alleged murder, again an alternative to extradition to the U.S., the state with primary jurisdiction under Art. 7 of the NATO Status of Forces Treaty.

portionality and reasonableness of the Minister's decision. Deportation to the United States would also, of course, be ruled out if it were being used as a disguised form of extradition.¹⁶²

Of the two cases, only *Kindler* has analysed section 12 of the Charter. Following the Minister of Justice's decision to extradite without seeking assurances on January 17, 1986, Kindler applied under section 18 of the Federal Court Act¹⁶³ to the Federal Court, Trial Division, to review the decision. The Trial Division¹⁶⁴ dismissed the application and held, *inter alia*, that the question whether the death sentence constitutes cruel and unusual punishment was not an argument to be ruled on at that point, even though Rouleau, J. held that it might find its way before the courts further down the line. The Appeal Division¹⁶⁵ dealt with two issues which looked at the scope of section 12 and whether the death penalty per se constitutes cruel and unusual punishment. Mr. Justice Pratte stated:

I find it impossible to say that the death penalty is, in itself, a cruel and unusual punishment that is forbidden by section 12 of the Charter. . . . Section 12. . . limits the freedom of action of Canadian authorities but does not govern the actions of foreign countries. In deciding to surrender a fugitive to a foreign country for trial and punishment in accordance with its laws for an offence committed there, the Canadian Minister of Justice cannot be said, in my view, to subject the fugitive to any cruel and unusual punishment or treatment.¹⁶⁶

He went on to provide further that this would be the case even when the fugitive could be subjected to cruel and unusual punishment, as there the objectionable punishment would be imposed by the foreign country and not by Canada.¹⁶⁷

This latter statement seems to be out of harmony with even La Forest, J.'s views as expressed in *Schmidt* and *Mellino* to

¹⁶² See *Regina v. Governor of Brixton Prison, ex parte Soblen*, [1963] 2 Q.B. 243 (C.A.); *Moore v. Minister of Manpower and Immigration*, [1968] S.C.R. 839; *Kindler v. Flora MacDonald*, [1985] 1 F.C. 676 (F.C.T.D.).

¹⁶³ R.S.C. 1985, c.F7.

¹⁶⁴ *Kindler v. Crosbie, Attorney-General of Canada*, [1987] 2 F.C. 145.

¹⁶⁵ *Kindler v. Crosbie, Minister of Justice, Attorney-General of Canada*, [1989] 2 F.C. 492 (F.C.A.).

¹⁶⁶ *Ibid.*, 498-99.

¹⁶⁷ *Ibid.*, 499.

the effect that the nature of criminal penalties in the foreign country may shock the conscience or be unacceptable and be tied into section 7 of the *Charter*. Apart from this, Pratte, J.'s finding that the death sentence is not a violation of Section 12 of the *Charter* is the important segment with regard to the previous discussion here. Marceau, J. agreed with Pratte, J. in denying the appeal and held that "it cannot be said that capital punishment, however imposed and for whatever crime, is inevitably cruel and unusual within the meaning of section 12. . . ." ¹⁶⁸ He referred to *Miller et al. v. The Queen* ¹⁶⁹ where the Supreme Court of Canada held that the death penalty provision, which had until shortly before been in the Criminal Code, ¹⁷⁰ did not constitute cruel and unusual punishment contrary to paragraph 2(b) of the Canadian Bill of Rights. ¹⁷¹ He cogently capsulized the basic notion to which the phrase refers as follows:

a punishment may be cruel and unusual, either because the unnecessary infliction of pain or degradation it involves makes it inherently and absolutely so, or else because its disproportion to the gravity of the crime committed makes it become so. Capital punishment is not more inherently cruel and unusual today than it was twelve years ago: there is no more unavoidable infliction of pain involved. And I do not think that society's standards of decency have evolved in the interim to the point where capital punishment would not appear disproportionate to the gravity of any crime, however revolting and outrageous. ¹⁷²

Marceau, J. referred to the vote taken in the House of Commons on June 29, 1987, to reinstate the death penalty in Canada, which has been abolished in 1976. ¹⁷³ The vote was 148 against reinstatement to 127 in favour. He did not take this majority vote to mean, however, that capital punishment is now seen as "an outrage to the public conscience or as a degradation to human dignity." ¹⁷⁴ His view was that the simple fact

¹⁶⁸ *Ibid.*, 500.

¹⁶⁹ [1977] 2 S.C.R. 680.

¹⁷⁰ R.S.C. 1970, c. C-34.

¹⁷¹ R.S.C. 1970, Appendix III.

¹⁷² *Supra* note 164, 15 500-1. In *Smith v. The Queen*, (1987), 34 C.C.C. (3d) 97, 141, Lamer, J. held that section 12 is only concerned with the *effect* of a punishment and the process by which it is imposed is not of great relevance.

¹⁷³ S.C. 1974-75-76, c. 105, s. 5. The death penalty had not been used since 1962.

¹⁷⁴ *Supra* note 164, at 500-1.

that the vote was taken attests to the contrary. The majority vote indicated to him that the view was that the death penalty was beyond what was necessary to achieve the goals that criminal punishment seeks in Canada, with a consideration that possible alternatives existed; also that there was a profound depth of belief and feeling that retribution instincts should be controlled and less irreversible means found to protect society from dangerous criminal offenders. He felt that there was a gap between these rationalizations which are based on moral values and beliefs and on an educated evaluation of the collective good, and "an acknowledgement to be given constitutional entrenchment, that any criminal, whatever his crime, has a fundamental right not to suffer the death penalty."¹⁷⁵

Both Pratte, J. and Marceau, J. dealt with the death sentence per se; they did not address the death row phenomenon question.¹⁷⁶ The former, however, is the harder issue and was the one the European Court did not address. Marceau, J. acknowledged that the means by which the sentence is to be carried out or its disproportionality to the gravity of the crime involved may render the death sentence in certain cases contrary "to our notions of decency and therefore in direct conflict with the prescriptions of the Charter."¹⁷⁷

Hugessen, J., dissenting, took a similar approach to that of Wilson, J. in *Schmidt* with regard to the application of the Charter. He held that extradition involves the application of Canadian law, treaties forming an integral part thereof. Thus, the Canadian government and the courts cannot "turn a blind eye to what is going to happen once the fugitive is surrendered."¹⁷⁸ With respect to section 12, he was of the view that contemporary Canadian society views the death sentence as unacceptable.¹⁷⁹

¹⁷⁵ *Ibid.*

¹⁷⁶ The Privy Council has addressed the matter of delay in executing the death penalty (unsuccessfully for applicants) in *Abbott v. Att. Gen. for Trinidad and Tobago*, [1979] 1 W.L.R. 1342, and *Riley v. Att. Gen. of Jamaica*, [1982] 1 W.L.R. 557; 3 All E.R. 469. See also D. Pannick, *Judicial Review of the Death Penalty* C. 4 (1982). The "delay in execution" argument must be read in the light of the fact that it results from the rights of review of the individual: see *Richmond v. Lewis* (9th Cir. U.S. C.A., Dec. 26, 1990, unreported) and the European Commission's Report, *supra* note 93 in Soering.

¹⁷⁷ *Supra* note 164, at 502.

¹⁷⁸ *Ibid.*, 506.

¹⁷⁹ *Ibid.*, 508.

It is worthwhile noting that in 1987 the Supreme Court of Canada in *Smith v. The Queen*¹⁸⁰ struck down the imposition in section 5(2) of the Narcotic Control Act¹⁸¹ of a seven-year minimum term of imprisonment for importing narcotics, as being contrary to section 12 of the Charter. The term was viewed as qualitatively acceptable but quantitatively grossly disproportionate. Lamer, J. (as he then was), with whom the other justices agreed, made it clear that some categories of punishment are just unacceptable as they will "outrage our standards of decency."¹⁸² The criteria enunciated by Lamer, J. may well prelude his analysis of the death penalty/extradition matter. He there stated that "[T]he determination of whether the punishment is necessary to achieve a valid penal purpose, whether it is founded on recognized sentencing principles, and whether there exist valid alternatives to the punishment imposed, are all guidelines, which without being determinative in themselves, help to assess whether the punishment is grossly disproportionate."¹⁸³

The basis for this type of balancing can be found in the case of *R. v. Miller and Cockriell*¹⁸⁴ where McIntyre, J.A. held in dissent in the British Columbia Court of Appeal that it was not permissible to impose a sentence with no value because it neither protected society by deterring criminal behaviour nor served another social purpose. A punishment without these attributes, in his view, would be cruel and unusual. Although this case dealt with the death sentence in Canada, its passages are apposite to the present discussion. In McIntyre, J.'s view, capital punishment fails to acquire the justification of deterrent effect and that "it would be cruel and unusual to impose the ultimate penalty on the mere chance that it may have a deterrent effect."

Hugessen, J. in *Kindler* held that the only penal purpose being served by the imposition of the death penalty was the incapacitation of the executed criminal. He found this as

180 (1987), 34 C.C.C. (3d) 97; [1987] 1 S.C.R. 1045.

181 R.S.C. 1970, c. N-1.

182 *Supra* note 180, at 1073-74. Referring as examples to corporal punishment, lobotomization, and castration.

183 *Ibid.*, 1074. See also *Bouthillier v. U.S.A.*, *supra* note 100.

184 (1975), 63 D.L.R. (3d) 193 (B.C.C.A.). See also his judgment in *R. v. Smith*, *supra* note 179, in dissent, 103-23.

unacceptable as the use of punishment practices in some states, for example, cutting off the hand of a thief. Thus, his final position was that, as a valid and acceptable alternative is present (presumably assurances being given), the death sentence has no merit and is grossly disproportionate.

Both McIntyre, J. and Hugessen, J. in their respective cases were in dissent. In *Miller*, the Supreme Court of Canada did not find favour with McIntyre, J.'s view.¹⁸⁵ Rather it affirmed that the Bill of Rights did not confer new rights and could not have the effect of abolishing capital punishment. The Court said little about the actual meaning of cruel and unusual punishment.¹⁸⁶

There have been numerous cases in the United States dealing with this issue. In *Gregg v. Georgia*¹⁸⁷ the United States Supreme Court held that the death penalty per se did not constitute cruel and unusual punishment contrary to the Eighth Amendment of the United States Constitution. More recently in *South Carolina v. Gathers*¹⁸⁸ the Supreme Court held that for the purposes of imposing the death penalty, the defendant's punishment must be tailored to his or her personal responsibility and moral guilt.

The Supreme Court of Canada will have to face section 12 head on in the "death sentence reference." Is it directly applicable or can it only be looked at in conjunction with section 7? If found to be directly applicable, will the Court address the question whether the death penalty is cruel and unusual per se, or will it dispose of the case on the basis of whether the position of the convicted person on death row for an undetermined period of time with all its psychological and physical

185 [1977] 2 S.C.R. 680, a pre-abolition case. Laskin, C.J. did conclude that the death penalty did not constitute cruel and unusual punishment within para. 2(b) of the Bill of Rights.

186 See *Smith*, *supra* note 180, at 135 (C.C.C.). For a synthesis of the criteria used by a minority of the judges, see W. Tarnopolsky (as he then was), "Just Desserts or Cruel and Unusual Treatment or Punishment?: Where Do We Look for Guidance?" (1978) 10 Ottawa L. Rev. 1, 32-33. See also *Re Mitchell and The Queen* (1983), 6 C.C.C. (3d) 193 (Ont. H.C.) and other cases referred to in *Smith*, *supra* note 179, at 135-37.

187 428 U.S. 156 (1976). Note that 37 states in the United States permit capital punishment. See *Furman v. Georgia*, 408 U.S. 238 (1972) and *Stanford v. Kentucky* 109 S. Ct. 2969 (1989). Also Bassiouni, Lahey, and Sang, "La Peine de mort aux États-Unis: L'État de la question en 1972," (1973) 1 Revue de Science Criminelle et le Droit Comparé 23.

188 109 S. Ct. 2207 (1989).

ramifications, in and of itself constitutes cruel and unusual punishment or treatment?

Undoubtedly, it will be argued by the requesting state that any cruel or unusual treatment or punishment will occur outside of Canada, if at all, and therefore that section 12 does not apply. This argument will go against the grain of the European Court of Human Rights decision in *Soering*.

Should section 12 be found to apply directly and be *prima facie* violated by future imposition of the death sentence, then on the basis of *Smith v. The Queen* it will be on account of gross disproportionality.¹⁸⁹ As has been expounded on many occasions by the Supreme Court of Canada, in a case of violation of a Charter right the burden lies upon the authority in question "to salvage the legislative provision"¹⁹⁰ by showing that it is justified under section 1 of the Charter.¹⁹¹ The criteria set out by Dickson, C.J. in *R. v. Oakes*¹⁹² must be met to discharge this burden. The objective must be of sufficient importance to warrant overriding the Charter right. Clearly the Supreme Court has recognized this with respect to extradition in *U.S.A. v. Cotroni and El Zein*.¹⁹³ However, the party invoking section 1 must then show that there is proportionality between the measures adopted and the objective in question; that the means impair "as little as possible" the right of freedom; and lastly, that there is proportionality between the effects of the measures and the objective.¹⁹⁴

Le Dain, J. and McIntyre, J. in *Smith* held that once section 12 is *prima facie* violated, it cannot be saved by section 1; this was also the approach in the dissent of Hugessen, J. in *Kindler*.¹⁹⁵ This view of the absolute nature of section 12 is in error. There is no non-derogation provision in the Charter; the rights contained in it are not absolute, but are to be evaluated in the light of section 1.

189 *Supra* note 180, at 139 (per Lamer, J.).

190 *Ibid.*, 144.

191 For such an analysis by this writer, see Castel and Williams, *supra* note 68. Section 1 provides: "The *Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society."

192 [1986] 1 S.C.R. 103 at 138.

193 [1989] 1 S.C.R. 1469.

194 *Supra* note 192, at 139.

195 *Supra*, note 180, at 149 (Le Dain) and 105-6 (McIntyre).

If, however, the Supreme Court of Canada in the death sentence reference takes the view that section 12 of the Charter is not directly applicable, as the treatment and punishment will occur abroad, that section will be relevant to a determination of the applicability of section 7. In *R. v. Herbert*, the Supreme Court of Canada held that “[T]he scope of a fundamental principle of justice under s. 7 cannot be defined without reference to the other rights enunciated in [the portion of the *Charter* dealing with legal rights.]”¹⁹⁶

4. *Section 7 of the Charter*

It is clear from the extradition cases decided since the enactment of the Charter that the decision of the Minister of Justice to surrender the fugitive must conform with section 7 and thus the principles of fundamental justice.¹⁹⁷ This raises the question of the reasonableness of the Minister of Justice’s decision in not asking for assurances or accepting insufficient assurances as to the death penalty. In both the *Kindler* and *Ng* cases, no assurances were asked for. Was this in keeping with the principles of fundamental justice?

Section 7 in its own terms is not absolute, having qualifying words. Life, liberty, and security of the person are rights, but the implication is that they may be derogated from if doing so is in accordance with the principles of fundamental justice. The extradition to a state that retains the death penalty is thus not automatically ruled out. In assessing whether the principles of fundamental justice have been complied with by the Minister of Justice in deciding to extradite without seeking assurances, the Supreme Court of Canada in the extradition reference will have to look at three interconnected issues. First, how is it to be determined that the Minister of Justice acted fairly and reasonably in exercising his or her discretion to extradite? Second, if section 12 is *prima facie* violated, will this result in a breach of the principles of fundamental justice if extradition occurs? Third, in such an event, will section 1 operate to allow the extradition?

¹⁹⁶ [1990] 2 S.C.R. 151, 176 (per MacLachlin, J.). See also *Re B.C. Motor Vehicle Act*, [1985] 2 S.C.R. 486, 502 (per Lamer, J.).

¹⁹⁷ See, e.g., *Schmidt*, *supra* note 9; *Mellino*, *supra* note 128; and *Allard and Charette*, *supra* note 111.

As to the first issue, the Federal Court, Trial Division, in *Kindler* held that the decision of the Minister was an administrative decision involving an exercise of discretion and that naturally this was subject to the requirements of natural justice.¹⁹⁸ Rouleau, J. agreed with the submissions of counsel for the Minister that "the object of the *Extradition Act* is to provide for the return of fugitive offenders to the country in which the offence was committed. . . . The courts have recognized the broad nature of [the Minister's] discretion."¹⁹⁹

Rouleau, J. adroitly summed up the duty incumbent upon the Minister to act fairly by referring to *Nicholson v. Haldimand-Norfolk Regional Board of Commissioners of Police*²⁰⁰ in which the Supreme Court of Canada emphasized that one of the essential components of the duty to act fairly is the disclosure of the grounds upon which an adverse decision is made. He stated that if the decision required the exercise of a discretion, the reasons given should demonstrate two things: first, that the decisionmaker recognized that there was a choice and, second, the factors considered in making the choice.²⁰¹ But his conclusion was that balanced against these requirements is the practical notion that it would be an unjustifiable burden to place a requirement of "elaborate and overly-scrupulous reasons."²⁰² The Minister's decision must fairly and accurately assess the situation both from the fugitive's perspective and also from that of the Canadian public interest. In *Re Idziak and Minister of Justice (No. 2)*,²⁰³ Doherty, J. held that the standard adopted by Rouleau, J. in *Kindler* was correct and was met in *Idziak*, the manner in which the Minister of Justice reached his decision being in accordance with the principles of fundamental justice.

This discretion of the Minister under Article 6 of the Extradition Treaty with the United States is an administrative discretion and subject to the control that the judiciary exercises over the executive;²⁰⁴ the Minister of Justice must act lawfully

198 [1987] F.C. 145, 155.

199 *Ibid.*, 156.

200 [1979] 1 S.C.R. 311.

201 *Supra* note 198, at 154.

202 *Ibid.*

203 (1989), 53 C.C.C. (3d) (Ont. H.C.), aff'd (1990), 72 O.R. (2d) 480 (Ont. C.A.).

204 *Supra* note 198, at 155.

and fairly. In order to determine this, it is necessary to look at the Extradition Act and its scope and object.²⁰⁵ The Minister's discretion only arises after the courts have committed the fugitives for the purposes of surrender.²⁰⁶ Rouleau, J. in *Kindler* held that "in the absence of a blatant error in law going to jurisdiction, a court should not review a decision of this nature on its merits."²⁰⁷

Specifically concerning Article 6 he went on to state that "the decision of the Minister is essentially a policy one and the determination of whether assurances should be sought from the United States is a matter wholly within the Minister's discretion."²⁰⁸ Furthermore, he stated that the Minister had had regard to Canadian public interests in that the government wished to discourage fugitives from seeking refuge in Canada. This policy decision in his view was not "an error of law."²⁰⁹ It is worth mentioning at this juncture that this "discouragement" is necessary as Canada employs a basically territorial approach to criminal jurisdiction over the offence as encapsulated in section 6(2) of the Canadian Criminal Code. Thus, unless the Code were to be amended to allow for prosecution in Canada, on other bases than the territorial principle as interpreted in *R. v. Libman*,²¹⁰ Canada would be in an impossible position. Rouleau, J. was satisfied that the fugitive *Kindler* had "been availed of all the fairness to which he was entitled."²¹¹ He felt that the Minister had reached a rational conclusion.

The Federal Court of Appeal also dealt with this same issue. Pratte, J. held that since the decision of the Supreme Court of Canada in *Re B.C. Motor Vehicle Act*,²¹² the section 7 reference to the principles of fundamental justice did not apply only to rules of procedure; thus, a decision that is in accord with all rules of procedure may still violate the principles of fundamental justice. The question is simply put. Is the exercise of

205 *Ibid.*, 156.

206 See *Re Federal Republic of Germany and Rauca* (1983), 41 O.R. (2d) 225, 241 (Ont. C.A.).

207 *Supra* note 198 at 156.

208 *Ibid.*, 157.

209 *Ibid.*, 157.

210 [1985] 2 S.C.R. 178 (S.C.C.).

211 *Ibid.*

212 [1985] 2 S.C.R. 486.

the discretion fundamentally unjust? Pratte, J. referred to the judgment of La Forest, J. in *Schmidt* and stated that "a ministerial decision to surrender a fugitive to a country where he could be tortured could be said to be fundamentally unjust and violate section 7."²¹³ Pratte, J.'s view was that the decision to extradite Kindler was not fundamentally unjust for the reason that deprivation of the right to life is not in itself contrary to the principles of fundamental justice, as section 7 expressly recognizes.

Marceau, J. took the position that the duty to seek assurances under Article 6 of the Treaty could only be turned into a compulsory duty rather than a discretion if the death sentence per se was a cruel and unusual punishment within section 12. He also alluded to the statement of La Forest, J. in *Allard and Charette*²¹⁴ where he discussed the right of the courts to review the Minister's decision by virtue of their role under the Charter but warned of exercise of this function with caution, saying that "Our international obligations are involved here and the executive obviously has the primary responsibility in this area."²¹⁵ Marceau, J. concluded his judgment by assessing the impact of the Supreme Court of Canada's trilogy and stated that he thought that the various statements as to "caution" by the courts and the "pre-eminent position" of the executive and so on mean that "for the Court to intervene, it does not suffice that the situation facing the fugitive in his country would not be in full accordance with the prescriptions of the Charter. . . . It would be necessary that the situation 'sufficiently shocks the conscience' (*Schmidt*) and be 'simply unacceptable' (*Allard*) regardless of the Canadian context."²¹⁶ Thus, he too concluded that the Minister will be forced to refuse surrender only if the punishment or treatment to which the fugitive is likely to be subjected on return is "inherently and absolutely contrary to section 12."²¹⁶ Otherwise, it is within the assessment and discretion of the Minister based on the Canadian context and circumstances of the foreign country.

The big question that the Supreme Court of Canada will be

²¹³ *Supra* note 118, at 498.

²¹⁴ *Supra* note 111, at 572-73.

²¹⁵ *Ibid.*

²¹⁶ *Ibid.*, 503. Citations omitted.

²¹⁷ *Ibid.*, 504.

facing on the death sentence reference is the nature of the judicial review of the Minister's discretionary power under the Extradition Act in conjunction with Article 6 of the Treaty. There are British cases that add some insight into such review. In *Council of Civil Service Unions and Others v. Minister for the Civil Service*,²¹⁸ Lord Diplock classified three grounds upon which an administrative decision may be impugned: illegality, irrationality, and procedural impropriety.²¹⁹ Left open were other grounds of judicial review, the most likely next on the agenda being proportionality.

"Irrationality" according to Lord Diplock was most succinctly articulated in *Associated Provincial Picture Houses Ltd. v. Wednesbury Corporation*.²²⁰ The so-called Wednesbury principles of reasonableness must be utilized. In extradition matters, the test would be that a reasonable Minister of Justice could not have made the order to extradite in such circumstances. The question may be asked whether the Minister considered all relevant factors.²²¹ In *Council of Civil Service Unions*, Lord Diplock stated that "It applies to a decision which is so outrageous in its defiance of logic or accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it."²²²

In *Bugdaycay v. Secretary of State for the Home Department*,²²³ an immigration case dealing with a claim to asylum, Lord Bridge of Harwich did acknowledge the limitations of the *Wednesbury* principles, but went on to add that the court in reviewing an administrative decision must be able to subject it to the most rigorous examination "to ensure that it is in no way flawed, according to the gravity of the issue which the decision determines."²²⁴ He emphasized that "The most fundamental of all human rights is the individual's right to life and, when an administrative decision under challenge is said to be one which may put the applicant's life at risk, the basis of the decision must surely call for the most anxious scrutiny."²²⁵

218 [1984] 3 All E.R. 935 (H.L.).

219 *Ibid.*, 950-51.

220 [1948] 1 K.B. 223 (C.A.), per Lord Greene, M.R.

221 N. Price, "Human Rights, Death Row and Administrative Law Remedies," (1985) 34 Int'l & Comp. L.Q.

222 *Supra* note 82 at 950-51.

223 [1987] 1 All E.R. 840, 852.

224 *Ibid.*, 952.

225 *Ibid.* See also Lord Templeman at 956 in the same vein. As to judicial review of

It is clear that these English cases spell out something that is quite fundamental to the issue being discussed, that is, that a fugitive should not be extradited without assurances being given on the non-application of the death penalty unless the Minister is able to rationalize his or her decision, based on all pertinent factors. It seems particularly appropriate that the inability to extradite Ng and also Kindler to any other abolitionist state and also the inability to prosecute them in Canada weigh heavily in this determination.

Concerning the second issue, the previous analysis of section 12 is pertinent. If section 12 is not directly applicable because the treatment or punishment will occur abroad, can it still play a part in assessing the reasonableness of the decision to extradite and assist in looking at section 7? As was indicated earlier in assessing whether or not the death penalty is cruel and unusual treatment or punishment, the *Smith*²²⁶ case seems of great assistance. Is the death sentence grossly disproportionate? Also as was stated by La Forest, J. in *Allard*,²²⁷ would the fugitive face a totally unacceptable situation in the foreign state or, as he held in *Schmidt*,²²⁸ do the criminal penalties or procedures in the requesting state sufficiently shock the conscience so as to result in a violation of section 7? In *Re B.C. Motor Vehicle Act*, Lamer, J. held that the Charter rights contained in sections 8 to 14 "address specific deprivations of the right to life, liberty and security of the person in breach of the principles of fundamental justice"²²⁹ and as such are violations of section 7.

If the death penalty is categorized as punishment in accordance with the law of the requesting state and not necessarily cruel and unusual, this will be a crucial finding.

It must be recalled that neither the European Convention nor the International Covenant prohibit the death sentence per se, but only cruel and unusual punishment. It is only if the

the Australian Attorney General's decision to extradite, see *Hempel and Etheridge v. A.G.*, [1987] 29 A. Crim. R. 133 (F.C.).

²²⁶ *Supra*, note 180. See also *Bouthillier v. U.S.A.*, *supra* note 100, where in *obiter dicta* Pinard, J. discusses ss. 7 and 12 of the Charter in relation to the extradition when there is a mandatory minimum punishment.

²²⁷ *Supra* note 111, at 572.

²²⁸ *Supra* note 9, at 521

²²⁹ [1985] 2 S.C.R. 486, 502.

two are equated that there is a violation of section 7. The Supreme Court of Canada has been willing to look to these international instruments for assistance in interpreting the Charter.²³⁰ Thus the differentiation in the Covenant, to which Canada is a party, between the prohibition of cruel, inhuman, and degrading treatment or punishment in Article 7 and the allowance in Article 6(2) of the death penalty for the most serious crimes must not be forgotten. As to the Covenant itself, the United Nations Committee on Human Rights considered in *Pratt and Morgan v. Jamaica*²³¹ whether capital punishment is a violation of section 6(2) and concluded that it did not. Neither is such a sentence torture within the definition contained in Article 1(1) of the Torture Convention.

CONCLUSION

It is difficult for many people when faced with a convicted murderer or an alleged murderer, especially where a *prima facie* case is readily available, to debate this issue of extradition or not. But several matters must be faced head on. The Minister of Justice must exercise his or her discretion under section 25 reasonably. Considerations that will play a part are, *inter alia*, from the international co-operation side, the need to honour Canada's international treaty obligations. From the Canadian perspective, it must be emphasized that with respect to Ng and Kindler there is no alternative extradition destination. Deportation too may prove impossible; certainly, this would be the case if the fugitive were a Canadian citizen. Further, prosecution in Canada is restricted by the territorial parameters of the Criminal code. The Minister's decision to surrender must look at the overall Canadian context and the public interest, as well as the circumstances in the foreign state.

If the Supreme Court of Canada holds that extradition is not reasonable in the circumstances of the case if assurances are

²³⁰ E.g., *Smith*, *supra* note 180; *Slight Commission Inc. v. Davidson*, [1989] 1 S.C.R. 1038, 1056-57, per Dickson, C.J. See also W. A. Schabas, *International Human Rights Law and the Canadian Charter* (1991).

²³¹ Communications Nos. 210/1986 and 225/1987 (Apr. 6, 1989) in Report of the Human Rights Committee, UN General Assembly, Off. Rec. 44th Session, Supp. No. (A/44/40), at 231, para. 215.

not given, then Canada is faced with two options. The first is to do what the United Kingdom did in *Soering* following the European Court's decision;²³² it got United States agreement that it would prosecute Soering only on the non-capital charges, with the result that if found guilty he would face a maximum penalty of life imprisonment without the possibility of parole. If the United States does indeed want persons for the purposes of prosecution this procedure is a possibility and Canada must indicate this. Second, Canada could amend the Criminal Code to provide for prosecution in Canada in those cases of capital murder magnitude where extradition is not possible. No matter where an individual stands on moral or religious grounds on the death penalty issue, a solution along one or other of the following lines would prove acceptable. It would also be in accord with the maxim *aut dedere, aut judicare* (extradite or prosecute).

A dangerous option to both individual human rights and state sovereignty remains, namely that of forcibly returning the fugitive by illegal means outside the extradition process.²³³ If extradition becomes impossible, will there be an increase in kidnappings in Canada and forcible returns to the United States?²³⁴ It is shortsighted not to envisage these possibilities, as United States law enforcement officers or private bounty hunters have not hesitated even in recent times to operate beyond the orders of their own country, and the United States

²³² This compromise was also the approach suggested by The Netherlands Supreme Court in the *Short* case, *supra* note 63. In November 1990, the United States agreed that the death penalty would not be requested and Short was extradited.

²³³ See S. A. Williams, "Comment on Unlawful Arrest and Return," (1975) 53 Can. Bar Rev. 404; F. A. Mann, "Reflections on the Prosecution of Persons Abducted in Breach of International Law," in *International Law at a Time of Perplexity* (ed. Y. Dinstein, 1989), reprinted in F. A. Mann, *Further Studies in International Law* 339 (1990); and A. F. Lowenfeld, "U.S. Law Enforcement Abroad: The Constitution and International Law, Continued," (1990) 84 Am. J. Int'l. L. 444 and "Kidnapping by Government Order: A Follow Up," (1990) 84 Am. J. Int'l. L. 712. Note the cases of *Ker v. Illinois*, 119 U.S. 436, 7 S. Ct. 225 (1886); *Frisbie v. Collins*, 342 U.S. 519, 72 S. Ct. 509 (1952); *U.S. v. Toscanino*, 500 F. 2d 267 (U.S.C.A. 2d Cir. 1974); *U.S. v. Herrera*, 504 F. 2d 859 (U.S.C.A. 2d Cir. 1974); *U.S. ex rel Lujan v. Gengler*, 510 F. 2d 62 (U.S.C.A. 2d Cir. 1979); *U.S. v. Lira*, 515 F. 2d 68 (U.S.C.A. 2d Cir. 1975). See also the recent cases of *U.S. v. Yunis*, 681 F. Supp. 909 (D.D.C. 1988); *Matta-Ballesteros ex rel Stolar v. Henman*, 697 F. Supp. 1036 (S.D. Ill. 1988), *aff'd* 896 F. 2d 255 (7th Cir. 1990), and *U.S. v. Verdugo-Urquidez*, 856 F. 2d 1214 (9th Cir. 1988), *cert. granted*, 109 S. Ct. 1741 (1989).

²³⁴ See C. Van den Wyngaert, "Applying Human Rights to Extradition: Opening Pandora's Box?," *Revue Internationale de Droit Pénal* (forthcoming).

courts have not relinquished jurisdiction²³⁵ over the trial of the cases on account of the manner in which the accused was brought before them.

²³⁵ Based upon *U.S. v. Toscanino*, *supra* note 233, this seemed a possibility. However, initial optimism concerning this case was ill-founded.

Sommaire

L'Extradition à un état qui impose la peine de mort

L'auteur examine la question de la peine de mort dans le contexte de l'extradition à la lumière des articles 7 et 12 de la Charte canadienne des droits et libertés. Quels sont les options du Canada si l'on tient compte de la décision de la Cour européenne de Justice dans l'affaire Soering?