Kindler *v.* Canada (Minister of Justice), [1991] 2 S.C.R. 779

Joseph John Kindler *Appellant*

v.

Mr. John Crosbie, Minister of Justice and Attorney General of Canada *Respondent*

and

Amnesty International *Intervener*

Indexed as: Kindler *v.* Canada (Minister of Justice)

File No.: 21321.

1991: February 21; 1991: September 26.

Present: Lamer C.J. and La Forest, L'Heureux-Dubé, Sopinka, Gonthier, Cory and McLachlin JJ.

on appeal from the federal court of appeal

Constitutional law -- Charter of Rights -- Fundamental justice -- Extradition -- Surrender of fugitive to foreign state -- Fugitive convicted of murder in U.S. -- Minister of Justice deciding to extradite fugitive without obtaining

assurances from U.S. authorities that death penalty will not be imposed -- Whether Minister's decision infringed s. 7 of Canadian Charter of Rights and Freedoms -- Whether s. 25 of Extradition Act infringes s. 7 of Charter -- Extradition Act, R.S.C., 1985, c. E-23, s. 25 -- Extradition Treaty between Canada and the United States of America, Can. T.S. 1976 No. 3, Art. 6.

Constitutional law -- Charter of Rights -- Cruel and unusual punishment -- Extradition -- Surrender of fugitive to foreign state -- Fugitive convicted of murder in U.S. -- Minister of Justice deciding to extradite fugitive without obtaining assurances from U.S. authorities that death penalty will not be imposed -- Whether s. 12 of Canadian Charter of Rights and Freedoms applies to extradition proceedings -- Extradition Act, R.S.C., 1985, c. E-23, s. 25 -- Extradition Treaty between Canada and the United States of America, Can. T.S. 1976 No. 3, Art. 6.

Extradition -- Surrender of fugitive to foreign state -- Fugitive convicted of murder in U.S. -- Minister of Justice deciding to extradite fugitive without obtaining assurances from U.S. authorities that death penalty will not be imposed -- Whether Minister's decision infringed s. 7 or s. 12 of Canadian Charter of Rights and Freedoms -- Extradition Act, R.S.C., 1985, c. E-23, s. 25 -- Extradition Treaty between Canada and the United States of America, Can. T.S. 1976 No. 3, Art. 6.

Administrative law -- Natural justice -- Extradition -- Minister's decision to surrender fugitive made without oral hearing -- Whether requirements of natural justice complied with -- Extradition Act, R.S.C., 1985, c. E-23, s. 25.

The appellant was found guilty of first degree murder, conspiracy to commit murder and kidnapping in the State of Pennsylvania and the jury recommended the imposition of the death penalty. Before he was sentenced, the appellant escaped from prison and fled to Canada where he was arrested. After a hearing, the extradition judge allowed the U.S.'s application for his extradition and committed the appellant to custody. The Minister of Justice of Canada, after reviewing the material supplied by the appellant, ordered his extradition pursuant to s. 25 of the *Extradition Act* without seeking assurances from the U.S., under Art. 6 of the Extradition Treaty between the two countries, that the death penalty would not be imposed or, if imposed, not carried out. Both the Trial Division and the Court of Appeal of the Federal Court dismissed appellant's application to review the Minister's decision. This appeal is to determine whether the Minister's decision to surrender the appellant to the U.S., without first seeking assurances that the death penalty will not be imposed or executed, violates the appellant's rights under s. 7 or s. 12 of the *Canadian Charter of Rights and Freedoms*. In addition, this Court stated the following two constitutional questions: whether s. 25 of the *Extradition Act* infringes s. 7 or s. 12 of the *Charter*; and, if so, whether such infringement is justified under s. 1.

Held (Lamer C.J. and Sopinka and Cory JJ. dissenting): The appeal should be dismissed. The extradition order is confirmed. Section 25 of the *Extradition Act* does not infringe s. 7 or s. 12 of the *Charter*.

Per La Forest, L'Heureux-Dubé and Gonthier JJ.: Section 7 of the *Charter*, and not s. 12, is the appropriate provision under which the actions of the Minister are to be assessed. The Minister's actions do not constitute cruel and unusual punishment. The execution, if it ultimately takes place, will be in the U.S. under American law against an American citizen in respect of an offence that took place in the U.S. It does not result from any initiative taken by the Canadian Government. The real question is whether the action of the Canadian Government in returning the appellant to his own country infringes his liberty and security in an impermissible way.

The unconditional surrender of the appellant seriously affects his right to liberty and security of the person. The issue is whether the surrender violates the principles of fundamental justice in the circumstances of this case. The values emanating from s. 12 play an important role in defining fundamental justice in this context. The Court has held that extradition must be refused if the circumstances facing the accused on surrender are such as to "shock the conscience". There are situations where the punishment imposed following surrender -- torture, for example -- would be so outrageous as to shock the conscience of Canadians, but that is not so of the death penalty in all cases. While there is strong ground that, barring exceptional cases, the death penalty could not be justified in Canada having regard to the limited extent to which it

advances any penological objectives and its serious invasion of human dignity, that is not the issue in this case. The issue is whether the extradition to the U.S. of a person who may face the death penalty there shocks the conscience.

In considering whether such surrender may constitutionally take place, the global setting where the vast majority of the nations of the world retain the death penalty must be kept in mind. While there has been a welcome trend in Western nations to abolish the death penalty, some nations have resisted the trend, notably the U.S. whose relatively open borders and cultural affinity with Canada make the escape of criminals to this country a pressing problem. While there are a number of major international instruments supporting the trend, all except one fall short of actually prohibiting the death penalty. More directly reflective of international attitudes is the recent *Model Treaty on Extradition* prepared under the United Nations' auspices, which like the Canada-U.S. Extradition Treaty, gives a state discretion to decide whether it should demand assurances against the imposition of the death penalty.

The Government has a right and duty to keep criminals out of Canada and to expel them by deportation. Otherwise Canada could become a haven for criminals. The issue has arisen in several recent cases in relation to persons facing the death penalty for murder. Similar policy concerns apply to extradition. It would be strange if Canada could keep out lesser offenders but be obliged to grant sanctuary to those accused or convicted of the worst types of crimes.

In summary, the extradition of an individual who has been accused of the worst form of murder in the U.S., which has a system of justice similar to our own, could not be said to shock the conscience of Canadians or to violate any international norm. The extradition did not go beyond what was necessary to serve the legitimate and compelling social purpose of preventing Canada from becoming an attractive haven for fugitives. The Minister determined, in the interests of protecting the security of Canadians, that he should not, in this case, seek assurances regarding the penalty to be imposed. On the evidence before the Court, the Minister's determination was not unreasonable and this Court should not interfere with his decision to extradite without restrictions.

The procedure followed by the Minister in reaching his decision to surrender the appellant did not offend the principles of fundamental justice. Nor did the subsidiary grounds -- the alleged arbitrariness, the "death row" phenomenon and the mode of execution -- lead to a different result.

Per L'Heureux-Dubé and Gonthier and McLachlin JJ.: While the *Charter* applies to extradition matters, including the executive decision of the Minister that effects the fugitive's surrender, the guarantee against cruel and unusual punishment found in s. 12 of the *Charter* has no application to s. 25 of the *Extradition Act* or to ministerial acts done pursuant to that section. The decision to surrender a fugitive under s. 25 does not constitute the imposition of cruel and unusual punishment by a Canadian government. The purpose and effect of s. 25 is to permit the fugitive to be extradited to face the consequences of the judicial process elsewhere. The punishment, if any, to which the fugitive is ultimately

subject will be punishment imposed, not by the Government of Canada, but by the foreign state. The fact that the Minister may seek assurances that the death penalty will not be demanded or enforced in the foreign jurisdiction does not change this situation. Since the *Charter*'s reach is confined to the legislative and executive acts of Canadian governments, to apply s. 12 directly to the act of surrender to a foreign country where a particular penalty may be imposed would be to give the section extraterritorial effect. Effective relations between different states require that Canada respects the differences of its neighbours and that it refrains from imposing its constitutional guarantees on other states.

Section 25 of the *Extradition Act*, which permits the extradition of fugitives without assurances that the death penalty will not be applied in the requesting states, does not offend the fundamental principles of justice enshrined in s. 7 of the *Charter*. Section 25 is consistent with extradition practices, viewed historically and in light of current conditions, and is consonant with the fundamental conceptions of what is fair and right in Canadian society. Bearing in mind the nature of the offence and the penalty, the justice system of the requesting state including the safeguards and guarantees it affords the fugitive, the considerations of comity and of security, and according due latitude to the Minister to balance the competing interests involved in particular extradition cases, the extradition of a fugitive to a state where he may face capital punishment, if convicted, is not a situation which is shocking and fundamentally unacceptable in our society. There is no clear consensus in this country that capital punishment is morally abhorrent and absolutely unacceptable. Further, while in some cases it may be mandatory for the Minister to seek death penalty

assurances, the variance between cases supports legislation which accords to the Minister a measure of discretion on the question of whether such assurances should be demanded. If such assurances were mandatory, Canada might become a safe haven for criminals in the U.S. seeking to avoid the death penalty. Finally, the importance of maintaining effective extradition arrangements with other countries, in a world where law enforcement is increasingly international in scope, also supports the ministerial discretion found in s. 25. An effective extradition process is founded on respect for sovereignty and differences in the judicial systems among various nations.

The Minister's decision to extradite without seeking death penalty assurances from the U.S. did not infringe s. 7 of the *Charter*. The reasons for extradition were compelling and the procedural guarantees in the reciprocating state high. The sole fact that at the end of the process, the appellant could face the death penalty was insufficient in the context of the extradition system of this country to render the decision unconstitutional. The courts should not lightly interfere with executive decisions on extradition matters.

The Minister's decision to extradite is not invalid because the appellant was denied an oral hearing before the Minister. The appellant was afforded that right at the stage of the judicial hearing. No further oral hearing is required at the second stage of the Minister's final decision.

Per Lamer C.J. and Sopinka J. (dissenting): While capital punishment *per se* constitutes cruel and unusual punishment, it is preferable not to decide

whether s. 12 of the *Charter* applies because s. 7 is the appropriate provision for the determination of this appeal.

The surrender order infringes s. 7 of the *Charter*. Extradition to face the potential imposition of capital punishment deprives the appellant of liberty and security of the person. The circumstances in which extradition constitutes a breach of the principles of fundamental justice are not limited to situations which "shock the conscience". The protection afforded by s. 7 extends to individuals who face situations that are "simply unacceptable". This requirement entails more than a simple consideration of majority opinion. It must be interpreted in light of the values underlying s. 7. Here, the Minister's decision to surrender the appellant without seeking the assurances against the imposition of what would be a violation of s. 12 of the *Charter*, were it carried out in Canada, offends the principles of fundamental justice. Indeed, the extradition of the fugitive to face the death penalty without seeking assurances that it would not be imposed or carried out shocks the conscience. The Minister did not even ask the U.S. to give such assurances. It is quite possible that they would have been given. With the cooperation of the requesting state, it is possible to achieve the goals of an effective extradition system in a manner that does not deprive the fugitive of the protection of the *Charter*. To refuse to seek such assurances is to give an official blessing to the death penalty, despite the fact that Canadian public policy stands firmly opposed to its use. The surrender order is not justifiable under s. 1 of the *Charter*.

Per Lamer C.J. and Cory J. (dissenting): Capital punishment for murder is prohibited in Canada. As the ultimate desecration of human dignity, the death penalty is *per se* a cruel and unusual punishment and violates s. 12 of the *Charter*. The decision of the Minister to surrender a fugitive who may be subject to execution without obtaining an assurance pursuant to Art. 6 of the Extradition Treaty is one which can be reviewed under s. 12. Although the *Charter* has no extraterritorial application, persons in Canada who are subject to extradition proceedings must be accorded all the rights which flow from the *Charter*. Notwithstanding the fact that it is the U.S. and not Canada which would impose the death penalty, Canada has the obligation not to extradite a person to face a cruel and unusual treatment or punishment. Indeed, to surrender a fugitive who may be subject to the death penalty violates s. 12 of the *Charter* just as surely as would the execution of the fugitive in Canada. Canada, as the extraditing state, must accept responsibility for the ultimate consequence of the extradition. It follows that the Minister must not surrender the appellant without obtaining the undertaking described in Art. 6 of the Treaty. To do so would render s. 25 of the *Extradition Act* inconsistent with the *Charter* in its application to fugitives who would be subject to the death penalty.

This conclusion is based upon the historical reluctance displayed by jurors over the centuries to impose the death penalty, the provisions of s. 12 of the *Charter* and the decisions of this Court pertaining to that section. It is also based upon the pronouncements of this Court emphasizing the fundamental importance of human dignity, and upon the international statements and commitments made

by Canada stressing the importance of the dignity of the individual and urging the abolition of the death penalty.

In the absence of obtaining an Art. 6 assurance, the surrender order would contravene s. 12 of the *Charter* and could not be justified under s. 1. There is simply no evidence that the existence of Art. 6 has led to a flood of American murderers into Canada. Nor is there any reason to believe that this would occur if Ministers of Justice uniformly sought Art. 6 assurances. Further, Canada has committed itself in the international community to the recognition and support of human dignity and to the abolition of the death penalty. These commitments, like the *Charter* and this Court's judicial pronouncements, reflect Canadian values and principles. The preservation of Canada's integrity and reputation in the international community require that extradition be refused unless an undertaking is obtained pursuant to Art. 6. To take this position does not constitute an absolute refusal to extradite. It simply requires the requesting state to undertake that it will substitute a penalty of life imprisonment for the execution of the prisoner if that prisoner is found to be guilty of the crime.

The Minister's denial of appellant's request to present oral evidence did not breach his right to an oral hearing. The Minister, both in determining what evidence he should consider on the application and in reaching his decision, complied with all the requirements of natural justice. Any issues of credibility or claims of innocence must be addressed by the extradition judge. It was therefore not open to the appellant to seek to adduce fresh evidence before the Minister of Justice as to the credibility of witnesses or his innocence of the offence. The

Minister was obliged neither to consider such issues, nor to hear *viva voce* evidence.

Cases Cited

By La Forest J.

Referred to: *Canada v. Schmidt*, [1987] 1 S.C.R. 500; *Miller v. The Queen*, [1977] 2 S.C.R. 680; *R. v. Smith*, [1987] 1 S.C.R. 1045; *R. v. Lyons*, [1987] 2 S.C.R. 309; *Kindler v. MacDonald*, [1987] 3 F.C. 34; *Shepherd v. Canada (Minister of Employment and Immigration)* (1989), 52 C.C.C. (3d) 386 (Ont. C.A.), leave to appeal to this Court denied, [1989] 2 S.C.R. xi; *Blanusa v. Canada (Minister of Employment and Immigration)* (1989), 27 F.T.R. 107; *Attorney-General for Canada v. Cain*, [1906] A.C. 542; Eur. Court H. R., *Soering* case, judgment of 7 July 1989, Series A No. 161; *United States of America v. Cotroni*, [1989] 1 S.C.R. 1469; *Argentina v. Mellino*, [1987] 1 S.C.R. 536; *Furman v. Georgia*, 408 U.S. 238 (1972); *Richmond v. Lewis*, 921 F.2d 933 (1990); *Glass v. Louisiana*, 471 U.S. 1080 (1984); *Thomson Newpapers Ltd. v. Canada (Director of Investigation and Research, Restrictive Trade Practices Commission*, [1990] 1 S.C.R. 425.

By McLachlin J.

Referred to: *United States of America v. Cotroni*, [1989] 1 S.C.R. 1469; *Canada v. Schmidt*, [1987] 1 S.C.R. 500; *Argentina v. Mellino*, [1987] 1 S.C.R.

536; *United States v. Allard*, [1987] 1 S.C.R. 564; *Spencer v. The Queen*, [1985] 2 S.C.R. 278; *Re B.C. Motor Vehicle Act*, [1985] 2 S.C.R. 486; *R. v. Hebert*, [1990] 2 S.C.R. 151; *R. v. Beare*, [1988] 2 S.C.R. 387; *R. v. Lyons*, [1987] 2 S.C.R. 309; *R. v. Milne*, [1987] 2 S.C.R. 512; *R. v. Jones*, [1986] 2 S.C.R. 284; *Syndicat des employés de production du Québec et de l'Acadie v. Canada (Canadian Human Rights Commission)*, [1989] 2 S.C.R. 879; Application No. 10479/83, *Kirkwood v. United Kingdom*, March 12, 1984, D.R. 37, p. 158; Eur. Court H. R., *Soering* case, judgment of 7 July 1989, Series A No. 161.

By Sopinka J. (dissenting)

Canada v. Schmidt, [1987] 1 S.C.R. 500; *United States v. Allard*, [1987] 1 S.C.R. 564; *Re B.C. Motor Vehicle Act*, [1985] 2 S.C.R. 486.

By Cory J. (dissenting)

Canada v. Schmidt, [1987] 1 S.C.R. 500; *Operation Dismantle Inc. v. The Queen*, [1985] 1 S.C.R. 441; *Gregg v. Georgia*, 428 U.S. 153 (1976); *Miller v. The Queen*, [1977] 2 S.C.R. 680; *Re B.C. Motor Vehicle Act*, [1985] 2 S.C.R. 486; *R. v. Smith*, [1987] 1 S.C.R. 1045; *R. v. Oakes*, [1986] 1 S.C.R. 103; *R. v. Morgentaler*, [1988] 1 S.C.R. 30; *Andrews v. Law Society of British Columbia*, [1989] 1 S.C.R. 143; *Singh v. Minister of Employment and Immigration*, [1985] 1 S.C.R. 177; *Argentina v. Mellino*, [1987] 1 S.C.R. 536; *United States v. Allard*, [1987] 1 S.C.R. 564; Application No. 6315/73, *X. v. Federal Republic of Germany*, September 30, 1974, D.R. 1, p. 73; Application No. 10308/83, *Altun v. Federal*

Republic of Germany, May 3, 1983, D.R. 36, p. 209; Application No. 10479/83, *Kirkwood v. United Kingdom*, March 12, 1984, D.R. 37, p. 158; Eur. Court H. R., *Soering* case, judgment of 7 July 1989, Series A No. 161.

Statutes and Regulations Cited

American Convention on Human Rights, O.A.S.T.S. No. 36, at 1, Art. 4.

Bill of Rights of 1689 (Eng.), 1 Will. & Mar. sess. 2, c. 2, clause 10.

Canadian Bill of Rights, S.C. 1960, c. 44 (reprinted in R.S.C., 1985, App. III).

Canadian Charter of Rights and Freedoms, ss. 1, 7, 12.

Charter of the United Nations, Can. T.S. 1945 No. 7.

Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, G.A. Res. 39/46 39 U.N. GAOR Supp. (No. 51), at 197, U.N. Doc. A/RES/39/46 (1984).

Constitution of the United States, Eight Amendment.

European Convention for the Protection of Human Rights and Fundamental Freedoms, 213 U.N.T.S. 222, Art. 3.

Extradition Act, R.S.C., 1985, c. E-23, s. 25.

Extradition Treaty between Canada and the United States of America, Can. T.S. 1976 No. 3, Art. 6.

International Covenant on Civil and Political Rights, 999 U.N.T.S. 172, Arts. 6, 7.

Model Treaty on Extradition, Art. 4.

Optional Protocol to the International Covenant on Civil and Political Rights, 999 U.N.T.S. 302.

Protocol No. 6 to the European Convention for the Protection of Human Rights and Fundamental Freedoms Concerning the Abolition of the Death Penalty, Europ. T.S. No. 114.

Protocol to the American Convention on Human Rights to Abolish the Death Penalty.

Second Optional Protocol to the International Covenant on Civil and Political Rights, aiming at the abolition of the death penalty, preamble, Art. 1, 2.

Universal Declaration of Human Rights, G.A. Res. 217 A (III), U.N. Doc. A/810, at 71 (1948), preamble, Art. 1, 3, 5.

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United Nations. Economic and Social Council. Commission on Human Rights. Sub-Commission on Prevention of Discrimination and Protection of Minorities. *Elaboration of a second optional protocol to the International Covenant on Civil and Political Rights, aiming at the abolition of the death penalty*. By Special Rapporteur Marc J. Bossuyt, June 29, 1987.

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APPEAL from a judgment of the Federal Court of Appeal, [1989] 2 F.C. 492, 91 N.R. 359, 46 C.C.C. (3d) 257, 69 C.R. (3d) 38, 42 C.R.R. 262, affirming a judgment of the Trial Division, [1987] 2 F.C. 145, 8 F.T.R. 222, 34 C.C.C. (3d) 78. Appeal dismissed, Lamer C.J. and Sopinka and Cory JJ. dissenting.

Julius H. Grey and *Cheryl A. Buckley*, for the appellant.

Douglas J. A. Rutherford, Q.C., and *Graham Garton, Q.C.*, for the respondent.

David Matas and *Emilio S. Binavince*, for the intervener Amnesty International.

The reasons of Lamer C.J. and Sopinka J. were delivered by

//*Sopinka J.*//

SOPINKA J. (dissenting) -- I have had the advantage of reading the reasons of my colleagues, Cory, McLachlin and La Forest JJ. While I reach the same result as Cory J., I do so for different reasons.

The facts are as set out by Cory J. The issue raised by this appeal is whether the decision of the Minister of Justice to surrender the appellant to the United States, without first seeking assurances that the death penalty will not be imposed or carried out, violates the appellant's rights under either s. 7 or s. 12 of the *Canadian Charter of Rights and Freedoms*.

While I agree with Cory J. that capital punishment *per se* constitutes cruel and unusual punishment, I prefer not to decide whether s. 12 of the *Charter* applies because, in my view, s. 7 clearly applies and is the appropriate provision for the determination of this appeal. My colleagues, La Forest and McLachlin JJ., hold that s. 12 of the *Charter* does not apply because the death penalty would be imposed outside of Canada. As I understand their reasons, they concede that s. 7 applies to the decision of the Minister but conclude that there is no breach of the principles of fundamental justice. I disagree with the latter conclusion and will restrict my reasons to that issue.

Extradition to face the potential imposition of capital punishment deprives the fugitive of liberty and security of the person, thus triggering s. 7 of the *Charter*. Is that deprivation in accordance with the principles of fundamental justice?

This Court has recognized that the manner in which the foreign state will deal with a fugitive on surrender may be contrary to the principles of fundamental justice. In *Canada v. Schmidt*, [1987] 1 S.C.R. 500, La Forest J., writing for the majority, stated (at p. 522):

> 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 Commission 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 falling far short of this may well arise where the nature of the criminal procedures 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.

On my reading of this passage, La Forest J. did not intend to deal exhaustively with the circumstances in which extradition constitutes a breach of the principles of fundamental justice. Such circumstances are not limited to situations which "shock the conscience". To hold otherwise would be to overly restrict the application of s. 7 in the extradition context. Principles of fundamental justice are not limited by public opinion of the day. The protection afforded by s. 7 extends to individuals who face unjust situations which are not recognized as such by the majority.

In *United States v. Allard*, [1987] 1 S.C.R. 564, La Forest J., again writing for the majority of the Court, stated (at p. 572):

> To arrive at the conclusion that the surrender of the respondents would violate the principles of fundamental justice, it would be necessary to establish that the respondents would face a situation that is simply unacceptable.

Once again the requirement that the fugitive face a situation that is "simply unacceptable" must entail more than a simple consideration of majority opinion. It must be interpreted in light of the values underlying s. 7. As Lamer J., as he then was, stated for the majority of the Court in *Re B.C. Motor Vehicle Act*, [1985] 2 S.C.R. 486, at p. 512:

> [Principles of fundamental justice] represent principles which have been recognized by the common law, the international conventions and by the very fact of entrenchment in the *Charter*, as essential elements of a system for the administration of justice which is founded upon the belief in the dignity and worth of the human person and the rule of law.

Guided by these considerations, I am of the view that it offends the principles of fundamental justice not to seek assurances against the imposition of what would be a violation of s. 12, were it carried out in Canada.

Even if the comments of the majority in *Schmidt, supra*, were intended to be exhaustive of the circumstances that constitute a breach of the principles of fundamental justice, in my opinion the extradition of the fugitive to face the death penalty without seeking assurances shocks the conscience and as such is contrary to principles of fundamental justice.

In 1976 in a free vote, a majority of the members of the House of Commons voted to abolish capital punishment for all offences under the *Criminal Code*. Its reinstitution was rejected in another free vote in 1987. These votes reflect the view of the majority of the elected members of Parliament that the death penalty is incompatible with respect for human dignity and the value of human life. Thus public policy in Canada, reaffirmed as recently as four years ago, stands clearly opposed to the death penalty. It is against this background that the actions of the Minister must be evaluated.

The Minister did not even ask the United States to give assurances that the death penalty would not be imposed or, if imposed, would not be carried out. It is quite possible that such assurances would have been given, had they been requested. The appellant would then have been returned to face the Pennsylvania judicial system and the likely imposition of a life sentence. Thus it is not at all clear that this case involves a choice between extraditing the appellant to face the death penalty and having him escape the judicial process entirely. With the cooperation of the requesting state, it is possible to achieve the goals of an effective extradition system in a manner that does not deprive the fugitive of the protection of the *Charter*. In such circumstances, it is fundamentally unjust for the Canadian Government to extradite a fugitive without at least seeking assurances against the imposition of the death penalty. To refuse to seek such assurances is to give an official blessing to the death penalty, despite the fact that Canadian public policy stands firmly opposed to its use.

The situations in which a breach of s. 7 can be justified under s. 1 will be exceedingly rare. This is not one of them. In this regard, I adopt the analysis of Cory J. with respect to the application of s. 1 in this appeal. I would therefore set aside the decision of the Minister to surrender the appellant pending a request for assurances under Article 6 of the *Extradition Treaty between Canada and the United States of America*, Can. T.S. 1976 No. 3. I would answer the constitutional questions as follows:

> 1. 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, or, if imposed, will not be executed, inconsistent with ss. 7 or 12 of the *Canadian Charter of Rights and Freedoms*?

Answer: Yes, it is inconsistent with s. 7 of the *Charter*.

> 2. 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*?

Answer: Section 25 of the *Extradition Act* is not a reasonable limit within the meaning of s. 1 of the *Charter*.

The reasons of Lamer C.J. and Cory J. were delivered by

//*Cory J.*//

CORY J. (dissenting) -- This appeal involves a challenge to the decision of the Minister of Justice, rendered pursuant to s. 25 of the *Extradition Act*, R.S.C., 1985, c. E-23, to surrender a fugitive charged with an offence punishable by death without first seeking assurances under Article 6 of the *Extradition Treaty between Canada and the United States of America*, Can. T.S. 1976 No. 3 (the "Treaty"), that the death penalty will not be imposed or, if imposed, not executed. The principal issue to be resolved is whether the Minister's decision to surrender the appellant to the United States without obtaining Article 6 assurances violates the appellant's rights under the *Canadian Charter of Rights and Freedoms*. In addressing this issue, two main questions arise. First, does the death penalty itself violate rights guaranteed under the *Charter*? Second, if so, what is the significance of this finding to the constitutional status of the Minister's decision?

Before dealing with the substantive issues raised on this appeal a few words must be said about extradition. Extradition treaties have long been recognized as both sound and necessary for the effective prosecution and enforcement of criminal law. It must be remembered that it is not the salutary scheme of extradition which is challenged on this appeal; rather, the question to be resolved is whether a fugitive subject to capital punishment in the requesting state should be surrendered without death penalty assurances.

I Factual Background

On November 15, 1983 in Philadelphia, Pennsylvania, Kindler was found guilty of first degree murder, conspiracy to commit murder and kidnapping. Following his conviction, the jury heard further evidence and recommended the imposition of the death penalty. Before the formal imposition of the sentence, Kindler escaped from prison and fled to Canada in September 1984.

He was arrested near St. Adèle, Quebec, on April 26, 1985 and charged with offences under the *Immigration Act, 1976*, S.C. 1976-77, c. 52, and the *Criminal Code*, R.S.C. 1970, c. C-34. On May 27, 1985, Kindler made an application to the Federal Court to prohibit the holding of an enquiry which had been commenced under s. 28 of the *Immigration Act, 1976*. Rouleau J. granted the application on July 23, 1985: [1985] 1 F.C. 676.

In the meantime, on July 3, 1985, the United States made a request for the extradition of Kindler pursuant to the Treaty. Kindler was arrested and an extradition hearing was set for August 26 in Montréal.

The hearing was held before Pinard J. of the Quebec Superior Court. It was agreed by counsel for Kindler that the evidence supplied by the United States complied with the conditions and requirements of the Treaty for the extradition of Kindler as a convicted fugitive. The sole issue raised was whether Article 6 of the Treaty required the extradition judge or the Minister of Justice to seek death penalty assurances from the United States before surrendering Kindler. Article 6 provides:

Article 6

> When the offense for which extradition is requested is punishable by death under the laws of the requesting State and the laws of the requested State do not permit such punishment for that offense, extradition may be refused 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 executed.

On August 30, 1985, Pinard J. determined that he had no jurisdiction to request the Article 6 assurances and committed Kindler to custody to await the Minister's decision to surrender: [1985] C.S. 1117. That same day he sent a report of the case with a copy of his judgment to the Minister of Justice.

Kindler sought review of the decision of Pinard J. pertaining to Article 6 of the Treaty and brought an application for *habeas corpus*. This application was dismissed by Greenberg J. on September 20, 1985. He too was of the opinion that only the Minister of Justice could seek the assurances referred to in Article 6 of the Treaty. However, he added that in his view Kindler was entitled to be dealt with in accordance with the principles of fundamental justice pursuant to the provisions of s. 7 of the *Charter*. This clearly implied that the Minister's decision could be subject to judicial review. He determined that it was premature to decide whether extradition which could lead to the imposition of the death penalty constituted cruel and unusual punishment and was thus in conflict with s. 12 of the *Charter*.

The then Minister of Justice, the Honourable John Crosbie, in the exercise of his authority under s. 25 of the *Extradition Act*, agreed to entertain representations. Section 25 provides:

> **25.** Subject to this Part, the Minister of Justice, on the requisition of the foreign state, may, under his hand and seal, order a fugitive who has been committed for surrender to be surrendered to the person or persons who are, in the Minister's opinion, duly authorized to receive the fugitive in the name and on behalf of the foreign state, and the fugitive shall be so surrendered accordingly.

Written material was supplied to the Minister, including letters from Kindler's parents, his wife and from Dr. Fugère and Dr. Cormier of the McGill University Clinic in Forensic Psychiatry relating to their examination of Kindler. An affidavit was filed by Kindler's counsel, who had been scheduled to handle his post-trial motions in Pennsylvania. It was her opinion that Kindler would not succeed in the appeals of his convictions and sentence and that as a result he would be executed as soon as the appeal procedure had been completed.

Counsel for Kindler also sought to have Kindler give evidence at the hearing before the Minister and to submit studies on the death penalty. The Minister refused the application to present oral testimony or to hear Kindler in person, but considered the written material.

By letter to counsel for Kindler dated January 17, 1986, the Minister of Justice expressed the opinion that Canada should surrender Kindler without seeking any assurance from the United States authorities that the death penalty

would not be imposed or, if imposed, would not be carried out. The Minister stated that in the interest of the Canadian public, those who commit murder in a foreign state should be discouraged from seeking haven in Canada as a means of reducing or limiting the severity of the penalty that might be exacted under the laws of the state in which their crime was committed.

II Review of the Minister's Decision

On January 21, 1987, Rouleau J. of the Federal Court dismissed with costs the application to review the decision of the Minister of Justice: [1987] 2 F.C. 145.

The decision of Rouleau J. was appealed to the Federal Court of Appeal. The majority of that court concluded that the appeal should be dismissed: [1989] 2 F.C. 492.

Marceau J.A., writing one of the plurality opinions, based his decision on two propositions. The first was that it could not be said that capital punishment, however imposed and for whatever crime, is inevitably cruel and unusual within the meaning of s. 12 of the *Charter*. His second proposition was that the discretion conferred on the Minister by Article 6 of the Treaty should only be transformed into a compulsory duty, so as to make the seeking and obtaining of the assurances a condition of surrender, if the death penalty was *per se* a cruel and unusual punishment within the meaning of the *Charter*.

Pratte J.A. agreed that the appeal should be dismissed. In his view the death penalty was not in itself a cruel and unusual punishment that would contravene s. 12 of the *Charter*. Further, he expressed the opinion that even if a fugitive could be subjected to a cruel and unusual punishment for the crime he committed or was suspected of committing in another state, the cruel punishment would be inflicted by the other state and not by the Canadian Government. As a result, the provisions of the *Charter* did not apply to the decision of the Minister.

Hugessen J.A. dissented. He concluded that the death penalty *per se* constituted cruel and unusual punishment.

III Administrative Law Objections to the Review Conducted by the Minister of Justice

Before dealing with the principal issues, the administrative law submissions put forward by the appellant must be considered. It was argued that the Minister of Justice acted in breach of the requirements of fundamental justice in two ways. First, it was said that the Minister's denial of Kindler's request to present oral evidence breached his right to an oral hearing. Second, it was argued that the Minister failed to determine explicitly whether execution in the electric chair constituted cruel and unusual punishment.

In my view, these submissions are based upon a misunderstanding of the extradition process. In Canada, extradition proceeds in two steps. First, an extradition judge examines the factual basis for the charge and ensures that it is

one for which extradition is available under the *Extradition Act*. The first step is complete when the extradition judge is satisfied as to both the factual basis for the charge and the availability of extradition. It is only then that the second step can be taken by the Minister of Justice. The Minister, if requested, may hear representations and exercise a discretion as to whether to surrender the fugitive. This second step obviously requires the Minister to make a decision which is largely political in nature. It involves, in the words of La Forest J. in *Canada v. Schmidt*, [1987] 1 S.C.R. 500, at p. 523: "the good faith and honour of this country in its relations with other states."

In this two-step process any issues of credibility or claims of innocence must be addressed by the extradition judge. Kindler had ample opportunity before Pinard J. to challenge the credibility of the evidence led against him at his trial. This he did not do. It was therefore not open to him to seek to adduce fresh evidence before the Minister of Justice as to the credibility of witnesses or his innocence of the offence. The Minister was obliged neither to consider such issues, nor to hear *viva voce* evidence.

The Minister was not required to provide detailed reasons for his decision. Nonetheless he expressly stated in his letter to counsel for Kindler that he had "examined this case thoroughly and with care" and that the decision was "based on a review of the evidence presented at trial, the extradition proceedings and the materials and representations [which had been] submitted." Among those representations were the written and oral submissions of counsel which dealt with various aspects of the case, including the method of execution used in

Pennsylvania. The material presented included a letter from Kindler. The Minister's letter indicates that he considered the submissions and material and found them insufficient to overcome the countervailing policy concerns.

The Minister, both in determining what evidence he should consider on the application and in reaching his decision, complied with all the requirements of natural justice. It follows that the appellant's submissions cannot be accepted. The more difficult and fundamental questions must now be considered.

IV The Application of the *Charter* to the Decision of the Minister

There can be no doubt that the decisions of the executive branch of government are subject to scrutiny under the *Charter*. See for example *Operation Dismantle Inc. v. The Queen*, [1985] 1 S.C.R. 441. It is also clear from the decision of this Court in *Schmidt*, *supra*, at pp. 521-22, that the *Operation Dismantle* principle applies in the extradition context. As La Forest J. stated for the majority at p. 518:

> 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* (s. 32).

Therefore, the decision of the Minister in the present case is subject to *Charter* scrutiny. Of course, this does not mean that the *Charter* can be given

extraterritorial effect so as to govern the manner in which a foreign state conducts its criminal proceedings. See *Schmidt*, *supra*, at p. 518.

V Early History of the Death Penalty

At the very heart of this appeal is a conflict between two concepts. On one side is the concept of human dignity and the belief that this concept is of paramount importance in a democratic society. On the other side is the concept of retributive justice and the belief that capital punishment is necessary to deter murderers. An historical review reveals an increasing tendency to resolve this tension in favour of human dignity.

The Conduct of Juries

In England until the last century the death penalty was, at least in theory, the punishment imposed for all felonies. However, even a cursory review of the history of the death penalty indicates that from the earliest times there was a marked resistance by juries to the death sentence.

In the period immediately following the Conquest in 1066, criminal law in its strict sense did not exist. Rather, compensation was sought for homicide, theft, rape and wounding, although this did not eliminate either private or regal retribution. By the late 12th century, however, regular measures had been adopted for prosecuting the more serious crimes including theft, murder, robbery, and arson.

The jury came into its own as a result of the prohibition in 1215 on clerical participation in trial by ordeal. From that time forward the jury, which had previously only presented crimes, also became the triers of fact to determine guilt or innocence.

Surviving records from the 14th century indicate that juries were unwilling to convict for felonies. Those juries which were still presenting crimes often undervalued the worth of stolen goods in order to make the offence charged one of trespass instead of a felony, thus avoiding the possible imposition of the death penalty. In addition there seems to have been a very low conviction rate for felonies, perhaps no more than 18 per cent, and an even lower rate of imposition of the death penalty, apparently in the range of 10 per cent of those brought to trial. (See B. W. McLane, "Juror Attitudes toward Local Disorder: The Evidence of the 1328 Lincolnshire Trailbaston Proceedings", in J. S. Cockburn and T. A. Green, eds., *Twelve Good Men and True: The Criminal Trial Jury in England, 1200-1800* (1988), 36, at pp. 54-55.)

In the early 15th century the criminal conviction rate remained low. Although it is true that the conviction rate increased to perhaps 50 per cent in the late 16th and early 17th centuries, especially in periods of economic hardship when the number of property crimes increased, this trend had reversed by the mid-17th century.

As time went on and certainly after 1600, juries made increasing use of their power to convict of lesser included offences in order to avoid the death

penalty. In J. S. Cockburn, "Twelve Silly Men? The Trial Jury at Assizes, 1560-1670", in Cockburn and Green, op. cit., 158, at pp. 171-72, it is reported that these so-called partial verdicts were typically used to reduce the capital charge of burglary to larceny or "clergyable" larceny and of grand larceny to petty larceny which was a misdemeanour punishable by whipping. The same procedure was used to reduce charges of murder to "clergyable" manslaughter. During the Interregnum and after the Restoration of the Monarchy this pattern continued.

In the 18th century when the number of crimes punishable by death increased dramatically over the previous century, the actual number of convictions and the harshness of the sentences imposed lessened. See D. Hay, "Property, Authority and the Criminal Law", in D. Hay et al., *Albion's Fatal Tree: Crime and Society in Eighteenth-Century England* (1975), 17, at p. 22, and M. Foucault, *Discipline and Punish: The Birth of the Prison* (1979). Quite simply, juries tended to refuse to convict or, if they did convict, refused to find the accused guilty of a capital offence.

This resistance by juries to the imposition of the death penalty is of particular significance when one considers the makeup of juries of that era. During the 18th century, jurors were men of property, merchants, tradesmen and farmers, with incomes in the top 25 per cent of the country. The jury was chosen from the very social class most likely to prosecute for theft. Yet, these jurors failed to convict in the vast majority of cases where capital punishment was available. See D. Hay, "The Class Composition of the Palladium of Liberty: Trial Jurors in the Eighteenth Century", in Cockburn and Green, op. cit., 305, at p. 354.

This marked resistance to the death penalty speaks volumes for the basic decency and compassion of jurors. It is reflected in their decisions over the centuries and constitutes a long and lasting record of social values that is worthy of consideration. The compassionate views of the jurors are echoed in over three hundred years of writings by reformers.

Calls for Reform of the Death Penalty

There is a long history of opposition to the death penalty by reformers. For example, following the defeat of Charles I by the parliamentary party, a group called "the Levellers" advocated reform of the criminal law and advanced the concept of proportionality between a crime and its punishment. They focussed much of their attack on capital punishment, arguing that it was not proportional to any offence except treason and murder. In particular, the Levellers decried the imposition of capital punishment for property offences, observing that many of those arraigned were poor labourers who stole things of small value out of necessity.

In the 17th century another reformer, Gerrard Winstanley took the position that capital punishment was *a priori* immoral. He has been quoted as saying:

> It is not for one creature called man to kill another, for this is abominable to the Spirit, and it is the curse which hath made the Creation to groan under bondage; for if I kill you I am a murderer, if a third come, and hang or kill me for murdering you, he is a murderer of

> me; and so by the government of the first Adam, murder hath been called Justice when it is but the curse.
>
> (R. Zaller, "The Debate on Capital Punishment During the English Revolution" (1987), 31 *Am. J. Legal Hist.* 126, at p. 141.)

Clause 10 of the *Declaration of Rights* included in the preamble to the *Bill of Rights* of 1689 reads as follows:

> 10. That excessive bail ought not to be required, nor excessive fines imposed; nor cruel and unusual punishment inflicted.

This wording is very similar to that of the Eighth Amendment to the American Constitution. The *Declaration of Rights* might well be seen as recognition of the need to make all punishment appropriate for and proportionate to the offence. In fact, the notion of proportionality between punishment and crime appears to date back at least to the laws of King Alfred in the 10th century, was protected by Chapter 14 of the *Magna Carta* and was continued in the laws of Edward the Confessor (1042-66): A. F. Granucci, "`Nor Cruel and Unusual Punishments Inflicted:' The Original Meaning" (1969), 57 *Cal. L. Rev.* 839, at pp. 844-47.

In 1764 Cesare Beccaria in *Dei delitti e delle pene* argued that punishment ought to fit the crime. It was his view that capital punishment was less of a deterrent than imprisonment. He wrote:

> From simple consideration of the truths thus far presented it is evident that the purpose of punishment is neither to torment and afflict a sensitive being, nor to undo a crime already committed. Can there,

> in a body politic which, far from acting on passion, is the tranquil moderator of private passions--can there be a place for this useless cruelty, for this instrument of wrath and fanaticism, or of weak tyrants? Can the shrieks of a wretch recall from time, which never reverses its course, deeds already accomplished? The purpose can only be to prevent the criminal from inflicting new injuries on its citizens and to deter others from similar acts. Always keeping due proportions, such punishments and such method of inflicting them ought to be chosen, therefore, which will make the strongest and most lasting impression on the minds of men, and inflict the least torment on the body of the criminal.
>
> (Translated by H. Paolucci, *On Crimes and Punishments* (1963), at p. 42.)

Significantly Beccaria observed that in a society dedicated to preserving it, life should not be taken by the state as punishment. At page 50, he wrote:

> The death penalty cannot be useful, because of the example of barbarity it gives men. If the passions or the necessities of war have taught the shedding of human blood, the laws, moderators of the conduct of men, should not extend the beastly example, which becomes more pernicious since the inflicting of legal death is attended with much study and formality. It seems to me absurd that the laws, which are an expression of the public will, which detest and punish homicide, should themselves commit it, and that to deter citizens from murder, they order a public one.

The work of the reformers eventually prevailed. By 1860 capital punishment in the United Kingdom was reserved for only a handful of crimes including treason and murder.

Summary

In summary it can be seen that from the 12th century forward there was a reluctance on the part of jurors to impose the death sentence. The jurors, the very people who might have been expected to be most interested in enforcing the criminal law particularly with regard to property offences, were loathe to condemn the accused to death. Their verdicts gave early recognition to the fundamental importance of human dignity and of the need to accord that dignity to all. As well, reformers for over 300 years advocated not only the reduction but the total abolition of the death penalty. This review demonstrates that opposition to the imposition of the death penalty has a long and honoured history.

VI Twentieth Century Developments: the International Protection of Human Dignity

The Commitment of the International Community

The end of hostilities following World War II signalled a massive movement towards the greater protection of human rights. Prior to the war, international law paid scant attention to human rights. However, the atrocities committed during the war led to international recognition of the fundamental importance of human dignity and human rights. The United Nations Charter of October 1945, Can. T.S. 1945 No. 7, provides:

WE THE PEOPLES OF THE UNITED NATIONS

DETERMINED

> to save succeeding generations from the scourge of war, which twice in our lifetime has brought untold sorrow to mankind, and
>
> to reaffirm faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women and of nations large and small . . .

The *Universal Declaration of Human Rights*, G.A. Res. 217 A (III), U.N. Doc. A/810, at 71, adopted by the United Nations General Assembly in 1948 in a vote which Canada supported, illustrates the centrality of human dignity and worth in its preamble and in its articles:

> *Whereas* recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world,
>
> . . .
>
> *Article 1*
>
> All human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act toward one another in a spirit of brotherhood.
>
> . . .
>
> Article 3
>
> Everyone has the right to life, liberty and security of person.
>
> . . .
>
> Article 5
>
> No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.

The *International Covenant on Civil and Political Rights*, 999 U.N.T.S. 172, of the United Nations which came into force in 1976, as well as reaffirming the importance of human dignity, made specific reference to the death penalty:

> *Article 6.* 1. Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life.
>
> 2. In countries which have not abolished the death penalty, sentence of death may be imposed only for the most serious crimes in accordance with the law in force at the time of the commission of the crime and not contrary to the provisions of the present Covenant and to the Convention on the Prevention and Punishment of the Crime of Genocide. This penalty can only be carried out pursuant to a final judgement rendered by a competent court.
>
> . . .
>
> 6. Nothing in this article shall be invoked to delay or to prevent the abolition of capital punishment by any State Party to the present Covenant.

In a similar vein the Organization of American States enacted the *American Convention on Human Rights*, O.A.S.T.S. No. 36, at 1, which came into force in 1978. Article 4 of that Convention provides:

> 1. Every person has the right to have his life respected. This right shall be protected by law and, in general, from the moment of conception. No one shall be arbitrarily deprived of his life.
>
> 2. In countries that have not abolished the death penalty, it may be imposed only for the most serious crimes and pursuant to a final judgment rendered by a competent court and in accordance with a law establishing such punishment, enacted prior to the commission of the crime. The application of such punishment shall not be extended to crimes to which it does not presently apply.

3. The death penalty shall not be reestablished in states that have abolished it.

The international recognition of the importance of human dignity culminated in the abolition of the death penalty in many countries. For example, the United Kingdom formally abolished the death penalty for all crimes (apart from certain offences under Military Law) in 1973. The last execution took place in 1964. In France the death penalty for civil crimes was abolished in 1949. The death penalty was totally abolished in 1981 while the last execution occurred in 1977. Australia and New Zealand as well as most of the west European countries have voted to abolish capital punishment. Recently, many eastern European countries such as Czechoslovakia, Hungary and Romania, have abolished the death penalty. A list of countries in which the death penalty has been abolished and the date of the passage of the legislation is set out in Schedule A to these reasons.

On the other hand, the position of the United States stands in marked contrast to that of western countries. A majority of American states and the United States Congress have opted to retain the death penalty for some civil offences. Moreover, in *Gregg v. Georgia*, 428 U.S. 153 (1976), the United States Supreme Court ruled that the death penalty was not, *per se*, invalid. The Court noted that the text of the Constitution acknowledged the existence of capital punishment and, that, for 200 years the Supreme Court had repeatedly found that capital punishment was not invalid *per se*.

The commitment of the international community to human dignity and the trend of western nations to abolish the death penalty parallels Canada's own international stance.

Canada's International Commitment

Canada's commitment to human dignity has a lengthy and respected history in international affairs. This commitment is exemplified by its accession to the United Nations Charter on November 9, 1945, its vote in favour of the *Universal Declaration of Human Rights* on December 10, 1948, its accession to the *International Covenant on Civil and Political Rights* and the *Optional Protocol to the International Covenant on Civil and Political Rights*, 999 U.N.T.S. 302, on May 19, 1976, and its accession to the *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* on June 24, 1987.

In the United Nations Economic and Social Council on December 10, 1971, Canada voted in favour of the resolution affirming the goal of abolition of capital punishment. Canada has also voted in favour of the *Second Optional Protocol to the International Covenant on Civil and Political Rights, aiming at the Abolition of the Death Penalty* (the "Second Optional Protocol") on December 15, 1989. The Second Optional Protocol provides:

> *The States Parties to the Present Protocol,*
>
> *Believing* that abolition of the death penalty contributes to enhancement of human dignity and progressive development of human rights,

Recalling article 3 of the Universal Declaration of Human Rights, adopted on 10 December 1948, and article 6 of the International Covenant on Civil and Political Rights, adopted on 16 December 1966,

Noting that article 6 of the International Covenant on Civil and Political Rights refers to abolition of the death penalty in terms that strongly suggest that abolition is desirable,

Convinced that all measures of abolition of the death penalty should be considered as progress in the enjoyment of the right to life,

Desirous to undertake hereby an international commitment to abolish the death penalty,

Have Agreed as follows:

Article 1

1. No one within the jurisdiction of a State Party to the present Protocol shall be executed.

2. Each State party shall take all necessary measures to abolish the death penalty within its jurisdiction.

Article 2

1. No reservation is admissible to the present Protocol, except for a reservation made at the time of ratification or accession that provides for the application of the death penalty in time of war pursuant to a conviction for a most serious crime of a military nature committed during wartime.

In supporting the Second Optional Protocol, Canada stated that the United Nations would be honouring human dignity by enshrining the abolition of the death penalty in an international instrument. Canada's position was put this way in the United Nations Economic and Social Council, Commission on Human Rights, *Elaboration of a second optional protocol to the International Covenant on Civil and Political Rights, aiming at the abolition of the death penalty* on June 29, 1987, at p. 27:

> Canada, having abolished the death penalty in 1977, believed that there was merit in the elaboration of a second optional protocol. The subject was a difficult one and raised passions in a number of countries, but it deserved the attention of the General Assembly even if all States would not be in a position to adopt such a second optional protocol immediately. There was no doubt that the United Nations would be honouring human dignity by enshrining the principle of the abolition of the death penalty in an international instrument.

Apart from Canada's international commitments, it is worthy of note that two other international organizations have taken steps similar to those of the United Nations to abolish capital punishment. The European Community enacted *Protocol No. 6 to the European Convention for the Protection of Human Rights and Fundamental Freedoms Concerning the Abolition of the Death Penalty*, Europ. T.S. No. 114, which came into force on March 3, 1985, and the Organization of American States approved the *Protocol to the American Convention on Human Rights to Abolish the Death Penalty* on June 8, 1990.

Summary

The international community has affirmed its commitment to the principle of human dignity through the various international instruments discussed above. Except for the United States, the western world has reinforced this commitment to human dignity, both internationally and nationally, through the express abolition of the death penalty. Canada's actions in the international forum affirms its own commitment to the preservation and enhancement of human dignity and to the abolition of the death penalty.

Let us now turn to the position within Canada.

VII The Canadian Position

A consideration of the place of the death penalty in Canadian society must now take place in the context of the *Charter*. In particular, it must be determined whether the death penalty violates the *Charter* proscription against cruel and unusual punishment. Section 12 of the *Charter* provides:

> **12**. Everyone has the right not to be subjected to any cruel and unusual treatment or punishment.

The constitutional status of capital punishment under s. 12 of the *Charter* is to be derived from the Canadian experience with respect to both the death penalty and the broader concept of cruel and unusual punishment.

The Pre-Charter Position

In the case of *Miller v. The Queen*, [1977] 2 S.C.R. 680, this Court considered the validity of legislation which provided for capital punishment of persons who were convicted of the murder of police officers or prison guards acting in the course of their duties. The majority of the Court upheld the death penalty provision of the legislation on the ground that judicial deference should be paid to the expressed will of Parliament. I would observe at the outset that this

reasoning is inconsistent with the approach which has been taken since the passage of the *Charter*. Unswerving judicial deference to the perceived intent of Parliament is no longer a determinative factor. See *Re B.C. Motor Vehicle Act*, [1985] 2 S.C.R. 486, at pp. 496-500; *R. v. Smith*, [1987] 1 S.C.R. 1045, at pp. 1070-71.

In *Miller*, Laskin C.J., for the minority, defined the protection against cruel and unusual punishment in terms of proportionality. His analysis focussed upon the issue of whether capital punishment was an appropriate penalty for the crime of murdering a police officer or prison guard. He did not consider whether the death penalty was itself unacceptable. At page 694, he set out his position in this way:

> In a general sense, all punishment by way of imprisonment or otherwise is degrading, but society cannot be expected to tolerate without sanction breaches of the criminal law merely because punishment degrades the criminal. What we are concerned with here is not mere degradation by which society expresses its reprobation of criminal behaviour but the extent of it, related of course to the offence and at times to the offender. The enormity and the irreversibility of a death penalty when carried out certainly bespeak its undue severity in the abstract, but the present case is concerned with proportionality, with mandatory application of the death penalty not to an entire range of the most heinous of offences, that is, murder, but to particular and narrow instances of it specially selected by Parliament as meriting the drastic penalty of death.

On the basis of this reasoning, corporal punishment could be justified as an appropriate penalty for certain crimes.

Laskin C.J. was also of the view that the legislation should be upheld unless those challenging it could demonstrate that capital punishment did not have a deterrent effect beyond that of life imprisonment. I note in passing that the heavy burden which he placed on those challenging the legislation, while appropriate to the *Canadian Bill of Rights*, S.C. 1960, c. 44 (reprinted in R.S.C., 1985, App. III), is not suitable in a *Charter* challenge.

The decision in *Miller* no longer provides an appropriate basis for a consideration of the issue presented in this appeal. The reasoning of the majority is simply not applicable to *Charter* issues. Nor should the minority position of Laskin C.J., heavily relied upon by the respondent, be followed. This is so not only because the minority placed a very heavy burden of proof on the party challenging the death penalty but also because it did not consider whether the death penalty was itself unacceptable. As well, it must be remembered that since that decision was delivered, the *Charter* has come into effect as the supreme law of the land.

The House of Commons Votes to Abolish the Death Penalty

In free votes in both 1976 and 1987, a majority of the members of the House of Commons supported the abolition of the death penalty. These votes, held after extensive and thorough debate, demonstrate that the elected representatives of the Canadian people found the death penalty for civil crimes to be an affront to human dignity which cannot be tolerated in Canadian society.

These votes are a clear indication that capital punishment is considered to be contrary to basic Canadian values.

The rejection of the death penalty by the majority of the members of the House of Commons on two occasions can be taken as reflecting a basic abhorrence of the infliction of capital punishment either directly, within Canada, or through Canadian complicity in the actions of a foreign state.

The Position Under the Charter

What then is the constitutional status of the death penalty under s. 12 of the *Charter*?

The American experience provides no guidance. Cases dealing with the constitutional validity of the death penalty were decided on very narrow bases unique to the wording of the American Constitution and rooted in early holdings of the United States Supreme Court. Canadian courts should articulate a distinct Canadian approach with respect to cruel and unusual punishment based on Canadian traditions and values.

The approach to be taken by this Court in determining whether capital punishment contravenes s. 12 of the *Charter* should, in my view, be guided by two central considerations. First is the principle of human dignity which lies at the heart of s. 12. It is the dignity and importance of the individual which is the

essence and the cornerstone of democratic government. Second is the decision of this Court in *Smith, supra*.

1. Human Dignity Under the *Charter*

The fundamental importance of human dignity in Canadian society has been recognized in numerous cases. In *R. v. Oakes*, [1986] 1 S.C.R. 103, Dickson C.J. at p. 136 referred to the basic principles and values which are enshrined in the *Charter*. He wrote:

> The Court must be guided by the values and principles essential to a free and democratic society which I believe embody, to name but a few, respect for the inherent dignity of the human person, commitment to social justice and equality, accommodation of a wide variety of beliefs, respect for cultural and group identity, and faith in social and political institutions which enhance the participation of individuals and groups in society. The underlying values and principles of a free and democratic society are the genesis of the rights and freedoms guaranteed by the *Charter* and the ultimate standard against which a limit on a right or freedom must be shown, despite its effect, to be reasonable and demonstrably justified.

In her reasons in *R. v. Morgentaler*, [1988] 1 S.C.R. 30, at p. 166, Wilson J. stressed the importance of human dignity in understanding the protections afforded by the *Charter*. She wrote:

> The idea of human dignity finds expression in almost every right and freedom guaranteed in the *Charter*. Individuals are afforded the right to choose their own religion and their own philosophy of life, the right to choose with whom they will associate and how they will express themselves, the right to choose where they will live and what occupation they will pursue.

Again, in *Andrews v. Law Society of British Columbia*, [1989] 1 S.C.R. 143, this Court emphasized the importance of human dignity. McIntyre J. wrote at p. 171:

> It is clear that the purpose of s. 15 is to ensure equality in the formulation and application of the law. The promotion of equality entails the promotion of a society in which all are secure in the knowledge that they are recognized at law as human beings equally deserving of concern, respect and consideration.

In *Re B.C. Motor Vehicle Act*, *supra*, the Court once again noted the fundamental importance of human dignity to the provisions of the *Charter*. Lamer J., as he then was, stated at p. 512:

> 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, and as such, violations of s. 7. They are therefore illustrative of the meaning, in criminal or penal law, of "principles of fundamental justice"; they represent principles which have been recognized by the common law, the international conventions and by the very fact of entrenchment in the *Charter*, as essential elements of a system for the administration of justice which is founded upon the belief in the dignity and worth of the human person and the rule of law.

Let us now turn to consider the second guiding consideration, the decision of this Court in *Smith*.

2. Section 12 and the *Smith* case

In *Smith*, *supra*, this Court considered a challenge to the minimum sentencing provision of the *Narcotic Control Act*, R.S.C. 1970, c. N-1. The penalty prescribed by the *Narcotic Control Act* for importing a narcotic into Canada was imprisonment for a minimum of seven years up to life. The minimum term was challenged on the ground that it constituted cruel and unusual punishment contrary to s. 12 of the *Charter*. It was argued that the punishment was unduly severe and disproportionate to the offence committed. The decision focused upon the element of proportionality.

Lamer J., as he then was, carefully considered the nature of the protection afforded by s. 12 of the *Charter*. In giving a broad interpretation to the s. 12 right, Lamer J., at p. 1072, held that punishments "must not be grossly disproportionate to what would have been appropriate." He later held, at pp. 1073-74, that certain punishments will by their very nature always be grossly disproportionate:

> Finally, I should add that some punishments or treatments will always be grossly disproportionate and will always outrage our standards of decency: for example, the infliction of corporal punishment, such as the lash, irrespective of the number of lashes imposed, or, to give examples of treatment, the lobotomisation of certain dangerous offenders or the castration of sexual offenders.

From this decision two principles emerge. First, punishments must never be grossly disproportionate to that which would have been appropriate to punish, rehabilitate or deter the particular offender or to protect the public from that offender. Second, and more importantly for the purposes of this case,

punishments must not in themselves be unacceptable no matter what the crime, no matter what the offender. Although any form of punishment may be a blow to human dignity, some form of punishment is essential for the orderly functioning of society. However, when a punishment becomes so demeaning that all human dignity is lost, then the punishment must be considered cruel and unusual. At a minimum, the infliction of corporal punishment, lobotomisation of dangerous offenders and the castration of sexual offenders will not be tolerated.

3. Does the Death Penalty Violate Section 12 of the *Charter*?

In light of both the decisions stressing the importance of human dignity under the *Charter* and the principles espoused in the *Smith* case, it remains to be determined whether the death penalty violates s. 12 of the *Charter*. In my view, there can be no doubt that it does.

A consideration of the effect of the imposition of the death penalty on human dignity is enlightening. Descriptions of executions demonstrate that it is state-imposed death which is so repugnant to any belief in the importance of human dignity. The methods utilized to carry out the execution serve only to compound the indignities inflicted upon the individual.

In his book *Condemned to Die: Life Under Sentence of Death* (1981), at pp. 86-87, Johnson makes this reference to executions in the electric chair:

> Electrocution has been described by one medical doctor as "a form of torture [that] rivals burning at the stake". Electrocutions have been known to drag on interminably, literally cooking the prisoners. In one instance, a man's brain "was found to be `baked hard', the blood in his head had turned to charcoal, and his entire back was burnt black". One man somehow survived electrocution and was returned months later, with the approval of the Supreme Court, for a second (and unsuccessful) encounter with the chair. More recently, John Spenkelink's electrocution lasted over six minutes and required three massive surges of electricity before he finally died. Although we have no accounts of the damage to Spenkelink's body caused by his execution, allegations that Florida prison officials stuffed his anus with cotton and taped his mouth shut suggest that they may have anticipated the forbidding spectacle typically provided by electrocution, and made every effort to make the sanction cosmetically acceptable.

This description of the imposition of the death penalty clearly indicates that persons executed by the state are deprived of all semblance of human dignity. The stuffing of the anus with cotton wool and the taping shut of the mouth suggest that even the authorities carrying out the execution were not only insensitive to human dignity but fully expected a horrible reaction to a dreadful punishment. Even so, these indignities are simply adjuncts to the ultimate attack on human dignity, the destruction of life by the state.

The following description by the Reverend Myer Tobey of the execution by lethal gas of Eddie Daniels is to similar effect:

> In the chamber now, he was strapped to the chair. The cyanide had been prepared, and was placed beneath his chair, over a pan of acid that would later react with the cyanide to form the deadly gas. Electrocardiographic wires were attached to Daniels' forearms and legs, and connected to a monitor in the observation area. This lets the doctor know when the heart stops beating.

This done, the prison guards left the room, shutting the thick door, and sealing it to prevent the gas from leaking. I took my place at one of the windows, and looked at Eddie, and he looked at me. We said the prayer together, over and over.

At a motion of the warden, a prison guard then pulled a lever releasing the cyanide crystals beneath the chair. Eddie heard the chemical pellets drop, and he braced himself. We did not take our eyes off each other.

In an instant, puffs of light white smoke began to rise. Daniels saw the smoke, and moved his head to try to avoid breathing it in. As the gas continued to rise he moved his head this way and that way, thrashing as much as his straps would allow still in an attempt to avoid breathing. He was like an animal in a trap, with no escape, all the time being watched by his fellow humans in the windows that lined the chamber. He could steal only glimpses of me in his panic, but I continued to repeat "My Jesus I Love You", and he too would try to mouth it.

Then the convulsions began. His body strained as much as the straps would allow. He had inhaled the deadly gas, and it seemed as if every muscle in his body was straining in reaction. His eyes looked as if they were bulging, much as a choking man with a rope cutting off his windpipe. But he could get no air in the chamber.

Then his head dropped forward. The doctor in the observation room said that that was it for Daniels. This was within the first few minutes after the pellets had dropped. His head was down for several seconds. Then, as we had thought it was over, he again lifted his head in another convulsion. His eyes were open, he strained and he looked at me. I said one more time, automatically, "My Jesus I Love You". And he went with me, mouthing the prayer. He was still alive after those several minutes, and I was horrified. He was in great agony. Then he strained and began the words with me again. I knew he was conscious, this was not an automatic response of an unconscious man. But he did not finish. His head fell forward again.

There were several more convulsions after this, but his eyes were closed. I could not tell if he were conscious or not at that point. Then he stopped moving, approximately ten minutes after the gas began to rise, and was officially pronounced dead.

The death penalty not only deprives the prisoner of all vestiges of human dignity, it is the ultimate desecration of the individual as a human being. It is the annihilation of the very essence of human dignity.

Let us now consider the principles set out in *Smith* to determine whether the death penalty is of the same nature as corporal punishment, lobotomy or castration which were designated as cruel and unusual punishment.

What is acceptable as punishment to a society will vary with the nature of that society, its degree of stability and its level of maturity. The punishments of lashing with the cat-o-nine tails and keel-hauling were accepted forms of punishment in the 19th century in the British navy. Both of those punishments could, and not infrequently, did result in death to the recipient. By the end of the 19th century, however, it was unthinkable that such penalties would be inflicted. A more sensitive society had made such penalties abhorrent.

Similarly, corporal punishment is now considered cruel and unusual yet it was an accepted form of punishment in Canada until it was abolished in 1973. The explanation, it seems to me, is that a maturing society has recognized that the imposition of the lash would now be a cruel and intolerable punishment.

If corporal punishment, lobotomy and castration are no longer acceptable and contravene s. 12 then the death penalty cannot be considered to be anything other than cruel and unusual punishment. It is the supreme indignity to

the individual, the ultimate corporal punishment, the final and complete lobotomy and the absolute and irrevocable castration.

As the ultimate desecration of human dignity, the imposition of the death penalty in Canada is a clear violation of the protection afforded by s. 12 of the *Charter*. Capital punishment is *per se* cruel and unusual.

If Kindler had committed the murder in Canada, then not simply the abolition of the death penalty in this country but, more importantly, the provisions of s. 12 of the *Charter* would prevent his execution. The next question is whether the fact that American, not Canadian, authorities would carry out the execution is fatal to Kindler's s. 12 claim. That is, does the Minister's decision to surrender Kindler to American authorities who may impose the death penalty "subject" him, within the meaning of s. 12, to cruel and unusual punishment?

VIII The Relevance of the Fact that the Death Penalty Would Be Inflicted by the United States and not Canada

The respondent contends that even if it is assumed that the death penalty constitutes cruel punishment, the *Charter* protections should not apply to a fugitive. In support of this position it was said that the surrender of Kindler did not mean that the Government of Canada would be subjecting the fugitive to cruel and unusual punishment, since the punishment would be inflicted by the requesting state. It was argued that so long as the trial procedure the fugitive had undergone or would undergo in the requesting state was fair, the punishment that

followed a finding of guilt was not something which could be subject to the provisions of the *Charter*. Based on the *Charter* jurisprudence of this Court, this argument must be rejected.

The Approach that Should Be Taken in Applying the Charter

Although the *Charter* has no extraterritorial application, persons in Canada who are subject to extradition proceedings must be accorded all the rights which flow from the *Charter*. The approach to be taken is indicated by this Court in *Singh v. Minister of Employment and Immigration*, [1985] 1 S.C.R. 177. In that case the refugee claimants contended that Canada's decision not to extend convention refugee status to them placed them at risk that they would be prosecuted in their home country for their political beliefs. Wilson J., for the plurality, found that this decision deprived the claimants of their s. 7 right to security of the person and that this was sufficient to trigger the protection of the *Charter*. Specifically, Wilson J. stressed that the *Charter* affords freedom not only from actual punishment but also from the threat of punishment.

The *Singh* principle was applied in the extradition context in *Schmidt*, *supra*, where La Forest J. held that the manner in which the foreign state will deal with the fugitive upon surrender may, in some situations, violate the *Charter*. When such a likelihood arises, Canada, as the extraditing state, must accept responsibility for the ultimate consequence of the extradition. This, I believe, is the conclusion to be drawn from the reasons of La Forest J., at p. 522:

> 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 Commission 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 falling far short of this may well arise where the nature of the criminal procedures 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. [Emphasis added.]

This position was reiterated in *Argentina v. Mellino*, [1987] 1 S.C.R. 536, and *United States v. Allard*, [1987] 1 S.C.R. 564. While true that these cases were based upon a consideration of s. 7 of the *Charter*, the same principles of *Charter* application must apply to s. 12. The same conclusion has been reached in Europe, where arguments similar to those of the respondent have been firmly rejected.

The European Position

While the European cases are to a large extent determined by the provisions of the *European Convention for the Protection of Human Rights and Fundamental Freedoms*, 213 U.N.T.S. 222, they are useful in their indication of a judicial trend in the consideration of extradition cases where a fugitive may be subjected to cruel and unusual punishment or treatment.

Article 3 of the European Convention provides that "[n]o one shall be subjected to torture or to inhuman or degrading treatment or punishment". In *X. v. Federal Republic of Germany*, Application No. 6315/73, September 30, 1974, D.R. 1, p. 73, at p. 75, the European Commission of Human Rights discussed the application of Article 3 to expulsion and extradition. It stated:

> The Commission notes that even though the questions of extradition, expulsion and the right to asylum do not figure, as such, amongst those rights which govern the Convention, the Contracting States have none the less agreed to restrict the free exercise of their rights under general international law, including their right to control the entry and exit of foreigners, to the extent and within the limits of the obligations they have accepted under the Convention.
> . . . Consequently, the expulsion or extradition of an individual could, in certain exceptional cases, prove to be in breach of the Convention and particularly of Article 3, whilst there are serious reasons to believe that he could be subjected to such treatment prohibited by the said Article 3 in the State to which he must be sent. [Emphasis added.]

In *Altun v. Federal Republic of Germany*, Application No. 10308/83, May 3, 1983, D.R. 36 p. 209 (a decision cited with approval by La Forest J. in *Schmidt*, *supra*, at p. 522), the European Commission elaborated on the application of Article 3 of the European Convention to extradition proceedings. The Commission held that a decision to surrender a fugitive to a country where that fugitive was in danger of being subjected to torture falls within the scope of Article 3. In that case the applicant alleged that if he were surrendered to the requesting state he would be at risk of being either executed or tortured. The Commission rejected the argument with respect to the death penalty since assurances had been given by the requesting state that this penalty would not be

inflicted upon the applicant. However the Commission found that Altun was at risk of being tortured and, as a result, refused the application to extradite.

As these cases indicate, the fact that a fugitive faces an objective possibility of being tortured has been held by the European Commission to be sufficient to trigger the responsibility of the requesting country under Article 3 of the Convention. This position was reaffirmed in *Kirkwood v. United Kingdom*, Application No. 10479/83, March 12, 1984, D.R. 37, p. 158, at p. 183.

One further European authority which is of assistance is the *Soering* case, judgment of 7 July 1989, Series A No. 161, where the European Court of Human Rights, at p. 35, considered an American request for extradition from the United Kingdom. The United States wished to try Soering for brutal murders committed in Virginia. The United Kingdom was prepared to surrender the accused on the strength of an understanding given that, should Soering be convicted, a representation would be made to the sentencing judge that it was the wish of the United Kingdom that the death penalty should not be imposed or carried out. Although this was apparently the usual undertaking given by the United States to the United Kingdom it was clearly not an assurance that the death penalty would not be carried out.

The European Court of Human Rights concluded that the decision by the United Kingdom (a contracting party to the European Convention) to extradite the fugitive gave rise to an issue as to whether Article 3 of the Convention would be breached by the extradition. It held that extradition would constitute a real risk

that Soering would be exposed to "death row phenomenon" and ultimately executed. This would result in the fugitive's being subjected to inhuman or degrading treatment or punishment contrary to Article 3. The court put its position this way at pp. 35-36:

> It would hardly be compatible with the underlying values of the Convention, that "common heritage of political traditions, ideals, freedom and the rule of law" to which the Preamble refers, were a Contracting State knowingly to surrender a fugitive to another State where there were substantial grounds for believing that he would be in danger of being subjected to torture, however heinous the crime allegedly committed. Extradition in such circumstances, while not explicitly referred to in the brief and general wording of Article 3, would plainly be contrary to the spirit and intendment of the Article, and in the Court's view this inherent obligation not to extradite also extends to cases in which the fugitive would be faced in the receiving State by a real risk of exposure to inhuman or degrading treatment or punishment proscribed by that Article.
>
> . . .
>
> It is not normally for the Convention institutions to pronounce on the existence or otherwise of potential violations of the Convention. However, where an applicant claims that a decision to extradite him would, if implemented, be contrary to Article 3 by reason of its foreseeable consequences in the requesting country, a departure from this principle is necessary, in view of the serious and irreparable nature of the alleged suffering risked, in order to ensure the effectiveness of the safeguard provided by that Article. . .
>
> In sum, the decision by a Contracting State to extradite a fugitive may give rise to an issue under Article 3, and hence engage the responsibility of that State under the Convention, where substantial grounds have been shown for believing that the person concerned, if extradited, faces a real risk of being subjected to torture or to inhuman or degrading treatment or punishment in the requesting country. The establishment of such responsibility inevitably involves an assessment of conditions in the requesting country against the standards of Article 3 of the Convention. Nonetheless, there is no question of adjudicating on or establishing the responsibility of the receiving country, whether under general international law, under the Convention or otherwise. In so far as any liability under the Convention is or may be incurred, it is liability incurred by the extraditing Contracting State by reason of its

> having taken action which has as a direct consequence the exposure of an individual to proscribed ill-treatment.

It was argued by the respondent that the *Soering* case is of little value as Soering was only 18 at the time of the murder and since his country of origin, West Germany, which had abolished the death penalty, was also seeking his extradition. However, on my reading of the decision neither his youth nor his country of origin were either crucial to or determinative of the result.

In summary, the position taken under the European Convention is that a decision to surrender a fugitive to a country in which that fugitive may face torture, or inhuman, or degrading treatment or punishment is a violation of the fugitive's right not to be "subjected" to such treatment. If extradition will result in a risk that Article 3 will be contravened then a contracting party to the European Convention must, in the absence of an appropriate undertaking, refuse the request to extradite. Further, the exposure to the death penalty which results in "death row phenomenon" constitutes a breach of Article 3. Thus it is clear that a decision to surrender a fugitive to face a cruel and unusual punishment constitutes the subjection of the fugitive to that punishment. If the same reasoning were applied in the Canadian context, a decision to surrender a fugitive who, on conviction, might be subjected to the death penalty would contravene the provisions of s. 12 of the *Charter*.

The Responsibility of the Extraditing State

Given all of the above, the respondent's contention that the *Charter* would not apply to cruel and unusual punishments inflicted by the requesting state must be rejected. In my view, since the death penalty is a cruel punishment, that argument is an indefensible abdication of moral responsibility. Historically such a position has always been condemned. The ceremonial washing of his hands by Pontius Pilate did not relieve him of responsibility for the death sentence imposed by others and has found little favour over the succeeding centuries.

Notwithstanding the fact that it is the United States and not Canada which would impose the death penalty, Canada has the obligation not to extradite a person to face a cruel and unusual treatment or punishment. To surrender a fugitive who may be subject to the death penalty violates s. 12 of the *Charter* just as surely as would the execution of the fugitive in Canada. Therefore, the Minister's decision to extradite Kindler without obtaining Article 6 assurances violates Kindler's s. 12 rights. The only remaining question is whether this violation can be justified under s. 1 of the *Charter*.

IX Section 1 of the *Charter*

The death penalty for civil crimes cannot be justified under s. 1 of the *Charter*. Indeed, it is difficult to imagine how it could ever be justified. However, let us assume that there could be a s. 1 justification for a punishment which would be, *per se*, a violation of s. 12. Even then, capital punishment could not meet the proportionality test except, perhaps, in very rare circumstances such as conviction for a very serious military offence committed during time of war or emergency.

The Safe Haven Argument

The primary s. 1 justification put forth by the respondent was the so-called "safe haven" argument. The respondent argued that if the death penalty was found to be cruel and unusual punishment *per se*, then to require the Minister to insist upon an Article 6 assurance in every case where the death penalty might be imposed would result in Canada becoming a safe haven for murderers. It was said that to retain such a ministerial discretion constitutes a reasonable limit on the *Charter* proscription against punishment which would be, *per se*, a breach of s. 12.

I cannot accept this contention. This submission is an *in terrorem* argument put forward without any evidentiary basis.

It is not an unreasonable supposition that people facing criminal charges may flee. But in Europe the decision not to extradite without death penalty assurances has not lead to any known exodus of violent criminals from one state to another. The respondent would exclude any comparison to Europe because of the stricter enforcement of national boundaries and its language differences which make it more difficult for a fugitive to flee. However, even if the relatively open border and the similarity in language invites flight from the United States to Canada, the reasons for flight are not necessarily dependent on a presumption that Canada will seek an Article 6 assurance before surrendering a fugitive. Flight may often be undertaken to avoid detection or trial. These are reasons enough to flee without an Article 6 assurance. It should be remembered

that any fugitive must first escape from the authorities in the United States and then successfully enter Canada. With that accomplished the fugitive still has to avoid detection in this country.

The respondent alleges that Canada is seeking to prevent an influx of murderers in the future. An allegation that there will be a future danger can best be substantiated by past history. In this case the past history gives little indication of a flood of future problems. Article 6 has been in existence since 1976 yet only two instances are known of American murderers or alleged murderers fleeing to Canada: Kindler and Ng. In the case of Ng it was not surprising that he would attempt to flee to Calgary where his sister resided. There is simply no evidence that the existence of Article 6 has led to a flood of American murderers into Canada. Nor is there any reason to believe that this would occur if Ministers of Justice uniformly sought Article 6 assurances.

The respondent does not contend that Article 6 assurances should never be sought; rather it is said that the decision whether to make the request should be made on a case-by-case basis. However, once it is known that Canada will, on some occasions, seek assurances, there will be just as strong an incentive for American fugitives to flee to Canada as if assurances were uniformly sought. The difference between a requirement for a uniform request for assurances and an occasional request is a difference only in quantity.

The respondent's position cannot be said to rest on principle. The notion that certain individuals will arbitrarily be subjected to cruel and unusual

punishment solely to serve as an apparent deterrent to American murderers contemplating flight to Canada cannot be accepted. Granting an arbitrary discretion to the Minister occasionally to seek Article 6 assurances cannot constitute a s. 1 justification. To say that it is justifiable to seek assurances only in some cases cannot meet the proportionality test required to establish a reasonable limit prescribed by law. This argument must be rejected.

Treaty Obligations

It was also argued that, in order to comply with its international commitments arising out of the Treaty, Canada should not uniformly seek Article 6 assurances. In essence the respondent argues that Kindler is an evil man. Regardless of the fact that he is subject to the death penalty, it is said, he should be extradited to the United States in order to fulfil Canada's obligations under the Treaty.

However, it must be remembered that, no matter how vile the killing, Kindler would not be executed in Canada had he committed the murder in this country. Further, Canada has committed itself in the international community to the recognition and support of human dignity and to the abolition of the death penalty. These commitments were not lightly made. They reflect Canadian values and principles. Canada cannot, on the one hand, give an international commitment to support the abolition of the death penalty and at the same time extradite a fugitive without seeking the very assurances contemplated by the Treaty. To do so would mean that Canada either was not honouring its international

commitments or was applying one standard to the United States and another to other nations. Neither alternative is acceptable. Both would contravene Canadian values and commitments.

X Summary

Capital punishment for murder is prohibited in Canada. Section 12 of the *Charter* provides that no one is to be subjected to cruel and unusual punishment. The death penalty is *per se* a cruel and unusual punishment. It is the ultimate denial of human dignity. No individual can be subjected to it in Canada. The decision of the Minister to surrender a fugitive who may be subject to execution without obtaining an assurance pursuant to Article 6 is one which can be reviewed under s. 12 of the *Charter*. It follows that the Minister must not surrender Kindler without obtaining the undertaking described in Article 6 of the Treaty. To do so would render s. 25 of the *Extradition Act* inconsistent with the *Charter* in its application to fugitives who would be subject to the death penalty.

This conclusion is based upon the historical reluctance displayed by jurors over the centuries to impose the death penalty; the provisions of s. 12 of the *Charter*; the decisions of this Court pertaining to that section; the pronouncements of this Court emphasizing the fundamental importance of human dignity; and the international statements and commitments made by Canada stressing the importance of the dignity of the individual and urging the abolition of the death penalty.

The *Charter*, the judicial pronouncements upon it and the international statements and commitments made by Canada reflect Canadian principles. The preservation of Canada's integrity and reputation in the international community require that extradition be refused unless an undertaking is obtained pursuant to Article 6. To take this position does not constitute an absolute refusal to extradite. It simply requires the requesting state to undertake that it will substitute a penalty of life imprisonment for the execution of the prisoner if that prisoner is found to be guilty of the crime.

XI Disposition

In the result I would allow the appeal, set aside the order of extradition and require the Minister to seek the assurances described in Article 6 of the Treaty. In the absence of obtaining an Article 6 assurance, the surrender order would contravene s. 12 of the *Charter* and could not be justified under s. 1. It follows that the answers to the constitutional questions are as follows:

> 1. 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, or, if imposed, will not be executed, inconsistent with ss. 7 or 12 of the *Canadian Charter of Rights and Freedoms*?

Yes it infringes s. 12 of the *Charter*.

2. 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*?

No.

SCHEDULE A

1. Abolitionist for all Crimes

Country	Date of Abolition	Date of Abolition for Ordinary Crimes	Date of Last Execution
Andorra	1990		1943
Australia	1985	1984	1967
Austria	1968	1950	1950
Cambodia	1989		
Cape Verde	1981		1835
Colombia	1910		1909
Costa Rica	1877		
Czech and Slovak Federative Republic	1990		1988
Denmark	1978	1933	1950
Dominican Republic	1966		
Ecuador	1906		
Finland	1972	1949	1944
France	1981		1977
Federal Republic of Germany	1949 /1987***		1949***
Haiti	1987		1972*
Honduras	1956		1940
Hungary	1990		1988
Iceland	1928		1830
Ireland	1990		1954
Kiribati			**
Liechtenstein	1987		1785
Luxembourg	1979		1949
Marshall Islands			**
Micronesia (Federated States)			**
Monaco	1962		1847
Mozambique	1990		1986
Namibia	1990		1988*
Netherlands	1982	1870	1952
New Zealand	1989	1961	1957
Nicaragua	1979		1930
Norway	1979	1905	1948
Panama			1903*
Philippines	1987		1976
Portugal	1976	1867	1849*
Romania	1989		1989
San Marino	1865	1848	1468*
Sao Tome and Principe	1990		**
Solomon Islands		1966	**
Sweden	1972	1921	1910
Tuvalu			**
Uruguay	1907		
Vanuatu			**

Vatican City State	1969
Venezuela	1863

*Date of last known execution.
**No executions since independence.

*** The death penalty was abolished in the Federal Republic of Germany (FRG) in 1949 and in the German Democratic Republic (GDR) in 1987. The last execution in the FRG was in 1949; the date of the last execution in the GDR is not known. The FRG and the GDR were unified in October 1990. The name of the unified country is the Federal Republic of Germany.

2. <u>Abolitionist for Ordinary Crimes Only</u>

Country	Date of Abolition	Date of Last Execution
Argentina	1984	
Brazil	1979	1855
Canada	1976	1962
Cyprus	1983	1962
El Salvador	1983	1973*
Fiji	1979	1964
Israel	1954	1962
Italy	1947	1947
Malta	1971	1943
Mexico		1937
Nepal	1990	1979
Papua New Guinea	1974	1950
Peru	1979	1979
Seychelles		**
Spain	1978	1975
Switzerland	1942	1944
United Kingdom	1973	1964

* Date of last known execution.

** No executions since independence.

Information compiled by Amnesty International.

The judgment of La Forest, L'Heureux-Dubé and Gonthier JJ. was delivered by

// *La Forest J.*//

LA FOREST J. -- I have had the advantage of reading the reasons of my colleagues, Cory J. and McLachlin J., and I am substantially in accord with McLachlin J. I wish, however, to add reasons of my own.

As the facts have already been set forth at some length, I need only outline them briefly here. The appellant, Joseph John Kindler, was found guilty of murder, kidnapping and criminal conspiracy by a court of competent jurisdiction in the State of Pennsylvania. A sentencing hearing was held in accordance with Pennsylvania law and the jury, which found that the aggravating circumstances surrounding these offences outweighed the mitigating circumstances, unanimously returned a sentence of death. The appellant escaped from custody before the sentence could be imposed and was arrested in the province of Quebec several months later. The United States requested the appellant's extradition pursuant to the *Extradition Treaty between Canada and the United States of America*, Can. T.S. 1976 No. 3.

The broad question raised by this appeal is whether the decision of the Minister of Justice to surrender the appellant to the United States, without first seeking assurances that the death penalty will not be imposed or executed, violates the appellant's rights under the *Canadian Charter of Rights and Freedoms*.

The appellant framed his arguments both in terms of s. 7 and s. 12 of the *Charter*, but he more directly focussed on s. 12, the provision that prohibits cruel

and unusual punishment or treatment. But McLachlin J. quite rightly points out that s. 7 of the *Charter* is the appropriate provision under which the actions of the Minister are to be assessed. The Minister's actions do not constitute cruel and unusual punishment. The execution, if it ultimately takes place, will be in the United States under American law against an American citizen in respect of an offence that took place in the United States. It does not result from any initiative taken by the Canadian Government. Canada's connection with the matter results from the fact that the fugitive came here of his own free will, and the question to be determined is whether the action of the Canadian Government in returning him to his own country infringes his liberty and security in an impermissible way.

There can be no doubt that the appellant's right to liberty and security of the person is very seriously affected because he may face the death penalty following his return. The real question is whether surrender under these conditions violates the principles of fundamental justice. I should, at the outset, say that I agree with Cory J. that the procedure followed by the Minister did not offend these principles. So the question is whether these principles were violated in substantive aspects.

In determining this question McLachlin J. rightly recognizes that the values emanating from s. 12 play an important role in defining fundamental justice in this context. Accordingly, this Court has held that extradition must be refused if surrender would place the fugitive in a position that is so unacceptable as to "shock the conscience"; see *Canada v. Schmidt*, [1987] 1 S.C.R. 500.

There are, of course, situations where the punishment imposed following surrender -- torture, for example -- would be so outrageous to the values of the Canadian community that the surrender would be unacceptable. But I do not think the surrender of fugitives who may ultimately face the death penalty abroad would in all cases shock the conscience of Canadians. My colleague, Cory J., refers to the free votes taken in the House of Commons in 1976 and 1987 rejecting the reinstatement of the death penalty as evidencing a "basic abhorrence" for the death penalty and providing "a clear indication that capital punishment is considered to be contrary to basic Canadian values" (p. 000). However, the fact that only four years ago, reinstatement of the death penalty was voted down by the relatively narrow margin of 148 to 127 attests to the contrary. As Marceau J.A. states in his judgment in the Federal Court of Appeal, [1989] 2 F.C. 492, that a vote was even taken on the issue suggests that capital punishment is not viewed as an outrage to the public conscience. One could not imagine a similar vote on the question of whether to reinstate torture. And it must be emphasized that we are trying to assess the public conscience, not in relation to the execution of the death penalty in Canada, but in regard to the extradition of an individual under circumstances where the death penalty might be imposed in another country. I should perhaps note that I do not think the courts should determine unacceptability in terms of statistical measurements of approval or disapproval by the public at large, but it is fair to say that they afford some insight into the public values of the community. For a similar approach, see Laskin C.J.'s reasons in *Miller v. The Queen*, [1977] 2 S.C.R. 680. These reasons have been of considerable influence in defining "cruel and unusual punishment" under the *Charter*; see *R. v. Smith*, [1987] 1 S.C.R. 1045; *R. v. Lyons*, [1987] 2 S.C.R. 309.

With this background, I turn to a more detailed analysis of whether the impugned surrender violates the principles of fundamental justice under s. 7 of the *Charter*. This Court has on previous occasions stated that in considering the issue of fundamental justice, it is engaged in a balancing process. In performing this task here, the global context must be kept squarely in mind. In Canada laws operate on a broad base and the law maker has a wide range of alternatives. Parliament, for example, may abolish the death penalty and achieve its goals by other means. This it has done, except as regards certain military offences. There is strong ground for believing that having regard to the limited extent to which the death penalty advances any valid penological objectives and the serious invasion of human dignity it engenders that the death penalty cannot, except in exceptional circumstances, be justified in this country. But that, I repeat, is not the issue.

Unlike the internal situation, the Minister's decision in the present case operates in a specific case where the particular facts are critical to constitutional evaluation. More important, it takes place in a global setting where the vast majority of the nations of the world retain the death penalty. There has, it is true, been a growing and, in my view, welcome trend among Western nations over the past fifty years to abolish the death penalty but some have gone against this trend, notably the United States, a fact of especial concern having regard to its size and proximity to this country. There are also a number of major international agreements mentioned by Cory J. supporting the trend for abolition but, except for the *Protocol No. 6 to the European Convention for the Protection of Human Rights and Fundamental Freedoms Concerning the Abolition of the Death Penalty*, Europ. T.S. No. 114, all fall short of actually prohibiting use of the death penalty.

This contrasts with the overwhelming universal condemnation that has been directed at practices such as genocide, slavery and torture; cf., for example, Articles 6 and 7 of the *International Covenant on Civil and Political Rights*, 999 U.N.T.S. 172.

There is thus, despite these trends, no international norm. Indeed, more directly reflective of international attitudes towards extraditing an individual to face the death penalty is the *Model Treaty on Extradition* brought forth at the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders as late as 1990 in Havana. Article 4 of the *Model Treaty on Extradition*, which lists "optional grounds" for refusing extradition, and provides for the same sort of discretion in obtaining assurances regarding the death penalty as is found in Article 6 of the Canada-United States Extradition Treaty, clearly contemplates the possibility of unconditional extradition under circumstances such as those found in the present case.

The Government has the right and duty to keep out and to expel aliens from this country if it considers it advisable to do so. This right, of course, exists independently of extradition. If an alien known to have a serious criminal record attempted to enter into Canada, he could be refused admission. And by the same token, he could be deported once he entered Canada. This basic state power was described by Lord Atkinson in *Attorney-General for Canada v. Cain*, [1906] A.C. 542, at p. 546:

> One of the rights possessed by the supreme power in every State is the right to refuse to permit an alien to enter that State [. . .] and to expel or deport from the State, at pleasure, even a friendly alien. . . .

If it were otherwise, Canada could become a haven for criminals and others whom we legitimately do not wish to have among us. I am aware that on humane grounds, provision is now made for the admission of political refugees, but that, of course, has no relevance here. It would be strange if Canada could expel lesser criminals but be obliged by the *Charter* to grant sanctuary to individuals who were wanted for crimes so serious as to call for the death penalty in their country of origin. This point was actually raised in respect of the present appellant in the Federal Court of Appeal, *Kindler v. MacDonald*, [1987] 3 F.C. 34, where it was concluded that deportation of the appellant would not violate the principles of fundamental justice. The same result was reached in another recent case, *Shepherd v. Canada (Minister of Employment and Immigration)* (1989), 52 C.C.C. (3d) 386 (Ont. C.A.), dismissed on jurisdictional grounds, at p. 399, leave to appeal to this Court denied, [1989] 2 S.C.R. xi. See also *Blanusa v. Canada (Minister of Employment and Immigration)* (1989), 27 F.T.R. 107.

I can see no reason why the same general approach should not apply to extradition. One of the basic purposes of that procedure is to ensure that a specific kind of undesirable alien should not be able to stay in Canada. It is, no doubt, true that extradition and deportation do not always have the same purpose, for cases can arise where they serve different ends, and fairness may demand that one procedure be used rather than the other. But that is not this case, and I would

be concerned about encouraging a resort to deportation rather than extradition with its inbuilt protections geared to the criminal process.

In both cases, situations could arise where an order was unconstitutional. Apart from torture, the nature of the offence, the age or mental capacity of the accused (see Eur. Court H. R., *Soering* case, judgment of 7 July 1989, Series A No. 161, at pp. 44 and 45), and other circumstances may constitutionally vitiate an order for surrender. No such considerations are raised in this case, however, nor in relation to Charles Ng, whose case was heard in conjunction with this appeal. The crime of which Kindler has been convicted can only be described as a brutal, premeditated murder. The extradition report shows that after beating the victim about the head with a baseball bat, Kindler allegedly dragged him to a nearby river, tied a cinder block to his neck and threw him into the river while he was still alive. Ng, for his part, has been accused of a series of offences of an almost unspeakable nature. These would seem to me to be precisely the kinds of individuals the Minister would wish to keep out of Canada for the protection of the public.

Thus the question with which we are presented here is whether it shocks the conscience to surrender individuals who have been charged with the worst sort of crimes to face capital prosecution in the United States. Absent proof of some mitigating circumstance, I do not think it does. This is especially true given that the failure to extradite without restrictions might lead to Canada becoming a more attractive destination for American fugitives in the future. It is also significant, as McLachlin J. notes, that the party requesting extradition in this case is the United

States -- a country with a criminal justice system that is, in many ways, similar to our own, and which provides substantial protections to the criminal defendant.

The possible significance of the temptation of an accused to escape to Canada should not be overlooked. Counsel has led evidence before us to show that, since 1976, approximately three hundred thousand homicides have occurred in the United States. As this Court has recognized previously, the two countries have a long, relatively open border and similar cultures, which makes the possibility of an escape over the border much more likely; see *United States of America v. Cotroni*, [1989] 1 S.C.R. 1469, at p. 1490. The fact that the appellant in this case, like the fugitive Charles Ng in the companion case to this appeal, was eventually found in Canada only because he had been committing crimes here, is indicative of the danger to which we are opening ourselves up if we allow Canada to become a "safe haven" for murder suspects. It was not entirely unpredictable that Ng, knowing the possible consequences of apprehension in his case, was willing to risk using a firearm in attempting to avoid capture even for the relatively minor offence of shoplifting. I should add that the other recently reported cases I have mentioned do nothing to dispel these concerns.

I am aware that there are at times reasons why a fugitive would flee to another country that have little to do with whether that country will insist that the death penalty not be imposed, but these do not dilute the cogency of the arguments already made. These arguments persuaded the Minister. He determined, in the interests of protecting the security of Canadians, that he should not, in this case, seek assurances regarding the penalty to be imposed. On the

evidence before us, it cannot be said that this determination was unreasonable. As this Court has previously stated, while the decisions of the executive are, of course, subject to judicial review, the jurisdiction of courts to interfere with the executive's exercise of discretion in this area "must be exercised with the utmost circumspection consistent with the executive's pre-eminent position in matters of external relations"; see *Argentina v. Mellino*, [1987] 1 S.C.R. 536, at pp. 557-58. The executive has a much greater expertise than the Court in the area of foreign relations, and is in a better position to evaluate many of the considerations which have been set forth above. I do not think the appellant has discharged the burden of establishing that his rights under the *Charter* have been violated.

I therefore conclude that the decision to extradite the appellant without restrictions, which was taken with the view to deterring fugitives from seeking a safe haven in Canada to avoid the death penalty, was made in pursuit of a legitimate and, indeed, compelling social goal. Surrendering the appellant to the United States without restriction does not go beyond what is necessary to achieve that goal, for it is apparent that surrendering the appellant with the restriction that the death penalty would not be imposed would completely undermine the deterrent effect the government is seeking to achieve. As this Court has frequently noted, the social goal addressed is an important consideration in a s. 7 balancing; see *Thomson Newspapers Ltd. v. Canada (Director of Investigation and Research, Restrictive Trade Practices Commission)*, [1990] 1 S.C.R. 425, at p. 539, where the cases are reviewed.

I need only add a few words about the subsidiary grounds raised by the appellant. The appellant argues that the death penalty in its practical application is arbitrarily and indiscriminately imposed. That argument is really directed at the criminal justice system in the United States and, as made, would require extraterritorial application of the *Charter*; see *United States of America v. Cotroni*, *supra*, at p. 1501. There is nothing here to indicate that the alleged arbitrariness is in any way related to the fugitive. It has nothing to do with the policy of the Canadian Government to protect the Canadian public against dangerous criminals seeking haven here. There may conceivably be situations where certain types of arbitrary conduct may sufficiently "shock the conscience" as to trigger s. 7, but this has not been established here. It is worth noting as well that the United States Supreme Court is well aware of the arbitrariness issue and has shown a willingness to act to prevent it; see *Furman v. Georgia*, 408 U.S. 238 (1972).

The appellant laid great stress on the "death row" phenomenon and the manner of execution. The death row phenomenon owes its existence in large part to the fact that it is not unusual for prisoners to spend many years on death row as they pursue their various appeals through the United States court system. The unwieldy and time-consuming nature of this generous appeal process has come under heavy criticism in the United States in recent years, and is the subject of efforts at reform. While the psychological stress inherent in the death row phenomenon cannot be dismissed lightly, it ultimately pales in comparison to the death penalty. Besides, the fact remains that a defendant is never forced to undergo the full appeal procedure, but the vast majority choose to do so. It would be ironic if delay caused by the appellant's taking advantage of the full and

generous avenue of the appeals available to him should be viewed as a violation of fundamental justice; see *Richmond v. Lewis*, 921 F.2d 933 (9th Cir. 1990), at p. 950. As in *Soering*, *supra*, there may be situations where the age or mental capacity of the fugitive may affect the matter, but again that is not this case.

So far as the specific manner of execution, electrocution, is concerned, it must be said that regardless of the manner chosen, there is a certain horror inherent in execution. It is far from clear, however, that there are more humane methods as viable alternatives; see Ian Gray and Moira Stanley, *A Punishment In Search of a Crime: Americans Speak Out Against the Death Penalty* (1989), at p. 39; Amnesty International, *When the State Kills . . . The Death Penalty: A Human Rights Issue* (1989), at pp. 58-60. The appellant's argument has "uniformly and summarily been rejected" by numerous courts in the United States, including the Supreme Court; see *Glass v. Louisiana*, 471 U.S. 1080 (1984).

For these reasons, then, I am of the opinion that surrendering the appellant unconditionally would not violate the principles of fundamental justice under the circumstances of this case. I reach this conclusion principally for two reasons. First, I believe that extradition of an individual who has been accused of the worst form of murder, to face capital prosecution in the United States, could not be said to shock the conscience of the Canadian people nor to be in violation of the standards of the international community. Second, I find that it is reasonable to believe that extradition in this case does not go beyond what is necessary to serve the legitimate social purpose of preventing Canada from becoming an attractive haven for fugitives.

I would accordingly dismiss the appeal and confirm the extradition order that was entered in this case. I would answer the first constitutional question in the negative. It is unnecessary to answer the second question.

The judgment of L'Heureux-Dubé, Gonthier and McLachlin JJ. were delivered by

//*McLachlin J.*//

MCLACHLIN J. -- This appeal and the companion case, *Reference Re Ng Extradition (Can.)*, raise the issue of whether the Minister of Justice can order the extradition of fugitives to the United States without obtaining an assurance from that country's authorities that the death penalty will not be imposed. Canadian law does not impose the death penalty, except for certain military offences. The question is whether our government is obliged, in all cases, to obtain assurances from the state requesting extradition that the death penalty will not be carried out by them. In my view the two cases raise the same issues. I have therefore chosen to deal with the cases together in the reasons for this appeal.

The Minister's orders of extradition are attacked on two grounds: (l) that the section of the *Extradition Act*, R.S.C., 1985, c. E-23, under which they are made is unconstitutional; and (2) that the Minister's exercise of his discretion under the order was unconstitutional.

For the reasons that follow, I conclude that it is not contrary to the *Canadian Charter of Rights and Freedoms* to give the Minister discretion on the question of whether to seek assurances from the requesting state that the death penalty will

not be carried out. I further conclude that the Minister did not err in the way he exercised his discretion in the cases of Ng and Kindler.

Facts

Kindler stands convicted of first degree murder, conspiracy to commit murder, and kidnapping in the State of Pennsylvania. The jury which convicted him, after hearing further evidence, recommended the imposition of the death penalty. Before he was sentenced, however, Kindler escaped from prison and fled to Canada, where he was subsequently arrested and, after a hearing before Pinard J., committed for surrender, [1985] C.S. 1117.

Ng is charged in the State of California with nineteen charges arising from multiple and brutal killings. On twelve of those charges, Ng, if found guilty, could receive the death penalty. He was arrested in Calgary following a bungled shoplifting attempt during which he shot and wounded a store security guard. At the end of a six-week hearing, Trussler J. committed Ng for extradition: (1988), 93 A.R. 204.

Section 25 of the *Extradition Act* leaves the final decision to surrender with the Minister of Justice. Article 6 of the *Extradition Treaty between Canada and the United States of America*, Can. T.S. 1976 No. 3, provides that the country from which extradition of a fugitive has been requested may seek assurances from the arresting country that the death penalty will not be imposed where the offences

involved carry the possibility of capital punishment. In the case of both Kindler and Ng, the Minister ordered final extradition without asking for such assurances.

In Kindler's case, an application to review the Minister's decision was brought in the Federal Court. The application was dismissed, [1987] 2 F.C. 145, as was an appeal from that dismissal to the Federal Court of Appeal, [1989] 2 F.C. 492. Marceau J.A. and Pratte J.A. were not prepared to conclude that the death penalty violated the *Charter*. Pratte J.A. also expressed the view that the *Charter* did not apply because the punishment in question would be inflicted not by the Canadian government, but by a foreign state. Hugessen J.A. dissented, expressing the view that the death penalty *per se* constituted cruel and unusual punishment.

Ng's action against the Minister never reached trial, the Governor in Council having referred the issues to this Court.

The Minister's reasons for surrendering the fugitives without seeking assurances that the death penalty would not be imposed or, if imposed, not carried out, may be summarized as follows:

1. There was no merit in the suggestion that a fugitive would not receive a fair trial or sentence hearing in the United States (Ng);

2. There was no merit in the so-called "death-row phenomenon" argument; the state's method of execution was accepted by the American courts (Kindler);

3. The provision in Article 6 of the Treaty should not be routinely applied: "[i]f it was intended that assurances should be sought other than for special reasons, that intent could have been clearly and simply expressed in the Treaty" (Ng);

4. Those who commit murder in a foreign state, particularly one with a long common border with Canada, should be discouraged from seeking haven in Canada as a means of reducing or limiting the severity of the penalty that might be exacted under the laws of the state in which the crime was committed (Ng and Kindler); and

5. The United States and Canada must work together to support law enforcement in the two nations (Ng).

Issues

The essence of these cases is not whether the death penalty offends the *Charter*. It is rather whether the Canadian extradition procedure, as expressed in the *Extradition Act* and in the Minister's decision, violates the *Charter*. In addition to the submissions advanced by the fugitives, this Court stated two constitutional

questions directed at whether s. 25 of the *Extradition Act* violates s. 7 or s. 12 of the *Charter*, and if so, whether such violation is justified under s. 1.

I propose to consider the following matters:

I.	The Place of Extradition in Our System of Justice
II.	Which Sections of the *Charter* Apply?
III.	Does Section 25 of the *Extradition Act* Violate the *Charter*?
IV.	Did the Minister's Order of Unconditional Extradition Violate the *Charter*?

The following constitutional questions were stated by Dickson C.J.:

> 1. 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, or, if imposed, will not be executed, inconsistent with ss. 7 or 12 of the *Canadian Charter of Rights and Freedoms*?
>
> 2. If the answer to question l 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*?

Treaties and Legislation

Canadian Charter of Rights and Freedoms:

> **7**. Everyone has 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.
>
> **12.** Everyone has the right not to be subjected to any cruel and unusual treatment or punishment.

Extradition Treaty between Canada and the United States of America, Can. T.S. 1976 No. 3, in force March 22, 1976:

> Article 6
>
> When the offense for which extradition is requested is punishable by death under the laws of the requesting State and the laws of the requested State do not permit such punishment for that offense, extradition may be refused 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 executed.

Extradition Act, R.S.C., 1985, c. E-23:

> **25**. Subject to this Part, the Minister of Justice, on the requisition of the foreign state, may, under his hand and seal, order a fugitive who has been committed for surrender to be surrendered to the person or persons who are, in the Minister's opinion, duly authorized to receive the fugitive in the name and on behalf of the foreign state, and the fugitive shall be so surrendered accordingly.

Discussion

I. *The Place of Extradition in Our System of Justice*

Extradition occupies a unique and important position in the structure of law enforcement. As the majority noted in *United States of America v. Cotroni*, [1989] 1 S.C.R. 1469, at p. 1485, "[t]he investigation, prosecution and suppression of crime for the protection of the citizen and the maintenance of peace and public order is an important goal of all organized societies. The pursuit of that goal cannot realistically be confined within national boundaries. That has long been the case, but it is increasingly evident today."

Extradition is a practice which has deep historical roots in this country. The long border with the United States has meant that effective measures for the return of alleged criminals and other fugitives have been a necessary component of the administration of justice since before Confederation. The Ashburton-Webster Treaty, which was the basis of this country's extradition arrangements with the United States until the implementation of the current treaty in 1976, was entered into by Great Britain in 1842. For a review of the history of these arrangements, see Chapter 1 of G. V. La Forest, *Extradition to and from Canada* (2nd ed. 1977).

While the extradition process is an important part of our system of criminal justice, it would be wrong to equate it to the criminal trial process. It differs from the criminal process in purpose and procedure and, most importantly, in the factors which render it fair. Extradition procedure, unlike the criminal procedure, is founded on the concepts of reciprocity, comity and respect for differences in other jurisdictions.

This unique foundation means that the law of extradition must accommodate many factors foreign to our internal criminal law. While our conceptions of what constitutes a fair criminal law are important to the process of extradition, they are necessarily tempered by other considerations.

Most importantly, our extradition process, while premised on our conceptions of what is fundamentally just, must accommodate differences between our system of criminal justice and the systems in place in reciprocating states. The simple fact is that if we were to insist on strict conformity with our own system, there would be virtually no state in the world with which we could reciprocate. Canada, unable to obtain extradition of persons who commit crimes here and flee elsewhere, would be the loser. For this reason, we require a limited but not absolute degree of similarity between our laws and those of the reciprocating state. We will not extradite for acts which are not offences in this country. We sign treaties only with states which can assure us that their systems of criminal justice are fair and offer sufficient procedural protections to accused persons. We permit our Minister to demand assurances relating to penalties where the Minister considers such a demand appropriate. But beyond these basic conditions precedent of reciprocity, much diversity is, of necessity, tolerated.

Thus this Court, *per* La Forest J., recognized in *Canada v. Schmidt*, [1987] 1 S.C.R. 500, at pp. 522-23, that our extradition process does not require conformity with Canadian norms and standards. The foreign judicial system will not necessarily be considered fundamentally unjust because it operates without,

for example, the presumption of innocence and other legal safeguards we demand in our own system of criminal justice.

For the same reasons, this Court has emphasized that we must avoid extraterritorial application of the guarantees in our *Charter* under the guise of ruling extradition procedures unconstitutional. As La Forest J. put it in *Schmidt*, at p. 518, "the *Charter* cannot be given extraterritorial effect to govern how criminal proceedings in a foreign country are to be conducted."

These considerations affect the applicability of the *Charter* in these cases and the determination of whether our extradition law offends the fundamental principles of justice which the *Charter* enshrines. It is to these issues that I now turn.

II. *Which Sections of the Charter Apply*?

The *Charter* clearly applies to extradition matters, including the executive decision of the Minister that effects the fugitive's surrender: *Schmidt*, *supra*; *Argentina v. Mellino*, [1987] 1 S.C.R. 536, and *United States v. Allard*, [1987] 1 S.C.R. 564.

The narrower question is what provisions of the *Charter* apply to extradition proceedings -- s. 12, s. 7, or both?

In my view, the guarantee against cruel and unusual punishment found in s. 12 of the *Charter* does not apply to s. 25 of the *Extradition Act* or to ministerial acts done pursuant to s. 25. The *Charter*'s reach is confined to the legislative and executive acts of Canadian governments. The question then is whether the decision to surrender a fugitive under s. 25 can constitute the imposition of cruel and unusual punishment by a Canadian government. In my view, it cannot. Neither s. 25 nor orders made under it impose or authorize punishment. The purpose and effect of the provision is to permit the fugitive to be extradited to face the consequences of the judicial process elsewhere. Any punishment which is imposed will be the result of laws and actions in that jurisdiction.

The fact that the Minister may seek assurances that the death penalty will not be demanded or enforced in the foreign jurisdiction does not change this situation. The punishment, if any, to which the fugitive is ultimately subject will be punishment imposed, not by the Government of Canada, but by the foreign state. To put it another way, the effect of any Canadian law or government act is too remote from the possible imposition of the penalty complained of to attract the attention of s. 12. To apply s. 12 directly to the act of surrender to a foreign country where a particular penalty may be imposed, is to overshoot the purpose of the guarantee and to cast the net of the *Charter* broadly in extraterritorial waters. Effective relations between different states require that we respect the differences of our neighbors and that we refrain from imposing our constitutional guarantees on other states under the guise of refusing to assist them (and extradition is a form of assistance) unless they conform to our *Charter*.

This Court has in the past refused to apply *Charter* guarantees to defects in proceedings outside the country. In *Schmidt, supra*, the majority, *per* La Forest J., rejected the argument that s. 11 rights could serve as an independent ground of *Charter* review, since the fugitive had not been charged with a crime in Canada. La Forest J. examined the opening words of s. 11, which grant the various rights contained within it to "[a]ny person charged with an offence". In his view, the rights under s. 11 apply only to criminal proceedings conducted by the governments referred to in s. 32 of the *Charter*, i.e. Parliament and the provincial legislatures. To go beyond this would be to give the section extraterritorial effect: *Schmidt, supra*, at pp. 518-19. See also *Spencer v. The Queen*, [1985] 2 S.C.R. 278.

This is not to say that extradition will never attract scrutiny on account of an objectionable procedure or punishment in the requesting country. While s. 12 of the *Charter* may not apply since the acts to which it is directed occur outside Canada, our law of extradition and the Minister's acts pursuant to that law do fall under the *Charter* and the general guarantees found in s. 7. They must meet the requirements of s. 7 of the *Charter* that no one be deprived of his or her life, liberty or security of person except in accordance with the fundamental principles of justice. Section 12 may affect the interpretation of s. 7: *Schmidt, supra*, at p. 522; *Re B.C. Motor Vehicle Act*, [1985] 2 S.C.R. 486; *R. v. Hebert*, [1990] 2 S.C.R. 151, at p. 176. But s. 12 is not the only factor to be considered in determining the constitutionality of an extradition procedure. Just as the extradition process involves considerations which go beyond our internal criminal law, so must an assessment of its fundamental fairness take account of those factors.

III. *Does Section 25 of the Extradition Act Violate the Charter*?

A. The Test Under Section 7

To ascertain the applicable principles of fundamental justice under s. 7 of the *Charter*, we must look to the basic tenets of our judicial system and the system under scrutiny -- in this case our extradition system: *Re B.C. Motor Vehicle Act*, *supra*; *R. v. Beare*, [1988] 2 S.C.R. 387. This may involve us in historic and comparative inquiries: *Beare*, *supra*; *R. v. Lyons*, [1987] 2 S.C.R. 309; *R. v. Milne*, [1987] 2 S.C.R. 512. It necessarily involves us in a consideration of the purposes of the provision or act under scrutiny: *Beare*, *supra*.

In assessing whether there has been a violation of the principles of fundamental justice, a contextual approach which takes into account the nature of the decision to be made must be adopted. In *R. v. Jones*, [1986] 2 S.C.R. 284, at p. 304, La Forest J. states that:

> Some pragmatism is involved in balancing between fairness and efficiency. The provinces must be given room to make choices regarding the type of administrative structure that will suit their needs unless the use of such structure is in itself so manifestly unfair, having regard to the decisions it is called upon to make, as to violate the principles of fundamental justice. [Emphasis in original.]

In a similar vein, Sopinka J. in *Syndicat des employés de production du Québec et de l'Acadie v. Canada (Canadian Human Rights Commission)*, [1989] 2 S.C.R. 879, stressed at pp. 895-96 that:

> . . .the rules of natural justice and the duty of fairness are variable standards. Their content will depend on the circumstances of the case, the statutory provisions and the nature of the matter to be decided.

Thus the Court in defining the principles of fundamental justice relevant to the extradition draws upon the principles and policies underlying extradition law and procedure. Is the impugned provision consistent with extradition practices, viewed historically and in the light of current conditions? Does the provision serve the purposes and concerns which lie at the heart of extradition policy? The question is whether, based on these considerations, the power conferred by s. 25 to extradite without imposing a condition which would preclude capital punishment, is consonant with the fundamental conceptions of what is fair and right in Canadian society.

In recognition of the various and complex considerations which necessarily enter into the extradition process, this Court has developed a more cautious approach in the review of executive decisions in the extradition area, holding that judicial scrutiny should not be over-exacting. As the majority in *Schmidt* pointed out, the reviewing court must recognize that extradition involves interests and complexities with which judges may not be well equipped to deal (p. 523). The superior placement of the executive to assess and consider the competing interests involved in particular extradition cases suggests that courts should be especially careful before striking down provisions conferring discretion on the executive. Thus the court must be "extremely circumspect" to avoid undue interference with an area where the executive is well placed to make these sorts of decisions:

Schmidt, at p. 523. It must, moreover, avoid extraterritorial application of the *Charter*: *Schmidt*, *supra*.

The test for whether an extradition law or action offends s. 7 of the *Charter* on account of the penalty which may be imposed in the requesting state, is whether the imposition of the penalty by the foreign state "sufficiently shocks" the Canadian conscience: *Schmidt*, *per* La Forest J., at p. 522. The fugitive must establish that he or she faces "a situation that is simply unacceptable": *Allard*, *supra*, at p. 572. Thus the reviewing court must consider the offence for which the penalty may be prescribed, as well as the nature of the justice system in the requesting jurisdiction and the safeguards and guarantees it affords the fugitive. Other considerations such as comity and security within Canada may also be relevant to the decision to extradite and if so, on what conditions. At the end of the day, the question is whether the provision or action in question offends the Canadian sense of what is fair, right and just, bearing in mind the nature of the offence and the penalty, the foreign justice system and considerations of comity and security, and according due latitude to the Minister to balance the conflicting considerations.

In determining whether, bearing all these factors in mind, the extradition in question is "simply unacceptable", the judge must avoid imposing his or her own subjective views on the matter, and seek rather to objectively assess the attitudes of Canadians on the issue of whether the fugitive is facing a situation which is shocking and fundamentally unacceptable to our society.

B. Applying the Section 7 test to Section 25 of the *Extradition Act*

Section 25 of the *Extradition Act* is attacked because it permits the Minister to order the extradition of a fugitive to a state where he or she may, if convicted, face capital punishment. To allow this, it is said, is to offend the principles of fundamental justice.

I do not agree. The question, I reiterate, is not whether the death penalty is constitutional, or even desirable in this country, but whether returning a fugitive to face it in another jurisdiction offends the Canadian sense of what is fair and right. The answer to this question turns on attitudes in this country toward the death penalty, and toward extradition, considered along with other factors such as the need to preserve an effective extradition policy and to deter American criminals fleeing to Canada as a "safe haven".

The practice of extradition, as has been noted, has deep roots in this country, and the practice *per se* has never been controversial. This reflects a strong belief that crime must not go unpunished. Fairness requires that alleged criminals be brought to justice and extradition is the normal means by which this is achieved when the offence was committed in a foreign jurisdiction.

When an accused person is to be tried in Canada there will be no conflict between our desire to see an accused face justice, and our desire that the justice he or she faces conforms to the most exacting standards which have emerged

from our judicial system. However, when a fugitive must face trial in a foreign jurisdiction if he or she is to face trial at all, the two desires may come into conflict. In some cases the social consensus may clearly favour one of these values above the other, and the resolution of the conflict will be straightforward. This would be the case if, for instance, the fugitive faced torture on return to his or her home country. In many cases, though, neither value will be able to claim absolute priority; rather, one will serve to temper the other. There may be less unfairness in requiring an accused to face a judicial process which may be less than perfect according to our standards, than in having him or her escape the judicial process entirely.

For this reason, in considering the attitude of Canadians toward the death penalty we must consider not only whether Canadians consider it unacceptable, but whether they consider it to be so absolutely unacceptable that it is better that a fugitive not face justice at all rather than face the death penalty.

With this in mind I turn to consider Canadian attitudes to the death penalty. Much has been said and written in this country on the death penalty. While it is difficult to generalize about a subject so controverted, this much can be ventured. There is no clear consensus in this country that capital punishment is morally abhorrent and absolutely unacceptable.

Capital punishment was a component of Canadian criminal law from this country's colonial beginnings until it was abolished by Parliament in 1976. For most of that period the penalty was accepted with little question, although

executions became increasingly rare in the latter years of its existence in Canada. The last execution in Canada was in 1962. Yet, while the death penalty has been formally abolished in this country, its possible return continues to be debated. In 1987, in response to persistent calls to bring back the death penalty, Members of Parliament conducted a free vote on a resolution to reinstate capital punishment. The result was a defeat of the motion, but the vote -- 148 to 127 -- fell far short of reflecting a broad consensus even among Parliamentarians.

To this day, capital punishment continues to apply to certain military offences. At the same time, public opinion polls continue to show considerable support among Canadians for the return of the death penalty for certain offences. Can it be said, in light of such indications as these, that the possibility that a fugitive might face the death penalty in California or Pennsylvania "shocks" the Canadian conscience or leads Canadians to conclude that the situation the fugitive faces is "simply unacceptable"? The case is far from plain.

When other considerations are brought into the picture, the matter becomes even less clear. In some cases, the unconditional surrender of a fugitive to face the death penalty may "sufficiently shock" the national conscience as to render it mandatory that the Minister seek an assurance that the penalty will not be imposed. But in other cases, this may not be so. These instances provide an example. Both fugitives are sought for crimes involving brutal, and in the case of Ng, multiple, murders. In both Pennsylvania and California the legal system is the product of democratic government, and includes the substantial protections of a constitutional rights document which dates back over two centuries. The

variance between cases supports legislation which accords to the Minister a measure of discretion on the question of whether an assurance that the death penalty will not be imposed should be demanded.

The importance of maintaining effective extradition arrangements with other countries in a world where law enforcement is increasingly international in scope, likewise supports the ministerial discretion found in s. 25. As discussed above, an effective extradition process is founded on respect for sovereignty and differences in the judicial systems among various nations. Canada displays confidence in the fairness of the justice systems of other nations by entering into treaties with them. If Canada is to be assured of cooperation when it seeks extradition from states whose laws may not conform exactly to ours, it must be prepared to reciprocate.

Another relevant consideration in determining whether surrender without assurances regarding the death penalty would be a breach of fundamental justice is the danger that if such assurances were mandatory, Canada might become a safe haven for criminals in the United States seeking to avoid the death penalty. This is not a new concern. The facility with which American offenders can flee to Canada has been recognized since the nineteenth century: *Cotroni*, *supra*, at p. 1490.

It was argued that there was little statistical evidence that criminals routinely cross the border into Canada. On the other hand, there must be few cases indeed where a person facing the death penalty in the United States is able to escape and

make his or her way to the border. What is certain is that this is precisely what happened in the two cases before the Court, and that the result endangered Canadians; Ng, arrested in the course of committing a crime here, shot and wounded a security guard. Given our long undefended common border with the United States, it is not unreasonable for the Minister, in deciding whether to seek the assurance that the death penalty will not be imposed, to consider the danger of encouraging other fugitives to do what Ng and Kindler did.

The fugitives, in suggesting that s. 25 should be struck down, in effect urge that the only constitutional law is one which absolutely forbids extradition in the absence of assurances that the death penalty will not be imposed. The foregoing discussion suggests that such a law might well prove too inflexible to permit the Government of Canada to deal with particular situations in a way which maintains the required comity with other nations, while at the same time going beyond what is required to conform to our fundamental sense of fairness. What is required is a law which permits the Minister, in the particular case before her, to act in a way which preserves the effectiveness of the extradition process, while conforming to the Canadian sense of what is fundamentally just. Section 25 does this; the less flexible alternative proposed by the fugitives would not.

I conclude that the fugitives have not established that the law which permits their extradition without assurances that the death penalty will not be applied in the requesting states offends the fundamental principles of justice enshrined in s. 7 of the *Charter*.

IV. *Did the Minister's Order of Unconditional Extradition Violate the Charter*?

I have concluded that s. 25 of the *Extradition Act* does not violate the *Charter*. The question remains whether the Minister, in the exercise of his discretion under s. 25, violated s. 7 of the *Charter*.

In making this determination, a court must remain sensitive to the dangers of over-zealous interference with the extradition system alluded to in *Canada v. Schmidt*, *per* La Forest J. These include the need not to compromise the integrity of the judicial process, the proper role of the Minister in assessing the competing considerations bearing on a particular extradition, and the need to ensure that the Court is not, in reality, giving the *Charter* extraterritorial effect. As La Forest J. put it in *Schmidt*, at p. 522:

> . . . I see nothing unjust in surrendering to a foreign country a person accused of having committed a crime there for trial in the ordinary way in accordance with the system for the administration of justice prevailing in that country simply because that system is substantially different from ours with different checks and balances. The judicial process in a foreign country must not be subjected to finicky evaluations against the rules governing the legal process in this country.

Given these concerns, judicial interference with decisions of the executive on matters of extradition must be limited. To quote La Forest J. in *Schmidt* (at p. 523) once again:

> What has to be determined is whether or not, in the particular circumstances of the case, surrender of a fugitive for a trial offends against the basic demands of justice. In

> determining that issue, the courts must begin with the notion that the executive must first have determined that the general system for the administration of justice in the foreign country sufficiently corresponds to our concepts of justice to warrant entering into the treaty in the first place, and must have recognized that it too has a duty to ensure that its actions comply with constitutional standards. Blind judicial deference to executive judgment cannot, of course, be expected. The courts have the duty to uphold the Constitution. Nonetheless, this is an area where the executive is likely to be far better informed than the courts, and where the courts must be extremely circumspect so as to avoid interfering unduly in decisions that involve the good faith and honour of this country in its relations with other states. In a word, judicial intervention must be limited to cases of real substance. [Emphasis added.]

In my view, the Minister's decisions in these cases do not violate s. 7. The crimes alleged to have been perpetrated by Ng in the State of California are among the worst imaginable. If the state's contention is correct, these were deliberate, cold-blooded murders of a series of random and innocent victims for no motive other than personal gratification. The crimes of which Kindler stands convicted are also brutal and shocking. The justice systems in California and Pennsylvania are founded on constitutional provisions not dissimilar to ours giving reasonable assurance of a fair trial. This leaves only the fact that at the end of the process, the fugitive may face the death penalty. But, as we have seen, that possibility alone in the context of the extradition system of this country is insufficient to render the decision unconstitutional. On the facts of these cases, where the reasons for extradition are compelling and the procedural guarantees in the reciprocating state high, I am satisfied that the Minister's decision did not infringe the *Charter*.

The Minister's decision to extradite without assurances that the death penalty would not be imposed or carried out is not out of step with the international

community. The United Kingdom, for example, has twice extradited fugitives charged with murder to the United States without demanding such assurances. In one case, *Kirkwood v. United Kingdom*, Application No. 10479/83, March 12, 1984, D.R. 37, p. 158, the European Commission of Human Rights approved the extradition in view of the extensive constitutional guarantees and reviews of death row conditions in California. The Commission rejected the argument that it infringed Article 3 of the *European Convention for the Protection of Human Rights and Fundamental Freedoms*, 213 U.N.T.S. 222, which provides that "[n]o one shall be subjected to torture or to inhuman or degrading treatment or punishment". In the other case, *Soering*, judgment of 7 July 1989, Series A No. 161, the European Court of Human Rights held that extradition infringed Article 3. The argument focused on the death row phenomenon, Article 2 of the Convention expressly recognizing the death penalty. In *Soering* the Court adverted to the importance of extradition and stated that considerations related to its aims were legitimate factors in determining the existence of a breach under Article 3 (p. 35). The fact that two tribunals reached different views on not dissimilar cases illustrates the complexity of the issue and supports the view that courts should not lightly interfere with executive decisions on extradition matters.

As for the other arguments, it has not been demonstrated that the Minister erred in law or exercised his discretion upon an inadmissible basis in either case. I reject Kindler's submission that he had the right to an oral hearing before the Minister. He was afforded that right at the stage of the judicial hearing. No further oral hearing is required at the second stage of the Minister's final decision.

I conclude that it has not been established that the Minister's orders infringe the *Charter* or are otherwise invalid.

Conclusion

The answer to the first constitutional question is "No". It is unnecessary to answer the second question. There is no basis for interfering with the Minister's decision in either Ng's or Kindler's case. I would dismiss the Kindler appeal and confirm the extradition orders.

Appeal dismissed, LAMER C.J. *and* SOPINKA *and* CORY JJ. *dissenting.*

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