United States *v*. Burns, [2001] 1 S.C.R. 283, 2001 SCC 7

Minister of Justice *Appellant*

v.

Glen Sebastian Burns and Atif Ahmad Rafay *Respondents*

and

Amnesty International,
the International Centre for Criminal Law & Human Rights,
the Criminal Lawyers' Association (Ontario),
the Washington Association of Criminal Defence Lawyers and
the Senate of the Republic of Italy *Interveners*

Indexed as: United States *v*. Burns

Neutral citation: 2001 SCC 7.

File No.: 26129.

Hearing: March 22, 1999.

Present: Lamer C.J. and L'Heureux-Dubé, Gonthier, Cory, McLachlin, Iacobucci, Major, Bastarache and Binnie JJ.

Rehearing: May 23, 2000; February 15, 2001.

Present: McLachlin C.J. and L'Heureux-Dubé, Gonthier, Iacobucci, Major, Bastarache, Binnie, Arbour and LeBel JJ.

on appeal from the court of appeal for british columbia

Constitutional law -- Charter of Rights -- Mobility rights -- Extradition -- Surrender of Canadian fugitives to foreign state -- Fugitives wanted in connection with triple murder in U.S. -- Minister of Justice deciding to extradite fugitives without obtaining assurances from U.S. authorities that death penalty would not be imposed -- Whether extradition without assurances infringed fugitives' constitutional rights to remain in or enter Canada -- Canadian Charter of Rights and Freedoms, s. 6(1) -- Extradition Act, R.S.C. 1985, c. E-23, s. 25.

Constitutional law -- Charter of Rights -- Application -- Cruel and unusual punishment -- Extradition -- Surrender of Canadian fugitives to foreign state -- Fugitives wanted in connection with triple murder in U.S. -- Minister of Justice deciding to extradite fugitives without obtaining assurances from U.S. authorities that death penalty would not be imposed -- Whether constitutional guarantee against cruel and unusual punishment engaged -- Canadian Charter of Rights and Freedoms, ss. 12, 32(1).

Constitutional law -- Charter of Rights -- Fundamental justice – Extradition -- Surrender of Canadian fugitives to foreign state -- Fugitives wanted in connection with triple murder in U.S. -- Minister of Justice deciding to extradite fugitives without obtaining assurances from U.S. authorities that death penalty would not be imposed -- Fugitives deprived of their rights to liberty and security of person by extradition order -- Whether threatened deprivation of fugitives' rights in accordance with principles of fundamental justice -- If not, whether extradition without assurances justifiable as reasonable in free and democratic society -- Canadian Charter of Rights and Freedoms, ss. 1, 7 -- 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.

The respondents are each wanted on three counts of aggravated first degree murder in the State of Washington. If found guilty, they will face either the death penalty or life in prison without the possibility of parole. The respondents are both Canadian citizens and were 18 years old when the father, mother and sister of the respondent Rafay were found bludgeoned to death in their home in Bellevue, Washington, in July 1994. Both Burns and Rafay, who had been friends at high school in British Columbia, admit that they were at the Rafay home on the night of the murders. They claim to have gone out on the evening of July 12, 1994 and when they returned, they say, they found the bodies of the three murdered Rafay family members. Thereafter, the respondents returned to Canada. As a result of investigative work by undercover RCMP officers, they were eventually arrested. The Attorney General of British Columbia decided against a prosecution in that province. United States authorities commenced proceedings to extradite the respondents to the State of Washington for trial. The Minister of Justice for Canada, after evaluating the respondents' particular circumstances, including their age and their Canadian nationality, ordered their extradition pursuant to s. 25 of the *Extradition Act* without seeking assurances from the United States under Article 6 of the extradition treaty between the two countries that the death penalty would not be imposed, or, if imposed, would not be carried out. The British Columbia Court of Appeal, in a majority decision, ruled that the unconditional extradition order would violate the mobility rights of the respondents under s. 6(1) of the *Canadian Charter of Rights and Freedoms*. The Court of Appeal therefore set aside the Minister's decision and directed him to seek assurances as a condition of surrender.

Held: The appeal should be dismissed.

Section 25 of the *Extradition Act* creates a broad ministerial discretion whether to surrender a fugitive, and if so, on what terms. While constitutionally valid,

the Minister's discretion is limited by the *Charter*. The authority of the Minister under s. 25 is predicated on the existence of an extradition treaty. In respect of seeking assurances under Article 6 of the treaty, the Minister took the position that assurances were not to be sought routinely in every case in which the death penalty was applicable; such assurances should be sought only in circumstances where the particular facts of the case warranted that special exercise of discretion. Although it is generally for the Minister, not the court, to assess the weight of competing considerations in extradition policy, the availability of the death penalty opens up a different dimension. Death penalty cases are uniquely bound up with basic constitutional values and the court is the guardian of the Constitution.

The death penalty is a justice issue and is only marginally a mobility rights issue. Section 6(1) of the *Charter*, standing alone, does not invalidate an extradition without assurances. Although extradition is a *prima facie* infringement of the s. 6(1) right of every Canadian citizen to "remain in" Canada, efforts to stretch mobility rights to cover the death penalty controversy are misplaced.

Nor is s. 12 of the *Charter* ("cruel and unusual treatment or punishment") the most appropriate head of relief. The *Charter* guarantees certain rights and freedoms from infringement by "the Parliament and government of Canada" and "the legislature and government of each province" (s. 32(1)). The Canadian government would not itself inflict capital punishment, although its decision to extradite without assurances would be a necessary link in the chain of causation to that potential result. However, the degree of causal remoteness between the extradition order to face trial and the potential imposition of capital punishment as one of many possible outcomes to this prosecution makes this a case more appropriately reviewed under s. 7 of the *Charter*. The values

underlying various sections of the *Charter*, including s. 12, form part of the balancing process engaged in under s. 7.

Section 7 ("fundamental justice") applies because the extradition order would, if implemented, deprive the respondents of their rights of liberty and security of the person since their lives are potentially at risk. The issue is whether the threatened deprivation is in accordance with the principles of fundamental justice. Section 7 is concerned not only with the act of extradition, but also with its potential consequences. The balancing process set out in *Kindler* and *Ng* is the proper analytical approach. The "shocks the conscience" language signals the possibility that even though the rights of the fugitive are to be considered in the context of other applicable principles of fundamental justice, which are normally of sufficient importance to uphold the extradition, a particular treatment or punishment may sufficiently violate our sense of fundamental justice as to tilt the balance against extradition. The rule is not that departures from fundamental justice are to be tolerated unless in a particular case it shocks the conscience. An extradition that violates the principles of fundamental justice will always shock the conscience.

The important inquiry is to determine what constitutes the applicable principles of fundamental justice in the extradition context. The outcome of the appeal turns on an appreciation of these principles, which in turn are derived from the basic tenets of our legal system. While these basic tenets have not changed since 1991 when *Kindler* and *Ng* were decided, their application 10 years later must take note of factual developments in Canada and in relevant foreign jurisdictions.

In this case, it is said that a number of factors favour extradition without assurances: (1) individuals accused of a crime should be brought to trial to determine

the truth of the charges, the concern being that if assurances are sought and refused, the Canadian government could face the possibility that the respondents might avoid a trial altogether; (2) justice is best served by a trial in the jurisdiction where the crime was allegedly committed and the harmful impact felt; (3) individuals who choose to leave Canada leave behind Canadian law and procedures and must generally accept the local law, procedure and punishments which the foreign state applies to its own residents; and (4) extradition is based on the principles of comity and fairness to other cooperating states in rendering mutual assistance in bringing fugitives to justice, subject to the principle that the fugitive must be able to receive a fair trial in the requesting state.

Countervailing factors favour extradition only with assurances. First, in Canada, the death penalty has been rejected as an acceptable element of criminal justice. Capital punishment engages the underlying values of the prohibition against cruel and unusual punishment. It is final and irreversible. Its imposition has been described as arbitrary and its deterrent value has been doubted. Second, at the international level, the abolition of the death penalty has emerged as a major Canadian initiative and reflects a concern increasingly shared by most of the world's democracies. Canada's support of international initiatives opposing extradition without assurances, combined with its international advocacy of the abolition of the death penalty itself, leads to the conclusion that in the Canadian view of fundamental justice, capital punishment is unjust and should be stopped. While the evidence does not establish an international law norm against the death penalty, or against extradition to face the death penalty, it does show significant movement towards acceptance internationally of a principle of fundamental justice Canada has already adopted internally -- namely, the abolition of capital punishment. International experience thus confirms the validity of concerns expressed in the Canadian Parliament about capital punishment. It also shows that a rule requiring that assurances be obtained prior to extradition in death penalty cases not only accords with

Canada's principled advocacy on the international level, but also is consistent with the practice of other countries with which Canada generally invites comparison, apart from the retentionist jurisdictions in the United States.

Third, almost all jurisdictions treat some personal characteristics of the fugitive as mitigating factors in death penalty cases. Canada's ratification of various international instruments prohibiting the execution of individuals who were under the age of 18 at the time of the commission of the offence, and the language of the new *Extradition Act* which permits the Minister in certain circumstances to refuse to surrender persons who were under 18 at the time of the offence, support the conclusion that some degree of leniency for youth is an accepted value in the administration of justice. Accordingly, even though the respondents were 18 at the time of the crime, their relative youth constitutes a mitigating circumstance in this case, albeit of limited weight.

Fourth, the accelerating concern about potential wrongful convictions is a factor of increased weight since *Kindler* and *Ng* were decided. The avoidance of conviction and punishment of the innocent has long been in the forefront of "the basic tenets of our legal system". The recent and continuing disclosures of wrongful convictions for murder in Canada and the United States provide tragic testimony to the fallibility of the legal system, despite its elaborate safeguards for the protection of the innocent. This history weighs powerfully in the balance against extradition without assurances when fugitives are sought to be tried for murder by a retentionist state, however similar in other respects to our own legal system.

Fifth, the "death row phenomenon" is another factor that weighs against extradition without assurances. The finality of the death penalty, combined with the determination of the criminal justice system to try to satisfy itself that the conviction is

not wrongful, inevitably produces lengthy delays, and the associated psychological trauma to death row inhabitants, many of whom may ultimately be shown to be innocent. The "death row phenomenon" is not a controlling factor in the s. 7 balance, but even many of those who regard its horrors as self-inflicted concede that it is a relevant consideration.

Factors for and against extradition without assurances must be balanced under s. 7. The objectives sought to be advanced by extradition without assurances would be as well served by extradition with assurances. There is no convincing argument that exposure of the respondents to death in prison by execution advances Canada's public interest in a way that the alternative, eventual death in prison by natural causes, would not. Other abolitionist countries do not, in general, extradite without assurances.

Extradition of the respondents without assurances cannot be justified under s. 1 of the *Charter*. While the government objective of advancing mutual assistance in the fight against crime is entirely legitimate, the Minister has not shown that extraditing the respondents to face the death penalty without assurances is necessary to achieve that objective. There is no suggestion in the evidence that asking for assurances would undermine Canada's international obligations or good relations with neighbouring states. The extradition treaty between Canada and the United States explicitly provides for a request for assurances and Canada would be in full compliance with its international obligations by making it. As well, while international criminal law enforcement including the need to ensure that Canada does not become a "safe haven" for dangerous fugitives is a legitimate objective, there is no evidence that extradition to face life in prison without release or parole provides a lesser deterrent to those seeking a "safe haven" than does the death penalty. Whether fugitives are returned to a foreign country

to face the death penalty or to face eventual death in prison from natural causes, they are equally prevented from using Canada as a "safe haven". Elimination of a "safe haven" depends on vigorous law enforcement rather than on infliction of the death penalty by a foreign state after the fugitive has been removed from this country.

A review of the factors for and against unconditional extradition therefore leads to the conclusion that assurances are constitutionally required in all but exceptional cases. This case does not present the exceptional circumstances that must be shown. A balance which tilted in favour of extradition without assurances in *Kindler* and *Ng* now tilts against the constitutionality of such an outcome.

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Dynar, [1997] 2 S.C.R. 462; *R. v. Hebert*, [1990] 2 S.C.R. 151; *Miller v. The Queen*, [1977] 2 S.C.R. 680; *S. v. Makwanyane*, 1995 (3) SA 391; *R. v. Harrer*, [1995] 3 S.C.R. 562; *R. v. Terry*, [1996] 2 S.C.R. 207; *Schreiber v. Canada (Attorney General)*, [1998] 1 S.C.R. 841; *Ross v. United States of America* (1994), 93 C.C.C. (3d) 500; *Reference re Public Service Employee Relations Act (Alta.)*, [1987] 1 S.C.R. 313; *R. v. Keegstra*, [1990] 3 S.C.R. 697; *Pratt v. Attorney General for Jamaica*, [1993] 4 All E.R. 769; *R. v. Milgaard* (1971), 2 C.C.C. (2d) 206, leave to appeal refused (1971), 4 C.C.C. (2d) 566n; *Reference re Milgaard (Can.)*, [1992] 1 S.C.R. 866; *R. v. Bentley (Deceased)*, [1998] E.W.J. No. 1165 (QL); *R. v. Mattan*, [1998] E.W.J. No. 4668 (QL); *Solesbee v. Balkcom*, 339 U.S. 9 (1950); *Elledge v. Florida*, 119 S. Ct. 366 (1998); *Knight v. Florida*, 120 S. Ct. 459 (1999); *R. v. Oakes*, [1986] 1 S.C.R. 103.

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APPEAL from a judgment of the British Columbia Court of Appeal (1997), 94 B.C.A.C. 59, 152 W.A.C. 59, 116 C.C.C. (3d) 524, 8 C.R. (5th) 393, 45 C.R.R. (2d) 30, [1997] B.C.J. No. 1558 (QL), finding that the unconditional extradition order was unconstitutional. Appeal dismissed.

S. David Frankel, Q.C., and *Deborah J. Strachan,* for the appellant.

Edward L. Greenspan, Q.C., and *Alison Wheeler,* for the respondent Burns.

Marlys A. Edwardh, *Clayton Ruby*, *Jill Copeland* and *A. Breese Davies*, for the respondent Rafay.

David Matas and *Mark Hecht,* for the intervener Amnesty International.

Written submissions by *Martin W. Mason*, for the intervener the International Centre for Criminal Law & Human Rights.

Michael Lomer and *James Lockyer*, for the intervener the Criminal Lawyers' Association.

Richard C. C. Peck, Q.C., and *Nikos Harris*, for the intervener the Washington Association of Criminal Defence Lawyers.

Written submissions by *Lorne Waldman*, for the intervener the Senate of the Republic of Italy.

The following is the judgment delivered by

THE COURT –

1 Legal systems have to live with the possibility of error. The unique feature of capital punishment is that it puts beyond recall the possibility of correction. In recent years, aided by the advances in the forensic sciences, including DNA testing, the courts and governments in this country and elsewhere have come to acknowledge a number of instances of wrongful convictions for murder despite all of the careful safeguards put in place for the protection of the innocent. The instances in Canada are few, but if capital punishment had been carried out, the result could have been the killing by the government of innocent individuals. The names of Marshall, Milgaard, Morin, Sophonow and Parsons signal prudence and caution in a murder case. Other countries have also experienced revelations of wrongful convictions, including states of the United States where the death penalty is still imposed and carried into execution.

2 The possibility of a miscarriage of justice is but one of many factors in the balancing process which governs the decision by the Minister of Justice to extradite two

Canadian citizens, Glen Sebastian Burns and Atif Ahmad Rafay, to the United States. A competing principle of fundamental justice is that Canadians who are accused of crimes in the United States can ordinarily expect to be dealt with under the law which the citizens of that jurisdiction have collectively determined to apply to offences committed within their territory, including the set punishment.

3 Awareness of the potential for miscarriages of justice, together with broader public concerns about the taking of life by the state, as well as doubts about the effectiveness of the death penalty as a deterrent to murder in comparison with life in prison without parole for 25 years, led Canada to abolish the death penalty for all but a handful of military offences in 1976, and subsequently to abolish the death penalty for all offences in 1998.

4 The abolitionist view is shared by some, but not a majority, of the United States. Michigan, Rhode Island and Wisconsin in fact abolished the death penalty for murder in the 1840s and 1850s, years before the first European state, Portugal, did so, and over a century before Canada did. At present, 12 states are abolitionist while 38 states retain the death penalty. The State of Washington, in which the respondents are wanted for trial on charges of aggravated first degree murder, is a retentionist state.

5 The extradition of the respondents is sought pursuant to the *Extradition Treaty between Canada and the United States of America*, Can. T.S. 1976 No. 3 (the "treaty" or the "extradition treaty") which permits the requested state (in this case Canada) to refuse extradition of fugitives unless provided with assurances that if extradited and convicted they will not suffer the death penalty. The Minister declined to seek such assurances because of his policy that assurances should only be sought in exceptional circumstances, which he decided did not exist in this case.

6 The respondents contend that Canada's principled abolition of the death penalty at home, and its spirited advocacy of abolition internationally, confirm Canadian acceptance of abolition as a fundamental principle of our criminal justice system. This principle, they say, combined with the respondents' Canadian citizenship and the fact that they were 18 years old at the time of the alleged offences, constitutionally prohibits the Minister from extraditing them to a foreign jurisdiction without assurances that they will not face a penalty which Canada, as a society, does not permit within its own borders.

7 The Minister contends, on the other hand, that persons who are found to commit crimes in foreign countries forfeit the benefit of Canada's abolitionist policy. The Constitution does not require Canada, on this view, to project its internal values onto the world stage, and to insist as a condition of extradition that a requesting state view capital punishment in the same light as our domestic legal system does.

8 We agree that the *Canadian Charter of Rights and Freedoms* does not lay down a constitutional prohibition in all cases against extradition unless assurances are given that the death penalty will not be imposed. The Minister is required (as he did here) to balance on a case-by-case basis those factors that favour extradition with assurances against competing factors that favour extradition without assurances. We hold, however, for the reasons which follow, that such assurances are constitutionally required in all but exceptional cases. We further hold that this case does not present the exceptional circumstances that must be shown before the Minister could constitutionally extradite without assurances. By insisting on assurances, Canada would not be acting in disregard of international extradition obligations undertaken by the Canadian government, but rather exercising a treaty right explicitly agreed to by the United States.

We thus agree with the result, though not the reasons, reached by a majority of the judges of the British Columbia Court of Appeal in this case. The Minister's appeal must therefore be dismissed.

I. Facts

9 The crimes alleged against the respondents were, as the Minister contends, "brutal and shocking cold blooded murder[s]". The father, mother and sister of the respondent Rafay were found bludgeoned to death in their home in Bellevue, Washington, in July 1994. Both Burns and Rafay, who had been friends at high school in British Columbia, admit that they were at the Rafay home on the night of the murders. They claim to have gone out on the evening of July 12, 1994 and when they returned, they say, they found the bodies of the three murdered Rafay family members. The house, they say, appeared to have been burgled.

10 However, if the confessions allegedly made by the respondents to undercover RCMP officers are to be believed, the three members of the Rafay family were bludgeoned to death by the respondent Burns while the respondent Rafay watched. Burns allegedly told an undercover RCMP officer that he had killed the three victims with a baseball bat while wearing only underwear so as not to get blood on his clothes. Rafay's father, Tariq Rafay, and mother, Sultana Rafay, were beaten to death in their bedroom. The force used was so violent that blood was spattered on all four walls and the ceiling of the room. The respondent Rafay's sister, Basma Rafay, was beaten about the head and left for dead in the lower level of the house. She later died in hospital. Burns allegedly explained that following the attacks, he had a shower at the Rafay home to clean off the victims' blood. The discovery of hairs with Caucasian characteristics in the shower near the master bedroom, where the two parents were killed, supports this

story. There is also evidence of dilute blood covering large sections of the shower stall. The respondents allegedly told the police that they drove around the municipality disposing of various items used in the killings as well as some of the parents' electronic devices, apparently to feign a burglary. The respondent Rafay is also alleged to have told the officer the killings were "a necessary sacrifice in order that he could get what he wanted in life". With the death of all other members of his family, Rafay stood to inherit his parents' assets and the proceeds of their life insurance. Burns, it is alleged, participated in exchange for a share in the proceeds under an agreement with Rafay. He was, the prosecution alleges, a contract killer.

11 The Bellevue police suspected both of the respondents but did not have enough evidence to charge them. When the respondents returned to Canada, the Bellevue police sought the cooperation of the RCMP in their investigation of the murders. The RCMP initiated an elaborate and in the end, they say, productive undercover operation. An RCMP officer posed as a crime boss and subsequently testified that, after gaining the confidence of the respondents, he repeatedly challenged them to put to rest his professed scepticism about their stomach for serious violence. The respondents are alleged to have tried to reassure him by bragging about their respective roles in the Bellevue murders.

12 The respondents assert their innocence. They claim that in making their alleged confessions to the police they were play-acting as much as the undercover policeman to whom they confessed. At this stage of the criminal process in Washington, they are entitled to the presumption of innocence. What to make of it all will be up to a jury in the State of Washington.

13 The respondents were arrested in British Columbia and a committal order was issued for their extradition pending the decision of the Minister of Justice on surrender. The then Minister, Allan Rock, signed an unconditional Order for Surrender to have both of the respondents extradited to the State of Washington to stand trial without assurances in respect of the death penalty. If found guilty, the respondents will face either life in prison without the possibility of parole or the death penalty. Washington State provides for execution by lethal injection unless the condemned individual elects execution by hanging (Revised Code of Washington §10.95.180(1)).

II. The Minister's Decision

14 An extradition matter does not reach the Minister until an extradition judge has determined that the offence falls within the scope of the treaty and there is a *prima facie* case that the fugitive has committed the crime with which he or she has been charged in the foreign jurisdiction (*Argentina v. Mellino*, [1987] 1 S.C.R. 536, at p. 553). At that stage, the Minister, after hearing representations, makes a decision under s. 25(1) of the *Extradition Act*, R.S.C. 1985, c. E-23, whether or not to surrender the fugitive, and if so on what terms.

15 Here, the Minister proceeded on the assumption that the death penalty would be sought by the prosecutors in the State of Washington.

16 The respondents submitted to the Minister that s. 6(1) of the *Charter* grants them the right to stay in Canada and that as a result, he was required to consider whether the respondents could be prosecuted in Canada rather than extradited, as permitted by Article 17 *bis* of the extradition treaty and as contemplated as a possible option by this Court in *United States of America v. Cotroni*, [1989] 1 S.C.R. 1469. Although there was

some evidence that the murders were planned in Canada, no killings occurred here. Canadian prosecutors concluded that Canada could only prosecute the respondents for conspiracy to commit murder. The decision to lay charges in Canada was within the exclusive jurisdiction of the Attorney General of British Columbia, who had decided, prior to this matter going to the federal Minister, that there was insufficient evidence to support a conspiracy charge.

17 The respondents also submitted to the Minister that he was required by ss. 6(1), 7 and 12 of the *Charter* to seek assurances that the death penalty would not be imposed. They argued that their unconditional extradition to face the death penalty would "shock the Canadian conscience" because of their age (18 years at the time of the offence) and their nationality (Canadian). The respondents sought to distinguish *Kindler v. Canada (Minister of Justice)*, [1991] 2 S.C.R. 779, and *Reference Re Ng Extradition (Can.)*, [1991] 2 S.C.R. 858, primarily on the basis that, unlike the fugitives in those cases, the respondents have the benefit of s. 6(1) of the *Charter* by virtue of being Canadian citizens. They were not foreigners seeking to use Canada as a "safe haven". Canada instead is their country of origin and the Canadian government does not, according to the respondents, have the right to expel them when they face the risk of never returning. This, they maintained, would amount to exile and banishment contrary to s. 6(1) of the *Charter*: *Canada v. Schmidt*, [1987] 1 S.C.R. 500, and *Cotroni*, *supra*.

18 The Minister stated that assurances should be sought only in circumstances where the particular facts of the case warrant a special exercise of discretion and that assurances should not be sought routinely pursuant to Article 6 of the treaty in every case in which the death penalty is applicable. The Minister found that the factors outlined in *Kindler* did not mandate that assurances be sought here. The age of the respondents, although "youthful", qualified them as adults in the Canadian criminal system. The

Minister thought Canadian citizenship was not itself a "special circumstance" to allow the respondents to escape from the full weight of the sentencing process in the United States where the murders were committed.

19 The Minister also rejected the respondents' claim that extradition without assurances would constitute exile and banishment. Extradition to face the death penalty does not amount to banishment since the underlying purpose of extradition is simply to face criminal prosecution. The Minister felt that Canada should not permit itself to become a safe haven for persons seeking to escape justice, even Canadians. Furthermore, there would be no exile because the respondents, once the criminal matters had been dealt with fully, would not be prevented by the Canadian government from returning to this country. In the end, Canadian nationality was simply one of several factors that the Minister considered, but it was not determinative. As stated, the Minister signed the extradition order without seeking or obtaining assurances.

III. British Columbia Court of Appeal

20 The British Columbia Court of Appeal set aside the Minister's decision and directed the Minister to seek the assurances described in Article 6 of the extradition treaty as a condition of surrender (Hollinrake J.A. dissenting): (1997), 94 B.C.A.C. 59. Donald J.A., with whom McEachern C.J.B.C. concurred, noted that if the respondents are put to death in the State of Washington, they will no longer be able to exercise a right of return under s. 6(1) of the *Charter*. He rejected the submissions of counsel for the Minister that the death penalty is not a part of the extradition process, which does no more than commit to trial. The causal connection between surrender and deprivation of the s. 6(1) right was to him "obvious and incontestable", stating at para. 30:

> The *Kindler* analysis is inapplicable to Canadian citizens facing the death penalty because the government, in the person of the Minister, has an obligation not to force citizens out of the country with the jeopardy of never returning. This is a different and higher duty than that pertaining to aliens.

21 Donald J.A. rejected the notion that life in prison without the possibility of parole, the only alternative to the death penalty in the State of Washington, would also violate s. 6(1) of the *Charter* since "where there is life there is hope" (para. 27). He distinguished *Kindler* on the basis that Canadian citizens are perfectly entitled to view Canada as a safe haven. "One's country", he said, "is properly to be considered a haven, and access to its constitutional protections is a feature of citizenship" (para. 54).

22 With regard to ss. 7 and 12 of the *Charter*, Donald J.A. felt bound by this Court's decisions in *Kindler* and *Ng* and determined that these sections were of no assistance to the respondents since they apply, if at all, to Canadian citizens and non-citizens alike.

23 Donald J.A. went on to find that, not only was s. 6(1) of the *Charter* breached by the unconditional surrender, but as a matter of administrative law the Minister failed to exercise his discretion properly when he refused to seek assurances under Article 6 of the treaty. Instead of stating that assurances would only be sought in "special" cases, the Minister was required to determine in each case what is appropriate having regard to the circumstances "without being fettered by rules designed to deal with an imagined case load" (para. 43). Applying this latter test, Donald J.A. found that the Minister should have placed more weight on the young age and Canadian nationality of the respondents and sought assurances before signing the extradition order.

24 Hollinrake J.A., dissenting, would not have interfered with the Minister's decision. He found that *Kindler* and *Ng* were controlling, even where the fugitives are Canadian citizens. It would be the State of Washington, not the Minister, that would deny the respondents their s. 6 *Charter* rights if they were, in the end, to be executed.

IV. Relevant Constitutional and Statutory Provisions

25 *Canadian Charter of Rights and Freedoms*

> **1.** The *Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.
>
> **6.** (1) Every citizen of Canada has the right to enter, remain in and leave Canada.
>
> ...
>
> **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.
>
> **32.** (1) This Charter applies
>
> (*a*) to the Parliament and government of Canada in respect of all matters within the authority of Parliament including all matters relating to the Yukon Territory and Northwest Territories; and
>
> (*b*) to the legislature and government of each province in respect of all matters within the authority of the legislature of each province.

Constitution Act, 1982

> **52.** (1) The Constitution of Canada is the supreme law of Canada, and any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect.

Extradition Act, R.S.C. 1985, c. E-23 (as am. by S.C. 1992, c. 13)

25. (1) Subject to this Part, the Minister of Justice, on the requisition of a foreign state, may, within a period of ninety days after the date of a fugitive's committal for surrender, under the hand and seal of the Minister, order the fugitive 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.

V. Relevant Provisions from International Documents

26 *Extradition Treaty between Canada and the United States of America* (amended by an Exchange of Notes), 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.

Protocol amending the Treaty on Extradition between the Government of Canada and the Government of the United States of America, Can. T.S. 1991 No. 37 (in force November 26, 1991), Article VII

Article 17 *bis*

If both contracting Parties have jurisdiction to prosecute the person for the offense for which extradition is sought, the executive authority of the requested State, after consulting with the executive authority of the requesting State, shall decide whether to extradite the person or to submit the case to its competent authorities for the purpose of prosecution. In making its decision, the requested State shall consider all relevant factors, including but not limited to:

(i) the place where the act was committed or intended to be committed or the injury occurred or was intended to occur;

(ii) the respective interests of the Contracting Parties;

(iii) the nationality of the victim or the intended victim; and

(iv) the availability and location of the evidence.

VI. Revised Code of Washington

27 **10.95.030. Sentences for aggravated first degree murder**

(1) Except as provided in subsection (2) of this section, any person convicted of the crime of aggravated first degree murder shall be sentenced to life imprisonment without possibility of release or parole. A person sentenced to life imprisonment under this section shall not have that sentence suspended, deferred, or commuted by any judicial officer and the indeterminate sentence review board or its successor may not parole such prisoner nor reduce the period of confinement in any manner whatsoever including but not limited to any sort of good-time calculation. The department of social and health services or its successor or any executive official may not permit such prisoner to participate in any sort of release or furlough program.

(2) If, pursuant to a special sentencing proceeding held under RCW 10.95.050, the trier of fact finds that there are not sufficient mitigating circumstances to merit leniency, the sentence shall be death. . . .

10.95.040. Special sentencing proceeding – Notice – Filing – Service

(1) If a person is charged with aggravated first degree murder as defined by RCW 10.95.020, the prosecuting attorney shall file written notice of a special sentencing proceeding to determine whether or not the death penalty should be imposed when there is reason to believe that there are not sufficient mitigating circumstances to merit leniency.

(2) The notice of special sentencing proceeding shall be filed and served on the defendant or the defendant's attorney within thirty days after the defendant's arraignment upon the charge of aggravated first degree murder unless the court, for good cause shown, extends or reopens the period for filing and service of the notice. Except with the consent of the prosecuting attorney, during the period in which the prosecuting attorney may file the notice of special sentencing proceeding, the defendant may not tender a plea of guilty to the charge of aggravated first degree murder nor may the court accept a plea of guilty to the charge of aggravated first degree murder or any lesser included offense.

(3) If a notice of special sentencing proceeding is not filed and served as provided in this section, the prosecuting attorney may not request the death penalty.

10.95.180. Death Penalty – How executed

(1) The punishment of death shall be supervised by the superintendent of the penitentiary and shall be inflicted by intravenous injection of a substance or substances in a lethal quantity sufficient to cause death and until the defendant is dead, or, at the election of the defendant, by hanging by the neck until the defendant is dead. In any case, death shall be pronounced by a licensed physician.

VII. Analysis

28 The evidence amply justifies the extradition of the respondents to Washington State to stand trial on charges of aggravated first degree murder. Under the law of that state, a conviction would carry a minimum sentence of imprisonment for life without the possibility of release or parole. If the prosecutors were to seek the death penalty, they would have the burden of persuading the jury that "there are not sufficient mitigating circumstances" in favour of the respondents. If the jury is so satisfied, the death penalty would be administered by lethal injection or (at the option of the convicted individual), by hanging. If the jury is not so satisfied, the convicted murderer is locked up for life without any possibility of release or parole. An individual convicted of aggravated first degree murder in Washington State thus will either die in prison by execution or will die in prison eventually by other causes. Those are the possibilities. Apart from executive clemency, the State of Washington does not hold out the possibility (or even the "faint hope") of eventual freedom.

29 The respondents' position is that the death penalty is so horrific, the chances of error are so high, the death row phenomenon is so repugnant, and the impossibility of correction is so draconian, that it is simply unacceptable that Canada should participate, however indirectly, in its imposition. While the government of Canada would not itself administer the lethal injection or erect the gallows, no executions can or will occur

without the act of extradition by the Canadian government. The Minister's decision is a prior and essential step in a process that may lead to death by execution.

30 The root questions here are whether the Constitution supports the Minister's position that assurances need only be sought in exceptional cases, or whether the Constitution supports the respondents' position that assurances must always be sought barring exceptional circumstances, and if so, whether such exceptional circumstances are present in this case.

31 In order to get to the heart of the argument on this appeal, it will be useful to deal initially with the Minister's powers and responsibilities under the *Extradition Act*, and then move to the *Charter* issue (s. 6 mobility rights) on which the respondents succeeded in the British Columbia Court of Appeal. We reject the s. 6 argument, for reasons to be discussed. We will then consider the other grounds on which the respondents constructed their constitutional argument against extradition without assurances, namely s. 12 ("cruel and unusual treatment or punishment") and s. 7 ("life, liberty and security of the person"). In the end, we conclude that the respondents are entitled to succeed on the sole ground that their extraditions to face the death penalty would, in the present circumstances, violate their rights guaranteed by s. 7 of the *Charter*.

1. *The Extradition Act Confers a Broad Statutory Discretion on the Minister*

32 The appeal reaches this Court by way of a judicial review of the exercise by the Minister of his discretion under s. 25(1) of the *Extradition Act* which we reproduce for ease of reference:

> **25.** (1) Subject to this Part, the Minister of Justice, on the requisition of a foreign state, may, within a period of ninety days after the date of a fugitive's committal for surrender, under the hand and seal of the Minister, order the fugitive 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.

Section 25 creates a broad discretion which the Minister must exercise in accordance with the dictates of the *Charter*: *Kindler, supra,* at p. 846; *Schmidt, supra,* at pp. 520-21; *Idziak v. Canada (Minister of Justice),* [1992] 3 S.C.R. 631, at pp. 655-56; and see generally *Operation Dismantle Inc. v. The Queen,* [1985] 1 S.C.R. 441; *Slaight Communications Inc. v. Davidson*, [1989] 1 S.C.R. 1038; and *Dagenais v. Canadian Broadcasting Corp.*, [1994] 3 S.C.R. 835. None of the parties to this litigation has attacked the constitutional validity of this discretion which has previously been found by a majority of this Court to pass *Charter* scrutiny: see *Kindler, supra*. In that case, the Court recognized that the Minister's discretion was limited by the *Charter*, and that the *Charter* required a balancing on the facts of each case of the applicable principles of fundamental justice. We affirm the correctness of the balancing test, and for reasons which will become apparent, we conclude that in the circumstances of this case the application of the balancing test and the ultimate requirement of adherence to "the basic tenets of our legal system" (*Re B.C. Motor Vehicle Act*, [1985] 2 S.C.R. 486, at p. 503) require the Minister to seek assurances.

33 The authority of the Minister under s. 25 is predicated on the existence of an extradition treaty (s. 3). The extradition treaty in question here was concluded by Canada and the United States in 1971 at a time when Canada still retained the death penalty, although no executions had been carried out since 1962. In the United States executions, which had occurred at the rate of about 50 per year in the late 1950s, "slowed to a trickle and then stopped" in the 1960s (W. S. White, "Capital Punishment's Future" (1993), 91

Mich. L. Rev. 1429, at p. 1429). A *de facto* moratorium occurred commencing June 2, 1967. This was reinforced five years later when the Supreme Court of the United States, in *Furman v. Georgia*, 408 U.S. 238 (1972), declared the death penalty regime of the State of Georgia to be unconstitutional. By 1976, the year in which the extradition treaty was ratified and came into force, there had been a realignment of positions. Canada had abolished the death penalty for all but a few military crimes (*Criminal Law Amendment Act (No. 2), 1976*, S.C. 1974-75-76, c. 105). In the same year the United States Supreme Court declared that the death penalty could be constitutional if appropriate procedural safeguards are put in place: *Gregg v. Georgia*, 428 U.S. 153 (1976). Executions resumed on January 17, 1977 when Gary Gilmore was shot by a firing squad in Utah (H. H. Haines, *Against Capital Punishment: The Anti-Death Penalty Movement in America, 1972-1994* (1996), at p. 211). In recognition, perhaps, of this fluid state of affairs the parties agreed that the extradition treaty should include Article 6 in respect of seeking assurances. As set out above, Article 6 provides as follows:

> 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.

34 In his decision, the then Minister said that where a committal judge under the Act is satisfied that the requesting state has made out a *prima facie* case against the fugitive, he will approach the issue

> from the premise that assurances should be sought only in circumstances where the particular facts of the case warrant that special exercise of discretion. Such assurances are not to be sought routinely in every case in which the death penalty is applicable.

As stated, the Minister saw nothing in the circumstances here to warrant asking for such assurances.

35 The question is not whether we agree with the Minister's decision. The only issue under the *Charter* is whether, as a matter of constitutional law, the Minister had the power to decide as he did. The *Charter* does not give the Court a general mandate to set Canada's foreign policy on extradition. Yet the Court is the guardian of the Constitution and death penalty cases are uniquely bound up with basic constitutional values. While the death penalty arises as a possibility only in a small fraction of the extradition cases dealt with by the Minister and departmental officials, it raises issues of fundamental importance to Canadian society.

2. *The Minister Is Responsible for the Performance of Canada's International Law Enforcement Obligations*

36 The Court has historically exercised restraint in the judicial review of extradition decisions, as McLachlin J. (as she then was) noted in *Kindler, supra,* at p. 849:

> 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*.

La Forest J. expressed similar views in *Kindler, supra,* at p. 837.

37 The customary deference to the Minister's extradition decisions is rooted in the recognition of Canada's strong interest in international law enforcement activities: *Cotroni*, *supra*, at p. 1485, cited by McLachlin J. in *Kindler*, at pp. 843-44; *Libman v. The Queen*, [1985] 2 S.C.R. 178, at p. 214; *Idziak*, *supra*, at p. 662. The respondents do not quarrel with these general observations. Their argument is that despite McLachlin J.'s caution in *Kindler* that "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" (p. 849), a constitutional requirement of assurances does not undermine in any significant way the achievement of Canada's mutual assistance objectives. The executive negotiated Article 6 of the extradition treaty, the United States agreed to it, and both parties must therefore have regarded its exercise as consistent with the fulfilment of their mutual assistance obligations.

38 We affirm that it is generally for the Minister, not the Court, to assess the weight of competing considerations in extradition policy, but the availability of the death penalty, like death itself, opens up a different dimension. The difficulties and occasional miscarriages of the criminal law are located in an area of human experience that falls squarely within "the inherent domain of the judiciary as guardian of the justice system": *Re B.C. Motor Vehicle Act*, *supra*, at p. 503. It is from this perspective, recognizing the unique finality and irreversibility of the death penalty, that the constitutionality of the Minister's decision falls to be decided.

3. *Section 6(1) ("Mobility Rights") of the Charter Does not Invalidate an Extradition Without Assurances*

39 It is convenient at this point to address the Minister's argument that extradition with or without assurances has nothing to do with the respondents' rights, as Canadian citizens, to enter or remain in Canada. Traditionally, nationality has afforded no defence to extradition from Canada. Sir William Buell Richards, the first Chief Justice of Canada, when sitting on the Court of Common Pleas of Upper Canada two years prior to Confederation, dealt with this issue in a review of a warrant of commitment for the extradition of a British subject to the United States:

> Whatever may be considered to have been the general rule in relation to a government surrendering its own subjects to a foreign government, I cannot say I have any doubt, that under the treaty and our own statute, a British subject who is in other respects brought within the law, cannot legally demand that he ought not to be surrendered merely because he is a natural born subject of Her Majesty. [Emphasis added.]
>
> (*Re Burley* (1865), 1 U.C.L.J. 34, at p. 46)

40 The present Minister contends that, from a policy as well as a legal perspective, the nationality of the fugitive ought to remain an irrelevant consideration. Otherwise, she argues, it could mean that if Burns were a Canadian citizen and Rafay were not, only the latter would be extradited to face the death penalty, despite the allegation that it was Burns who did the actual killing.

41 We affirm that extradition is a *prima facie* infringement of the s. 6(1) right of every Canadian citizen to "remain in" Canada: *Cotroni*, *supra*, at pp. 1480-81. The respondents will not, on this occasion, leave their homeland willingly. Their forcible removal must be justified under s. 1 of the *Charter* (*Re Federal Republic of Germany and Rauca* (1983), 41 O.R. (2d) 225 (C.A.), cited with approval in *Schmidt*, *supra*, at p. 520,

and by La Forest J. in *Cotroni*, *supra*, at pp. 1482-83; *Whitley v. United States of America* (1994), 20 O.R. (3d) 794 (C.A.), at p. 805, aff'd [1996] 1 S.C.R. 467; *Swystun v. United States of America* (1987), 40 C.C.C. (3d) 222 (Man. Q.B.), cited with approval in *Cotroni*, *supra*, at p. 1498; and *Re Decter and United States of America* (1983), 5 C.C.C. (3d) 364 (N.S.S.C.T.D.)).

42 The issue of s. 1 justification was considered by this Court in *Cotroni*, *supra*, and *Kindler, supra*. In *Cotroni,* the two fugitives were Canadian citizens who were alleged to have participated in a conspiracy to import and distribute heroin in the United States. They argued that s. 6(1) of the *Charter* required that they be prosecuted in Canada rather than in the United States. La Forest J., writing for a five-member majority, disagreed. He found that the *prima facie* violation of s. 6 could be saved under s. 1 because the concerns addressed by the extradition legislation were pressing and substantial. Further, the extradition of the respondents was rationally connected to the important objectives of international law enforcement, it impaired the s. 6(1) right as little as reasonably possible, and such pressing and substantial concerns justified the peripheral *Charter* infringement in that case. It is helpful to quote his precise language at p. 1490:

> As against this somewhat peripheral *Charter* infringement must be weighed the importance of the objectives sought by extradition – the investigation, prosecution, repression and punishment of both national and transnational crimes for the protection of the public. These objectives, we saw, are of pressing and substantial concern. They are, in fact, essential to the maintenance of a free and democratic society. In my view, they warrant the limited interference with the right guaranteed by s. 6(1) to remain in Canada. That right, it seems to me, is infringed as little as possible, or at the very least as little as reasonably possible.

43 Subsequently, in *Kindler,* La Forest J. expressed the concern that if Canada did not have the "right and duty" to extradite or expel undesirable aliens, "Canada could become a haven for criminals and others whom we legitimately do not wish to have

among us" (p. 834). While expressed in connection with aliens, the concern could also apply to citizens, even though citizens, unlike aliens, enjoy the added protection of s. 6. We accept that when the respondents are in British Columbia they are "at home". They are also using "home" as a safe haven. A murderer who flees the scene of a crime across an international boundary is seeking a "safe haven" irrespective of whether he or she holds citizenship in the state from which flight commenced, or in the destination state, or in neither. In all cases, the international boundary is to some extent an obstacle to law enforcement. Equally, to the extent the "safe haven" argument seeks to make Canada a safer place by returning to face justice in a foreign country fugitives who are considered dangerous, citizenship is irrelevant because the objective is advanced by extraditing Canadian fugitives as much as it is by extraditing persons of other nationalities.

44 The respondents contend that to satisfy the *Charter* requirement that their s. 6 mobility rights be impaired "as minimally as possible" the Minister is obliged to seek assurances. Extradition without assurances, they say, is not minimal impairment. Such assurances, however, would not uphold a "right to remain". Extradition with assurances would result in the forcible removal of the respondents from Canada as much as extradition without assurances.

45 A case that raised some of the same s. 6(1) concerns as the present appeal is *Re Federal Republic of Germany and Rauca*, *supra*, which was cited with approval by La Forest J. for the majority in both *Cotroni*, *supra*, at pp. 1482-83, and *Schmidt*, *supra*, at p. 520. In *Rauca*, the Ontario Court of Appeal rejected the claim by Rauca that his extradition to Germany to face charges of aiding and abetting the murder of several thousand civilians during the Second World War violated s. 6(1). Rauca was a naturalized Canadian citizen and was 74 years old at the time of the decision of that court. If convicted, he was expected to be sentenced to life in prison in Germany. Given the

usual span of human existence, it was clear that Rauca would not only be denied a right to "remain" in Canada but, if convicted in Germany, could never thereafter exercise a right to "enter" Canada. Nevertheless, the extradition of Rauca was held to be a justifiable limitation on the s. 6(1) right. Leave was granted to Rauca to appeal this ruling to this Court but he voluntarily submitted to the extradition before the appeal was heard and was returned to Germany, where he died before trial.

46 The death penalty was not at issue in *Rauca*, but viewed uniquely from the perspective of s. 6(1) mobility rights, death in a foreign prison by natural causes would be as effective a deprivation of a "right to return" as death in the foreign prison by capital punishment.

47 The respondents, unless acquitted, will be subject to life in prison without possibility of release or parole. The Revised Code of Washington §10.95.030 could scarcely be more emphatic:

> (1) Except as provided in subsection (2) of this section [the death penalty], any person convicted of the crime of aggravated first degree murder shall be sentenced to life imprisonment without possibility of release or parole. A person sentenced to life imprisonment under this section shall not have that sentence suspended, deferred, or commuted by any judicial officer and the indeterminate sentence review board or its successor may not parole such prisoner nor reduce the period of confinement in any manner whatsoever including but not limited to any sort of good-time calculation. The department of social and health services or its successor or any executive official may not permit such prisoner to participate in any sort of release or furlough program. [Emphasis added.]

The evidence is that the practice in Washington State conforms to the statutory provision. Thus, the relevant law contemplates that whether assurances are obtained or not, the fugitive, if convicted, will equally be unable to return to or "enter" Canada. In neither case would the bar to return be imposed by the Government of Canada.

48 Donald J.A. considered that prisoner exchange programs or possible legislative change in Washington State do at least create "a faint hope" of return because, as he says, "where there is life there is hope" (at para. 27). He also refers to the possibility of delayed executive clemency. The possible eventuality of legislative change or other exceptional relief in a foreign jurisdiction from a punishment that may never be imposed are events that are also remote from the making of an extradition order. In our view, with respect, efforts to stretch mobility rights to cover the death penalty controversy are misplaced. The real issue here is the death penalty. The death penalty is overwhelmingly a justice issue and only marginally a mobility rights issue. The death penalty issue should be confronted directly and it should be confronted under s. 7 of the *Charter*.

49 As the s. 1 justification for a breach of s. 6(1) parallels that for a breach of s. 7 in any event, a more ample discussion of the s. 1 arguments will be deferred until s. 7 has been considered.

4. *Section 12 ("Cruel and Unusual Treatment or Punishment") Is not Directly Engaged in this Appeal Except as a Value to Be Considered in the Section 7 Balance*

50 Section 12 of the *Charter* guarantees the respondents "the right not to be subjected to any cruel and unusual treatment or punishment". Concerns about the death penalty raise the question of whether its imposition would offend this provision. A threshold question, however, is whether in the circumstances of this case s. 12 can even apply, since it would be the State of Washington and not the government of Canada that would impose and carry out the death sentence.

51 The *Charter* only guarantees certain rights and freedoms from infringement by "the Parliament and government of Canada" (s. 32(1)(*a*)) and "the legislature and

government of each province" (s. 32(1)(*b*)). The role played by s. 32 in the extradition context was discussed by La Forest J. in *Schmidt*, *supra*, 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). Equally, though, there cannot be any doubt that the *Charter* does not govern the actions of a foreign country; see, for example, *Spencer v. The Queen*, [1985] 2 S.C.R. 278. In particular the *Charter* cannot be given extraterritorial effect to govern how criminal proceedings in a foreign country are to be conducted.

See also: *Mellino, supra*, at p. 547; *United States v. Allard*, [1987] 1 S.C.R. 564, at p. 571; and *United States of America v. Dynar*, [1997] 2 S.C.R. 462, at para. 123.

52 Nevertheless, counsel for the respondents suggest that Canada cannot avoid shouldering responsibility for the imposition of the death penalty just because it would be a foreign government, if anyone, that puts the respondents to death. The French text of s. 12 of the *Charter* guarantees to the respondents "*la protection contre tous traitements ou peines cruels et inusités*". The guarantee of "protection", it could be argued, imposes an affirmative obligation on the Canadian state to protect against infliction of the death penalty whether by Canada or by any other government.

53 There is some support for this view in the decision of the European Court of Human Rights in *Soering* (Eur. Court H.R., *Soering* case, judgment of 7 July 1989, Series A No. 161, at para. 91):

> In sum, the decision by a Contracting State to extradite a fugitive may give rise to an issue under Article 3 [of the *Convention for the Protection of Human Rights and Fundamental Freedoms*, which is equivalent to section 12 of our *Charter*], 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.

54 The "responsibility of th[e] State" is certainly engaged under the *Charter* by a ministerial decision to extradite without assurances. While the Canadian government would not itself inflict capital punishment, its decision to extradite without assurances would be a necessary link in the chain of causation to that *potential* result. The question is whether the linkage is strong enough and direct enough to invoke s. 12 in an extradition proceeding, especially where, as here, there are many potential outcomes other than capital punishment.

55 The view previously taken by this Court is that the proper place for the "state responsibility" debate is under s. 7. We affirm the correctness of that approach.

56 This issue was extensively canvassed in *Kindler* and *Ng.* The Court concluded that extradition by the Canadian government did not violate the guarantee against cruel and unusual punishment because the only action by the Canadian government was to hand the fugitives over to law enforcement authorities in the United States, not to impose the death penalty. La Forest J., concurring, stated in *Kindler*, *supra*, at p. 831:

> 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.

And further, McLachlin J. stated at pp. 845-46:

> [T]his Court has emphasized that we must avoid extraterritorial application of the guarantees in our *Charter* under the guise of ruling extradition procedures unconstitutional.
>
> . . .
>
> 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. [Emphasis added.]

57 In our view, the degree of causal remoteness between the extradition order to face trial and the potential imposition of capital punishment as one of many possible outcomes to this prosecution make this a case more appropriately reviewed under s. 7 than under s. 12. It must be kept in mind that the values underlying various sections of the *Charter*, including s. 12, form part of the balancing process engaged in under s. 7. In *Kindler*, *supra*, both McLachlin J. and La Forest J. specifically recognized that s. 12 informs the interpretation of s. 7: *Kindler*, *supra*, at pp. 831 and 847; *Schmidt*, *supra*, at p. 522; *Re B.C. Motor Vehicle Act*, *supra*; *R. v. Hebert*, [1990] 2 S.C.R. 151.

5. *The Outcome of this Appeal is Governed by Section 7 of the Charter ("Fundamental Justice")*

58 Section 7 of the *Charter* provides that:

> **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.

59 It is evident that the respondents are deprived of their liberty and security of the person by the extradition order: *Kindler, supra*, at p. 831. Their lives are potentially

at risk. The issue is whether the threatened deprivation is in accordance with the principles of fundamental justice.

60 This Court has recognized from the outset that the punishment or treatment reasonably anticipated in the requesting country is clearly relevant. Section 7 is concerned not only with the act of extraditing, but also the potential consequences of the act of extradition. This principle was recognized in the extradition context by La Forest J. in *Schmidt*, *supra*, 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.]

61 In their submissions on whether extradition without assurances is contrary to the principles of fundamental justice, the parties drew heavily on the decisions in *Kindler* and *Ng*. It may be helpful to recall the facts of those cases. Kindler was an American citizen who had escaped to Canada after being convicted in Pennsylvania for the brutal murder of an 18-year-old who was scheduled to testify against him in a burglary case. The jury which convicted Kindler had recommended that he face the death penalty. Prior to being sentenced, he escaped to Canada. After seven months as a fugitive in Quebec, Kindler was captured and escaped again. After remaining at large for nearly two years, Kindler was recaptured. Judicial review of Kindler's surrender order was dismissed by this Court even though (unlike this case) the death penalty was no longer simply a

possibility. It had already been recommended by the jury. Nevertheless, we held that the Minister was entitled to extradite without assurances.

62 In the companion appeal, the respondent Ng was a British subject born in Hong Kong and subsequently resident in the United States. He had been arrested in Calgary after shooting at two department store security guards who tried to apprehend him for shoplifting. Once his identity was established, he was extradited to the State of California to face numerous charges of murder. He has since been convicted and sentenced to death for murdering 11 people – six men, three women and two baby boys – during what one newspaper described as a "spree of sexual torture and murder in rural California". In that case, as well, the Minister was held to have the power, though not the duty, to extradite without assurances.

63 The respondents submit that even if the analytical framework developed in *Kindler* and *Ng* is accepted (i.e., balancing "the conflicting considerations" or "factors": *Kindler*, at p. 850), the result of those cases should not determine the outcome here. *Kindler* and *Ng* should either be distinguished on the facts or revisited on the weight to be given to the "factor" of capital punishment because of changed circumstances in the 10 years since those cases were decided.

6. *The Proper Analytical Approach (the "Balancing Process") Was Set Out by this Court in its Decisions in Kindler and Ng*

64 It is important to recognize that neither *Kindler* nor *Ng* provides a blanket approval to extraditions to face the death penalty. In *Kindler*, La Forest J., at p. 833, referred to a s. 7 "balancing process" in which "the global context must be kept squarely

in mind". At p. 835, he acknowledged the possible existence of circumstances that "may constitutionally vitiate an order for surrender".

65 It is inherent in the *Kindler* and *Ng* balancing process that the outcome may well vary from case to case depending on the mix of contextual factors put into the balance. Some of these factors will be very specific, such as the mental condition of a particular fugitive. Other factors will be more general, such as the difficulties, both practical and philosophic, associated with the death penalty. Some of these factors will be unchanging; others will evolve over time. The outcome of this appeal turns more on the practical and philosophic difficulties associated with the death penalty that have increasingly preoccupied the courts and legislators in Canada, the United States and elsewhere rather than on the specific circumstances of the respondents in this case. Our analysis will lead to the conclusion that in the absence of exceptional circumstances, which we refrain from trying to anticipate, assurances in death penalty cases are always constitutionally required.

66 The Minister approached this extradition decision on the basis of the law laid down in *Kindler* and *Ng* and related cases. Having regard to some of the expressions used in the case law, he concluded that the possibility of the death penalty does not pose a situation that is "simply unacceptable" (*Allard*, *supra*, at p. 572), nor would surrender of the respondents without assurances "shoc[k] the conscience" of Canadians (*Schmidt*, *supra*, at p. 522; *Kindler*, *supra*, and *Ng*, *supra*) or violate "the Canadian sense of what is fair and right" (*per* McLachlin J. in *Kindler*, at p. 850). A similar pre-*Charter* formulation was applied in a death penalty case under the *Canadian Bill of Rights*, S.C. 1960, c. 44, where Laskin C.J. asked "whether the punishment prescribed is so excessive as to outrage standards of decency" in *Miller v. The Queen*, [1977] 2 S.C.R. 680, at p. 688.

67 While we affirm that the "balancing process" set out in *Kindler* and *Ng* is the correct approach, the phrase "shocks the conscience" and equivalent expressions are not to be taken out of context or equated to opinion polls. The words were intended to underline the very exceptional nature of circumstances that would constitutionally limit the Minister's decision in extradition cases. The words were not intended to signal an abdication by judges of their constitutional responsibilities in matters involving fundamental principles of justice. In this respect, Canadian courts share the duty described by President Arthur Chaskalson of the Constitutional Court of South Africa in declaring unconstitutional the death penalty in that country:

> Public opinion may have some relevance to the enquiry, but, in itself, it is no substitute for the duty vested in the Courts to interpret the Constitution and to uphold its provisions without fear or favour. If public opinion were to be decisive, there would be no need for constitutional adjudication. The protection of rights could then be left to Parliament, which has a mandate from the public, and is answerable to the public for the way its mandate is exercised. . . . The very reason for establishing the new legal order, and for vesting the power of judicial review of all legislation in the courts, was to protect the rights of minorities and others who cannot protect their rights adequately through the democratic process. Those who are entitled to claim this protection include the social outcasts and marginalised people of our society. It is only if there is a willingness to protect the worst and the weakest amongst us that all of us can be secure that our own rights will be protected.
>
> (*S. v. Makwanyane*, 1995 (3) SA 391, at para. 88)

68 Use of the "shocks the conscience" terminology was intended to convey the exceptional weight of a factor such as the youth, insanity, mental retardation or pregnancy of a fugitive which, because of its paramount importance, may control the outcome of the *Kindler* balancing test on the facts of a particular case. The terminology should not be allowed to obscure the ultimate assessment that is required: namely whether or not the extradition is in accordance with the principles of fundamental justice. The rule is <u>not</u> that departures from fundamental justice are to be tolerated unless in a particular case it

shocks the conscience. An extradition that violates the principles of fundamental justice will always shock the conscience. The important inquiry is to determine what constitutes the applicable principles of fundamental justice in the extradition context.

69 The "shocks the conscience" language signals the possibility that even though the rights of the fugitive are to be considered in the context of other applicable principles of fundamental justice, which are normally of sufficient importance to uphold the extradition, a particular treatment or punishment may sufficiently violate our sense of fundamental justice as to tilt the balance against extradition. Examples might include stoning to death individuals taken in adultery, or lopping off the hands of a thief. The punishment is so extreme that it becomes the controlling issue in the extradition and overwhelms the rest of the analysis. The respondents contend that now, unlike perhaps in 1991 when *Kindler* and *Ng* were decided, capital punishment is the issue.

7. *The Principles of Fundamental Justice Are to Be Found in "The Basic Tenets of Our Legal System"*

70 The content of the "principles of fundamental justice" was initially explored by Lamer J. (as he then was) in *Re B.C. Motor Vehicle Act*, *supra*, at p. 503:

> ... the principles of fundamental justice are to be found in the basic tenets of our legal system. They do not lie in the realm of general public policy but in the inherent domain of the judiciary as guardian of the justice system. Such an approach to the interpretation of "principles of fundamental justice" is consistent with the wording and structure of s. 7, the context of the section, *i.e.*, ss. 8 to 14, and the character and larger objects of the *Charter* itself. It provides meaningful content for the s. 7 guarantee all the while avoiding adjudication of policy matters. [Emphasis added.]

71 The distinction between "general public policy" on the one hand and "the inherent domain of the judiciary as guardian of the justice system" is of particular

importance in a death penalty case. The broader aspects of the death penalty controversy, including the role of retribution and deterrence in society, and the view that capital punishment is inconsistent with the sanctity of human life, are embedded in the basic tenets of our legal system, but they also reflect philosophic positions informed by beliefs and social science evidence outside "the inherent domain of the judiciary". The narrower aspects of the controversy are concerned with the investigation, prosecution, defence, appeal and sentencing of a person within the framework of the criminal law. They bear on the protection of the innocent, the avoidance of miscarriages of justice, and the rectification of miscarriages of justice where they are found to exist. These considerations are central to the preoccupation of the courts, and directly engage the responsibility of judges "as guardian[s] of the justice system". We regard the present controversy in Canada and the United States over possible miscarriages of justice in murder convictions (discussed more fully below) as falling within the second category, and therefore as engaging the special responsibility of the judiciary for the protection of the innocent.

8. *Factors that Arguably Favour Extradition Without Assurances*

72 Within this overall approach, a number of the "basic tenets of our legal system" relevant to this appeal may be found in previous extradition cases:

> - that individuals accused of a crime should be brought to trial to determine the truth of the charges (see *Cotroni*, *supra*, at pp. 1487 and 1495), the concern in this case being that if assurances are sought and refused, the Canadian government could face the possibility that the respondents might avoid a trial altogether;

- that justice is best served by a trial in the jurisdiction where the crime was allegedly committed and the harmful impact felt (*Mellino*, *supra*, at pp. 555 and 558; *Idziak*, *supra*, at p. 662; and see *Cotroni*, *supra*, at p. 1488);

- that individuals who choose to leave Canada leave behind Canadian law and procedures and must generally accept the local law, procedure and punishments which the foreign state applies to its own residents. As Wilson J., dissenting in the result in *Cotroni, supra*, stated at p. 1510: "A Canadian citizen who leaves Canada for another state must expect that he will be answerable to the justice system of that state in respect of his conduct there". See also *R. v. Harrer*, [1995] 3 S.C.R. 562, at para. 50; *R. v. Terry*, [1996] 2 S.C.R. 207, at para. 24; *Schreiber v. Canada (Attorney General)*, [1998] 1 S.C.R. 841, at para. 23, *per* Lamer C.J.; *Ross v. United States of America* (1994), 93 C.C.C. (3d) 500 (B.C.C.A.), at p. 535, *per* Taylor J.A.;

- that extradition is based on the principles of comity and fairness to other cooperating states in rendering mutual assistance in bringing fugitives to justice (*Mellino*, *supra*, at p. 551; and see *Idziak*, *supra*, at p. 663); subject to the principle that the fugitive must be able to receive a fair trial in the requesting state (*Mellino*, *supra*, at p. 558; *Allard*, *supra*, at p. 571).

73 A state seeking Canadian cooperation today may be asked to yield up a fugitive tomorrow. The extradition treaty is part of an international network of mutual assistance that enables states to deal both with crimes in their own jurisdiction and transnational crimes with elements that occur in more than one jurisdiction. Given the ease of movement of people and things from state to state, Canada needs the help of the international community to fight serious crime within our own borders. Some of the

states from whom we seek cooperation may not share our constitutional values. Their cooperation is nevertheless important. The Minister points out that Canada satisfies itself that certain minimum standards of criminal justice exist in the foreign state before it makes an extradition treaty in the first place.

74 The Minister argues, very fairly, that expressions of judicial deference to ministerial extradition decisions extend in an unbroken line from *Schmidt* to *Kindler*. Such deference, taken together with the proposition that an individual (including a Canadian) who commits crimes in another state "must expect [to be] answerable to the justice system of that state in respect of his conduct there" (*Cotroni*, *supra*, at p. 1510), provides a sufficient basis, the Minister says, for upholding the extradition without assurances.

9. *Countervailing Factors that Arguably Favour Extradition Only with Assurances*

75 We now turn to the factors that appear to weigh against extradition without assurances that the death penalty will not be imposed.

(a) Principles of Criminal Justice as Applied in Canada

76 The death penalty has been rejected as an acceptable element of criminal justice by the Canadian people, speaking through their elected federal representatives, after years of protracted debate. Canada has not executed anyone since 1962. Parliament abolished the last legal vestiges of the death penalty in 1998 (*An Act to amend the National Defence Act and to make consequential amendments to other Acts*, S.C. 1998, c. 35) some seven years after the decisions of this Court in *Kindler* and *Ng*. In his letter to the respondents, the Minister of Justice emphasized that "in Canada, Parliament has

decided that capital punishment is not an appropriate penalty for crimes committed here, and I am firmly committed to that position."

77 While government policy at any particular moment may or may not be consistent with principles of fundamental justice, the fact that successive governments and Parliaments over a period of almost 40 years have refused to inflict the death penalty reflects, we believe, a fundamental Canadian principle about the appropriate limits of the criminal justice system.

78 We are not called upon in this appeal to determine whether capital punishment would, if authorized by the Canadian Parliament, violate s. 12 of the *Charter* ("cruel and unusual treatment or punishment"), and if so in what circumstances. It is, however, incontestable that capital punishment, whether or not it violates s. 12 of the *Charter*, and whether or not it could be upheld under s. 1, engages the underlying values of the prohibition against cruel and unusual punishment. It is final. It is irreversible. Its imposition has been described as arbitrary. Its deterrent value has been doubted. Its implementation necessarily causes psychological and physical suffering. It has been rejected by the Canadian Parliament for offences committed within Canada. Its potential imposition in this case is thus a factor that weighs against extradition without assurances.

(b) <u>The Abolition of the Death Penalty Has Emerged as a Major Canadian Initiative at the International Level, and Reflects a Concern Increasingly Shared by Most of the World's Democracies</u>

79 In *Re B.C. Motor Vehicle Act, supra,* Lamer J. expressly recognized that international law and opinion is of use to the courts in elucidating the scope of fundamental justice, 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.

80 Dickson C.J. made a similar observation in *Slaight Communications*, *supra*, at pp. 1056-57:

> ... Canada's international human rights obligations should inform not only the interpretation of the content of the rights guaranteed by the *Charter* but also the interpretation of what can constitute pressing and substantial s. 1 objectives which may justify restrictions upon those rights. [Emphasis added.]

Further in *Reference re Public Service Employee Relations Act (Alta.)*, [1987] 1 S.C.R. 313, at p. 348, Dickson C.J. stated:

> The various sources of international human rights law – declarations, covenants, conventions, judicial and quasi-judicial decisions of international tribunals, customary norms – must, in my opinion, be relevant and persuasive sources for interpretation of the *Charter*'s provisions.

See also *R. v. Keegstra*, [1990] 3 S.C.R. 697, at pp. 750 and 790-91.

81 Although this particular appeal arises in the context of Canada's bilateral extradition arrangements with the United States, it is properly considered in the broader context of international relations generally, including Canada's multilateral efforts to bring about change in extradition arrangements where fugitives may face the death penalty, and Canada's advocacy at the international level of the abolition of the death penalty itself.

(i) *International Initiatives Opposing Extradition Without Assurances*

82 A provision for assurances is found in the extradition arrangements of countries other than Canada and the United States. Article 11 of the Council of Europe's *European Convention on Extradition*, Eur. T.S. No. 24, signed December 13, 1957, is virtually identical to Article 6 of the Canada-U.S. treaty. To the same effect is Article 4(*d*) of the *Model Treaty on Extradition* passed by the General Assembly of the United Nations in December 1990 which states that extradition may be refused:

> (*d*) If the offence for which extradition is requested carries the death penalty under the law of the requesting State, unless that State gives such assurance as the requested State considers sufficient that the death penalty will not be imposed or, if imposed, will not be carried out;

83 We are told that from 1991 onwards Article 4(*d*) has gained increasing acceptance in state practice. Amnesty International submitted that Canada currently is the only country in the world, to its knowledge, that has abolished the death penalty at home but continues to extradite without assurances to face the death penalty abroad. Counsel for the Minister, while not conceding the point, did not refer us to any evidence of state practice to contradict this assertion.

84 The United Nations Commission on Human Rights Resolutions 1999/61 (adopted April 28, 1999) and 2000/65 (adopted April 27, 2000) call for the abolition of the death penalty, and in terms of extradition state that the Commission

> [r]equests States that have received a request for extradition on a capital charge to reserve explicitly the right to refuse extradition in the absence of effective assurances from relevant authorities of the requesting State that capital punishment will not be carried out;

Canada supported these initiatives. When they are combined with other examples of Canada's international advocacy of the abolition of the death penalty itself, as described below, it is difficult to avoid the conclusion that in the Canadian view of fundamental justice, capital punishment is unjust and it should be stopped.

(ii) *International Initiatives to Abolish the Death Penalty*

85 As stated, there have been important initiatives within the international community denouncing the death penalty, with the government of Canada often in the forefront. These include: *Extrajudicial, summary or arbitrary executions: Report by the Special Rapporteur*, U.N. Doc. E/CN.4/1997/60, at para. 79; *Extrajudicial, summary or arbitrary executions: Note by the Secretary-General*, U.N. Doc. A/51/457, at para. 145; United Nations Commission on Human Rights Resolutions 1997/12 (Canada voted in favour), 1998/8 (Canada sponsored the resolution and voted in favour), and 1999/61 and 2000/65 (discussed, *supra*). In this connection, Canada's representative is reported as stating to the Commission as follows:

> Suggestions that national legal systems needed merely to take into account international laws was inconsistent with international legal principles. National legal systems should make sure they were in compliance with international laws and rights, in particular when it came to the right to life.
>
> (Press Release HR/CN/788 (April 7, 1997))

86 See also resolutions adopted by the Parliamentary Assembly of the Council of Europe (Resolution 1044 (1994)) and the European Parliament (resolutions B4-0468, 0487, 0497, 0513 and 0542/97 (1997)) calling on all countries to abolish the death penalty, and the declaration of June 29, 1998 of the European Union's General Affairs Council stating that: "The [European Union] will work towards the universal abolition

of the death penalty as a strongly held policy now agreed by all [European Union] Member States".

87 Abolition is also the policy of the *Second Optional Protocol to the International Covenant on Civil and Political Rights, Aiming at the Abolition of the Death Penalty*, G.A. Res. 44/128 (December 15, 1989) (in force in 1991); Canada's position is still being given "careful consideration": U.N. Doc. A/46/40, at paras. 64-65, and see generally W. A. Schabas, *The Abolition of the Death Penalty in International Law* (2nd ed. 1997), at p. 176; the *Protocol to the American Convention on Human Rights to Abolish the Death Penalty* (1990) (Organization of American States), [1990] 29 *I.L.M.* 1447; and *Protocol No. 6 to the Convention for the Protection of Human Rights and Fundamental Freedoms Concerning the Abolition of the Death Penalty* (the Council of Europe), Eur. T.S. No. 114, which contain similar prohibitions on state parties to those Protocols. A significant number of countries have signed or ratified the latter Protocol since *Kindler* and *Ng* were decided: see Council of Europe, *The Death Penalty: Abolition in Europe* (May 1999), at pp. 169-84.

88 It is noteworthy that the United Nations Security Council excluded the death penalty from the punishments available to the International Criminal Tribunals for the former Yugoslavia (Resolution 827, May 25, 1993) and for Rwanda (Resolution 955, November 8, 1994), despite the heinous nature of the crimes alleged against the accused individuals. This exclusion was affirmed in the Rome Statute of the International Criminal Court, signed on December 18, 1998 and ratified on July 7, 2000 by Canada.

89 This evidence does not establish an international law norm against the death penalty, or against extradition to face the death penalty. It does show, however, significant movement towards acceptance internationally of a principle of fundamental

justice that Canada has already adopted internally, namely the abolition of capital punishment.

(iii) *State Practice Increasingly Favours Abolition of the Death Penalty*

90 State practice is frequently taken as reflecting underlying legal principles. To the extent this is true in the criminal justice field, it must be noted that since *Kindler* and *Ng* were decided in 1991, a greater number of countries have become abolitionist.

91 Amnesty International reports that in 1948, the year in which the Universal Declaration of Human Rights was adopted, only eight countries were abolitionist. In January 1998, the Secretary-General of the United Nations, in a report submitted to the Commission on Human Rights (U.N. Doc. E/CN.4/1998/82), noted that 90 countries retained the death penalty, while 61 were totally abolitionist, 14 (including Canada at the time) were classified as abolitionist for ordinary crimes and 27 were considered to be abolitionist *de facto* (no executions for the past 10 years) for a total of 102 abolitionist countries. At the present time, it appears that the death penalty is now abolished (apart from exceptional offences such as treason) in 108 countries. These general statistics mask the important point that abolitionist states include all of the major democracies except some of the United States, India and Japan ("Dead Man Walking Out", *The Economist*, June 10-16, 2000, at p. 21). According to statistics filed by Amnesty International on this appeal, 85 percent of the world's executions in 1999 were accounted for by only five countries: the United States, China, the Congo, Saudi Arabia and Iran.

92 The existence of an international trend against the death penalty is useful in testing our values against those of comparable jurisdictions. This trend against the death penalty supports some relevant conclusions. First, criminal justice, according to

international standards, is moving in the direction of abolition of the death penalty. Second, the trend is more pronounced among democratic states with systems of criminal justice comparable to our own. The United States (or those parts of it that have retained the death penalty) is the exception, although of course it is an important exception. Third, the trend to abolition in the democracies, particularly the Western democracies, mirrors and perhaps corroborates the principles of fundamental justice that led to the rejection of the death penalty in Canada.

(c) Almost All Jurisdictions Treat Some Personal Characteristics of the Fugitive as Mitigating Factors in Death Penalty Cases

93 Examples of potential mitigating factors include youth, insanity, mental retardation and pregnancy. In this case, the respondents rely on the fact that at the time of the crime they were 18. Article 6(5) of the *International Covenant on Civil and Political Rights*, Can. T.S. 1976 No. 47, to which Canada is a party, prohibits the execution of individuals who were under the age of 18 at the time of the commission of the offence. Article 37(*a*) of the *Convention on the Rights of the Child*, Can. T.S. 1992 No. 3, states a similar proposition. Section 47 of the new *Extradition Act*, S.C. 1999, c. 18, permits the Minister in certain circumstances to refuse to surrender persons who were under 18 at the time of the offence. Canada's ratification of these international instruments, and the language of the new *Extradition Act*, support the conclusion that some degree of leniency for youth is an accepted value in the administration of justice. Section 10.95.070 of the Revised Code of Washington recognizes youth as a potential mitigating factor against imposition of the death penalty. The respondents, at 18 years of age, had just passed the borderline from ineligibility to eligibility for the death penalty in Washington State. It is worth noting that only 16 of the 38 retentionist states of the United States have an age limitation of 18 years, another 5 have chosen 17, while the

others use 16 by law or judicial interpretation. It is correct that Canada would hold the respondents fully responsible for their actions under the *Criminal Code*, but Canada is an abolitionist country. The relative youth of the respondents at the time of the offence does constitute a mitigating circumstance in this case, although it must be said, a factor of limited weight.

(d) Other Factors

94 Other factors that weigh against extradition without assurances include the growing awareness of the rate of wrongful convictions in murder cases, and concerns about the "death row phenomenon", aptly described by Lord Griffiths in *Pratt v. Attorney General for Jamaica*, [1993] 4 All E.R. 769 (P.C.), at p. 783:

> There is an instinctive revulsion against the prospect of hanging a man after he has been held under sentence of death for many years. What gives rise to this instinctive revulsion? The answer can only be our humanity: we regard it as an inhuman act to keep a man facing the agony of execution over a long extended period of time.

As these factors call for extended treatment, they will be dealt with separately under the headings which follow.

10. *An Accelerating Concern About Potential Wrongful Convictions Is a Factor of Increased Weight Since Kindler and Ng Were Decided*

95 The avoidance of conviction and punishment of the innocent has long been in the forefront of "the basic tenets of our legal system". It is reflected in the presumption of innocence under s. 11(*d*) of the *Charter* and in the elaborate rules governing the collection and presentation of evidence, fair trial procedures, and the availability of appeals. The possibility of miscarriages of justice in murder cases has long been

recognized as a legitimate objection to the death penalty, but our state of knowledge of the scope of this potential problem has grown to unanticipated and unprecedented proportions in the years since *Kindler* and *Ng* were decided. This expanding awareness compels increased recognition of the fact that the extradition decision of a Canadian Minister could pave the way, however unintentionally, to sending an innocent individual to his or her death in a foreign jurisdiction.

(a) The Canadian Experience

96 Our concern begins at home. There have been well-publicized recent instances of miscarriages of justice in murder cases in Canada. Fortunately, because of the abolition of the death penalty, meaningful remedies for wrongful conviction are still possible in this country.

97 The first of a disturbing Canadian series of wrongful murder convictions, whose ramifications were still being worked out when *Kindler* and *Ng* were decided, involved Donald Marshall, Jr. He was convicted in 1971 of murder by a Nova Scotia jury. He served 11 years of his sentence. He was eventually acquitted by the courts on the basis of new evidence. In 1989 he was exonerated by a Royal Commission which stated that:

> The criminal justice system failed Donald Marshall, Jr. at virtually every turn from his arrest and wrongful conviction for murder in 1971 up to, and even beyond, his acquittal by the Court of Appeal in 1983. The tragedy of the failure is compounded by evidence that this miscarriage of justice could – and should – have been prevented, or at least corrected quickly, if those involved in the system had carried out their duties in a professional and/or competent manner. That they did not is due, in part at least, to the fact that Donald Marshall, Jr. is a Native.
>
> (Royal Commission on the Donald Marshall, Jr., Prosecution, *Digest of Findings and Recommendations* (1989), at p. 1)

In June 1990, a further commission of inquiry recommended that Marshall receive a compensation package consisting, among other things, of a payment for pain and suffering and monthly annuity payments guaranteed over a minimum period of 30 years, at the end of which he will have received in excess of $1 million. The miscarriage of justice in his case was known at the time *Kindler* and *Ng* were decided. What was not known was the number of other instances of miscarriages of justice in murder cases that would surface in subsequent years in both Canada and the United States.

98 In 1970, David Milgaard was convicted of murder by a Saskatchewan jury and sentenced to life imprisonment. He served almost 23 years in jail. On two occasions separated by almost 22 years, it was held by Canadian courts that Milgaard was given the benefit of a fair trial, initially by the Saskatchewan Court of Appeal in January 1971 in *R. v. Milgaard* (1971), 2 C.C.C. (2d) 206, leave to appeal refused (1971), 4 C.C.C. (2d) 566n, and subsequently by this Court in *Reference re Milgaard (Can.),* [1992] 1 S.C.R. 866. There was no probative evidence that the police had acted improperly in the investigation or in their interviews with any of the witnesses, and no evidence that there had been inadequate disclosure in accordance with the practice prevailing at the time. Milgaard was represented by able and experienced counsel. No serious error in law or procedure occurred at the trial. Notwithstanding the fact that the conviction for murder followed a fair trial, new evidence surfaced years later. This Court, on a special reference, considered that "[t]he continued conviction of Milgaard would amount to a miscarriage of justice if an opportunity was not provided for a jury to consider the fresh evidence" (p. 873). In 1994, Milgaard commenced proceedings against the Government of Saskatchewan for wrongful conviction and in 1995 he sued the provincial Attorney General personally after the latter had told the media he believed Milgaard was guilty of the murder. DNA testing in 1997 ultimately satisfied the Saskatchewan government that Milgaard had been wrongfully convicted. In May 2000 another individual was prosecuted and convicted for

the same murder. His appeal is pending before the Saskatchewan Court of Appeal. Compensation in the sum of $10 million was paid to Milgaard. The history of the wrongful conviction of David Milgaard shows that in Canada, as in the United States, a fair trial does not always guarantee a safe verdict.

99 Of equal concern is the wrongful conviction for murder of Guy Paul Morin who was only 25 years old when he was arrested on April 22, 1985, and charged with the first degree murder of a child named Christine Jessop who was his next door neighbour. While initially acquitted by an Ontario jury, he was found guilty at a second jury trial in 1992. DNA testing carried out while the second appeal was pending before the Ontario Court of Appeal, more than 10 years after his initial arrest, exonerated him. His appeal was then uncontested, and he received an apology from the Attorney General of Ontario, compensation of $1.25 million, and the establishment of a commission (the Kaufman Inquiry) to look into the causes of the wrongful conviction. In his 1998 Report, the Commissioner, a former judge of the Quebec Court of Appeal, concluded:

> The case of Guy Paul Morin is not an aberration. By that, I do not mean that I can quantify the number of similar cases in Ontario or elsewhere, or that I can pass upon the frequency with which innocent persons are convicted in this province. We do not know. What I mean is that the causes of Mr. Morin's conviction are rooted in systemic problems, as well as the failings of individuals. It is no coincidence that the same systemic problems are those identified in wrongful convictions in other jurisdictions worldwide.
>
> (Commission on Proceedings Involving Guy Paul Morin, *Report* (1998), vol. 2, at p. 1243)

100 Thomas Sophonow was tried three times for the murder of Barbara Stoppel. He served 45 months in jail before his conviction was overturned in 1985 by the Manitoba Court of Appeal. It was not until June 2000 that the Winnipeg police exonerated Sophonow of the killing, almost 20 years after his original conviction. The Attorney

General of Manitoba recently issued an apology to Mr. Sophonow and mandated the Honourable Peter Cory, recently retired from this Court, to head a commission of inquiry which is currently looking into the conduct of the investigation and the circumstances surrounding the criminal proceedings, both to understand the past and to prevent future miscarriages of justice. The commission will also examine the issue of compensation.

101 In 1994, Gregory Parsons was convicted by a Newfoundland jury for the murder of his mother. He was sentenced to life imprisonment with no eligibility for parole for 15 years. Subsequently, the Newfoundland Court of Appeal overturned his conviction and ordered a new trial. Before that trial could be held, Parsons was cleared by DNA testing. The provincial Minister of Justice apologized to Parsons and his family and asked Nathaniel Noel, a retired judge, to conduct a review of the investigation and prosecution of the case and to make recommendations concerning the payment of compensation.

102 These miscarriages of justice of course represent a tiny and wholly exceptional fraction of the workload of Canadian courts in murder cases. Still, where capital punishment is sought, the state's execution of even one innocent person is one too many.

103 In all of these cases, had capital punishment been imposed, there would have been no one to whom an apology and compensation could be paid in respect of the miscarriage of justice (apart, possibly, from surviving family members), and no way in which Canadian society with the benefit of hindsight could have justified to itself the deprivation of human life in violation of the principles of fundamental justice.

104 Accordingly, when Canada looks south to the present controversies in the United States associated with the investigation, defence, conviction, appeal and punishment in murder cases, it is with a sense of appreciation that many of the underlying

criminal justice problems are similar. The difference is that imposition of the death penalty in the retentionist states inevitably deprives the legal system of the possibility of redress to wrongfully convicted individuals.

(b) The U.S. Experience

105 Concerns in the United States have been raised by such authoritative bodies as the American Bar Association which in 1997 recommended a moratorium on the death penalty throughout the United States because, as stated in an ABA press release in October 2000:

> The adequacy of legal representation of those charged with capital crimes is a major concern. Many death penalty states have no working public defender systems, and many simply assign lawyers at random from a general list. The defendant's life ends up entrusted to an often underqualified and overburdened lawyer who may have no experience with criminal law at all, let alone with death penalty cases.
>
> The U.S. Supreme Court and the Congress have dramatically restricted the ability of our federal courts to review petitions of inmates who claim their state death sentences were imposed in violation of the Constitution or federal law.
>
> Studies show racial bias and poverty continue to play too great a role in determining who is sentenced to death.

106 The ABA takes no position on the death penalty as such (except to oppose it in the case of juveniles and the mentally retarded). Its call for a moratorium has been echoed by local or state bars in California, Connecticut, Ohio, Virginia, Illinois, Louisiana, Massachusetts, New Jersey and Pennsylvania. The ABA reports that state or local bars in Florida, Kentucky, Missouri, New Mexico, North Carolina and Tennessee are also examining aspects of the death penalty controversy.

107 On August 4, 2000, the Board of Governors of the Washington State Bar Association, being the state seeking the extradition of the respondents, unanimously adopted a resolution to review the death penalty process. The Governor was urged to obtain a comprehensive report addressing the concerns of the American Bar Association as they apply to the imposition of the death penalty in the State of Washington. In particular, the Governor was asked to determine "[w]hether the reversal rate of capital cases from our state by the federal courts indicates any systemic problems regarding how the death penalty is being implemented in Washington State".

108 Other retentionist jurisdictions in the United States have also expressed recent disquiet about the conduct of capital cases, and the imposition and the carrying out of the death penalty. These include:

> (i) Early last year Governor George Ryan of Illinois, a known retentionist, declared a moratorium on executions in that state. The Governor noted that more than half the people sentenced to die there in the last 23 years were eventually exonerated of murder. Specifically, Illinois exonerated 13 death row inmates since 1977, one more than it actually executed. Governor Ryan said ". . . I have grave concerns about our state's shameful record of convicting innocent people and putting them on death row". He remarked that he could not support a system that has come "so close to the ultimate nightmare, the state's taking of innocent life" (Governor Ryan Press Release, January 31, 2000).
>
> (ii) The Illinois moratorium followed closely in the wake of a major study on wrongful convictions in death penalty cases by the *Chicago Tribune* newspaper, and a conference held at Northwestern University School of Law:

see L. B. Bienen, "The Quality of Justice in Capital Cases: Illinois as a Case Study" (1998), 61 *Law & Contemp. Probs.* 193, at p. 213, fn. 103. The study examined the 285 death penalty cases that had occurred in Illinois since capital punishment was restored there. "The findings reveal a system so plagued by unprofessionalism, imprecision and bias that they have rendered the state's ultimate form of punishment its least credible" (*Chicago Tribune*, November 14, 1999).

(iii) One of the more significant exonerations in Illinois was the case of Anthony Porter who came within 48 hours of being executed for a crime he did not commit (*Chicago Tribune*, December 29, 2000, at p. N22).

(iv) Both the New Hampshire House of Representatives and Senate voted to abolish the death penalty last year, although the measure was vetoed by the Governor. It is noteworthy that New Hampshire has not executed anyone since 1939 (*New York Times*, May 19, 2000, at p. 16, and May 20, 2000, at p. 16).

(v) In May 1999, the Nebraska legislature approved a bill that imposed a two-year moratorium on executions in that state and appropriated funds for a study of the issue. That initiative was vetoed by the Governor. However, the legislature unanimously overrode part of the veto so that the study could proceed.

(vi) Senator Russ Feingold of Wisconsin introduced a bill in Congress in April 2000 calling on the federal government and all states that impose the death penalty to suspend executions while a national commission reviews the administration of the death penalty.

(vii) On September 12, 2000, the United States Justice Department released a study of the death penalty under federal law. It was the first comprehensive review of the federal death penalty since it was reinstated in 1988. The data shows that federal prosecutors were almost twice as likely to recommend the death penalty for black defendants when the victim was non-black than when he or she was black. Moreover, a white defendant was almost twice as likely to be given a plea agreement whereby the prosecution agreed not to seek the death penalty. The study also revealed that 43 percent of the 183 cases in which the death penalty was sought came from 9 of the 94 federal judicial districts. This has led to concerns about racial and geographical disparity. The then Attorney General Janet Reno said that she was "sorely troubled" by the data and requested further studies (*New York Times*, September 12, 2000, at p. 17).

109 Foremost among the concerns of the American Bar Association, the Washington State Bar Association and other bodies who possess "hands-on" knowledge of the criminal justice system, is the possibility of wrongful convictions and the potential state killing of the innocent. It has been reported that 43 wrongfully convicted people have been freed in the United States as a result of work undertaken by The Innocence Project, a clinical law program started in 1992 at the Cardozo School of Law in New York. See, generally, B. Scheck, P. Neufeld, and J. Dwyer, *Actual Innocence: Five Days to Execution and Other Dispatches from the Wrongly Convicted* (2000). One of the authors, Peter Neufeld testified on June 20, 2000 to the House of Representatives' Committee on the Judiciary that "DNA testing only helps correct conviction of the innocent in a narrow class of cases; most homicides do not involve biological evidence that can be determinative of guilt or innocence".

110 Finally, we should note the recent Columbia University study by Professor James Liebman and others which concludes that 2 out of 3 death penalty sentences in the United States were reversed on appeal: *A Broken System: Error Rates in Capital Cases, 1973-1995* (June 12, 2000). The authors gathered and analyzed all of the available cases from the period of 1973 to 1995, the former being the year that states began to enact new death penalty statutes following the United States Supreme Court's decision in *Furman, supra*, invalidating the existing regimes. Collection of the data for the study began in 1991, the year *Kindler* and *Ng* were decided. In their executive summary, the authors report that "the overall rate of prejudicial error in the American capital punishment system was 68%." These errors were detected at one of three stages of appeal in the American legal system. The authors say that with "so many mistakes that it takes three judicial inspections to catch them" there must be "grave doubt about whether we *do* catch them all" (emphasis in original). The authors point out in footnote 81 that "[b]etween 1972 and the beginning of 1998, 68 people were released from death row on the grounds that their convictions were faulty, and there was too little evidence to retry the prisoner" and as of May 2000 "the number of inmates released from death row as factually or legally innocent apparently has risen to 87, including nine released in 1999 alone." For an abridged version of the Liebman study, see "Capital Attrition: Error Rates in Capital Cases, 1973-1995" (2000), 78 *Tex. L. Rev.* 1839.

111 It will of course be for the United States to sort out the present controversy surrounding death penalty cases in that country. We have referred to some of the reports and some of the data, but there is much more that has been said on all sides of the issue. Much of the evidence of wrongful convictions relates to individuals who were saved prior to execution, and can thus be presented as evidence of the system's capacity to correct errors. The widespread expressions of concern suggest there are significant problems, but they also demonstrate a determination to address the problems that do exist. Our purpose

is not to draw conclusions on the merits of the various criticisms, but simply to note the scale and recent escalation of the controversy, particularly in some of the retentionist states, including the State of Washington.

(c) The Experience in the United Kingdom

112 Countries other than Canada and the United States have also experienced their share of disclosure of wrongful convictions in recent years. In the United Kingdom, in 1991, the then Home Secretary announced the establishment of a Royal Commission on Criminal Justice (the Runciman Commission) to examine the effectiveness of the criminal justice system in securing the conviction of the guilty and the acquittal of the innocent. In making the announcement, the Home Secretary referred to such cases as the "Birmingham Six" which had seriously undermined public confidence in the administration of criminal justice. The report of the Commission, pointing to potential sources of miscarriage of justice, was presented to the British Parliament in 1993. The new *Criminal Appeal Act*, adopted in 1995, created the Criminal Cases Review Commission, an independent body responsible for investigating suspected miscarriages of criminal justice in England, Wales and Northern Ireland and referring appropriate cases to the Court of Appeal.

113 The Criminal Cases Review Commission started its casework in April 1997. As of November 30, 2000, it had referred 106 cases to the Court of Appeal. Of these, 51 had been heard, 39 convictions quashed, 11 upheld and one remained under reserve. The convictions overturned by the court as unsafe included 10 convictions for murder. In two of the overturned murder convictions, the prisoners had long since been hanged.

114 In *R. v. Bentley (Deceased)*, [1998] E.W.J. No. 1165 (QL) (C.A.), the court posthumously quashed the murder conviction of Derek Bentley who was executed on January 28, 1953. The Crown had alleged that Bentley and an accomplice had embarked upon "a warehouse-breaking expedition" during which a police officer was killed. It was argued that the trial judge had erred in summing up to the jury. It was also argued that fresh evidence made the conviction unsafe. The Lord Chief Justice, Lord Bingham, said about the summing up in this case (at para. 78):

> It is with genuine diffidence that the members of this court direct criticism towards a trial judge widely recognised as one of the outstanding criminal judges of this century [Lord Goddard C.J.]. But we cannot escape the duty of decision. In our judgment the summing up in this case was such as to deny the appellant that fair trial which is the birthright of every British citizen.

After quashing the conviction on this basis, Lord Bingham C.J. said (at para. 95):

> It must be a matter of profound and continuing regret that this mistrial occurred and that the defects we have found were not recognised at the time.

It does not appear that the Court of Appeal gave much weight to the fresh evidence, though one component of this evidence (dealing with the taking of the appellant's statement) was said to provide "additional support" (para. 130) for the conclusion that the conviction was unsafe.

115 Another recent case is *R. v. Mattan*, [1998] E.W.J. No. 4668 (QL) (C.A.). Mahmoud Hussein Mattan was convicted of murdering a Cardiff shopkeeper in 1952. The shopkeeper's throat had been cut. On August 19, 1952, the Court of Criminal Appeal refused his application for leave to appeal. He was hanged in Cardiff Prison on September 8, 1952. Fresh evidence came to light in 1969 but the Home Secretary declined in

February 1970 to have the case reopened. The Commission, however, referred the matter to the Court of Appeal, which found that the Crown had failed to disclose highly relevant evidence to the defence. In the result, the conviction was quashed. Near the end of its judgment, the Court of Appeal stated that "[i]t is, of course, a matter for very profound regret that in 1952 Mahmoud Mattan was convicted and hanged and it has taken 46 years for that conviction to be shown to be unsafe." It also observed that the case demonstrates that "capital punishment was not perhaps a prudent culmination for a criminal justice system which is human and therefore fallible" (para. 39).

116 The U.K. experience is relevant for the obvious reason that these men might be free today if the state had not taken their lives. But there is more. These convictions were quashed not on the basis of sophisticated DNA evidence but on the basis of frailties that perhaps may never be eliminated from our system of criminal justice. It is true, as the English Court of Appeal noted in *Mattan*, that the present rules require far more disclosure on the part of the Crown. And it is true that there was some blood on the shoes of Mattan that could now be shown by DNA testing not to have belonged to the victim. But there is always the potential that eyewitnesses will get it wrong, either innocently or, as it appears in the case of *Mattan*, purposefully in order to shift the blame onto another. And there is always the chance that the judicial system will fail an accused, as it apparently did in *Bentley*. These cases demonstrate that the concern about wrongful convictions is unlikely to be resolved by advances in the forensic sciences, welcome as those advances are from the perspective of protecting the innocent and punishing the guilty.

(d) Conclusion

117 The recent and continuing disclosures of wrongful convictions for murder in Canada, the United States and the United Kingdom provide tragic testimony to the fallibility of the legal system, despite its elaborate safeguards for the protection of the innocent. When fugitives are sought to be tried for murder by a retentionist state, however similar in other respects to our own legal system, this history weighs powerfully in the balance against extradition without assurances.

11. *The "Death Row Phenomenon" Is of Increasing Concern Even to Retentionists*

118 The evidence filed on this appeal includes a report by Chief Justice Richard P. Guy, Chief Justice of the State of Washington, dated March 2000 entitled "Status Report on the Death Penalty in Washington State". In the report the Chief Justice notes the following statistics relevant to the present discussion:

- Since 1981, 25 men have been convicted and sentenced to death. Four have had their judgments reversed by the federal courts, 2 have had their sentences reversed by the Washington State Supreme Court, and 3 have been executed.
- The case of one defendant who was sentenced to be executed 18 years ago is still pending.
- Two of the three executed defendants chose not to pursue appeals to the federal courts.
- For cases completed in the federal courts, state and federal review has taken an average of 11.2 years.
- State review after conviction has averaged 5.5 years.

In his introduction to the Status Report, the Chief Justice made the following observations (at p. 2):

> Because a death sentence is irreversible, opportunities for proving innocence in addition to those furnished in other felony cases are offered to the defendant in order to avoid erroneous executions. The importance of the review system is illustrated by the current situation in Illinois, a state in which 12 men have been executed since the 1980s but another 13 men sentenced to death have been exonerated. Appellate review of their cases resulted in reversal of their judgments after they were able to prove their innocence through the use of newly discovered DNA techniques or for other reasons.

119 These statistics are comparable to the degree of delay on "death row" that concerned the European Court of Human Rights in *Soering*, *supra*. The evidence was that if Soering were to be sentenced to death under Virginia law he would face an average of six to eight years on death row. The European Court commented on the serious human rights consequences of holding a convict under the threat of death for a prolonged length of time at para. 106:

> However well-intentioned and even potentially beneficial is the provision of the complex of post-sentence procedures in Virginia, the consequence is that the condemned prisoner has to endure for many years the conditions on death row and the anguish and mounting tension of living in the ever-present shadow of death.

120 In *Pratt v. Attorney General for Jamaica*, *supra*, at p. 783, the Judicial Committee of the Privy Council ruled against the decision of the Jamaican government which sought to carry out death sentences against two appellants who had been on death row for over 14 years. Lord Griffiths for the Committee stated at p. 786:

> In their Lordships' view a state that wishes to retain capital punishment must accept the responsibility of ensuring that execution follows as swiftly as practicable after sentence, allowing a reasonable time for appeal and consideration of reprieve. <u>It is part of the human condition that a condemned man will take every opportunity to save his life through use of the appellate procedure.</u> If the appellate procedure enables the prisoner to prolong the appellate hearings over a period of years, the fault is to be attributed to the appellate system that permits such delay and not to the prisoner who takes advantage of it. Appellate procedures that echo down the years are not

> compatible with capital punishment. The death row phenomenon must not become established as a part of our jurisprudence. [Emphasis added.]

121 The role of the death row phenomenon in extradition proceedings was not conclusively determined by this Court in *Kindler*. Cory J., with whom Lamer C.J. concurred, was of the view that it would be wrong to extradite someone who would face the death row phenomenon: see pp. 822-24. Sopinka J. did not deal with the question while McLachlin J. (at p. 856) alluded to "the complexity of the issue". La Forest J. was critical of the concept. He said (at p. 838):

> 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; . . .

122 There is now, however, as is shown in the report of Chief Justice Guy of Washington State, *supra*, a widening acceptance amongst those closely associated with the administration of justice in retentionist states that the finality of the death penalty, combined with the determination of the criminal justice system to satisfy itself fully that the conviction is not wrongful, seems inevitably to provide lengthy delays, and the associated psychological trauma. It is apposite to recall in this connection the observation of Frankfurter J. of the United States Supreme Court, dissenting, in *Solesbee v. Balkcom*, 339 U.S. 9 (1950), at p. 14, that the "onset of insanity while awaiting execution of a death sentence is not a rare phenomenon". Related concerns have been expressed by Breyer J., dissenting from decisions not to issue writs of *certiorari* in *Elledge v. Florida*, 119 S. Ct. 366 (1998), and *Knight v. Florida*, 120 S. Ct. 459 (1999). In the latter case, Breyer J. cited

a Florida study of inmates which showed that 35 percent of those committed to death row attempted suicide.

123 The death row phenomenon is not a controlling factor in the s. 7 balance, but even many of those who regard its horrors as self-inflicted concede that it is a relevant consideration. To that extent, it is a factor that weighs in the balance against extradition without assurances.

12. *The Balance of Factors in This Case Renders Extradition of the Respondents Without Assurances a Prima facie Infringement of their Section 7 Rights*

124 Reviewing the factors for and against unconditional extradition, we conclude that to order extradition of the respondents without obtaining assurances that the death penalty will not be imposed would violate the principles of fundamental justice.

125 The Minister has not pointed to any public purpose that would be served by extradition without assurances that is not substantially served by extradition with assurances, carrying as it does in this case the prospect on conviction of life imprisonment without release or parole. With assurances, the respondents will be extradited and be made answerable to the legal system where the murders took place. The evidence shows that on previous occasions when assurances have been requested of foreign states they have been forthcoming without exception. (See, for example, Ministerial Decision in the Matter of the Extradition of Lee Robert O'Bomsawin, December 9, 1991; Ministerial Decision in the Matter of the Extradition of Rodolfo Pacificador, October 19, 1996.) There is no basis in the record to support the hypothesis, and counsel for the Minister did not advance it, that the United States would prefer no extradition at all to extradition with assurances. Under

Washington State law it by no means follows that the prosecutor will seek the death penalty if the respondents are extradited to face charges of aggravated first degree murder.

126 It is true that if assurances are requested, the respondents will not face the same punishment regime that is generally applicable to crimes committed in Washington State, but the reality is that Washington requires the assistance of Canada to bring the respondents to justice. Assurances are not sought out of regard for the respondents, but out of regard for the principles that have historically guided this country's criminal justice system and are presently reflected in its international stance on capital punishment.

127 International experience, particularly in the past decade, has shown the death penalty to raise many complex problems of both a philosophic and pragmatic nature. While there remains the fundamental issue of whether the state can ever be justified in taking the life of a human being within its power, the present debate goes beyond arguments over the effectiveness of deterrence and the appropriateness of vengeance and retribution. It strikes at the very ability of the criminal justice system to obtain a uniformly correct result even where death hangs in the balance.

128 International experience thus confirms the validity of concerns expressed in the Canadian Parliament about capital punishment. It also shows that a rule requiring that assurances be obtained prior to extradition in death penalty cases not only accords with Canada's principled advocacy on the international level, but is also consistent with the practice of other countries with whom Canada generally invites comparison, apart from the retentionist jurisdictions in the United States.

129 The "balancing process" mandated by *Kindler* and *Ng* remains a flexible instrument. The difficulty in this case is that the Minister proposes to send the respondents

without assurances into the death penalty controversy at a time when the legal system of the requesting country is under such sustained and authoritative internal attack. Although rumblings of this controversy in Canada, the United States and the United Kingdom pre-dated *Kindler* and *Ng*, the concern has grown greatly in depth and detailed proof in the intervening years. The imposition of a moratorium (*de facto* or otherwise) in some of the retentionist states of the United States attests to this concern, but a moratorium itself is not conclusive, any more than the lifting of a moratorium would be. What is important is the recognition that despite the best efforts of all concerned, the judicial system is and will remain fallible and reversible whereas the death penalty will forever remain final and irreversible.

130 The arguments in favour of extradition without assurances would be as well served by extradition with assurances. There was no convincing argument that exposure of the respondents to death in prison by execution advances Canada's public interest in a way that the alternative, eventual death in prison by natural causes, would not. This is perhaps corroborated by the fact that other abolitionist countries do not, in general, extradite without assurances.

131 The arguments against extradition without assurances have grown stronger since this Court decided *Kindler* and *Ng* in 1991. Canada is now abolitionist for all crimes, even those in the military field. The international trend against the death penalty has become clearer. The death penalty controversies in the requesting State – the United States – are based on pragmatic, hard-headed concerns about wrongful convictions. None of these factors is conclusive, but taken together they tilt the s. 7 balance against extradition without assurances.

132 Accordingly, we find that the Minister's decision to decline to request the assurances of the State of Washington that the death penalty will not be imposed on the respondents as a condition of their extradition, violates their rights under s. 7 of the *Charter*.

13. *Extradition of the Respondents Without Assurances Cannot Be Justified Under Section 1 of the Charter*

133 The final issue is whether the Minister has shown that the violation of the respondents' s. 7 rights that would occur if they were extradited to face the death penalty can be upheld under s. 1 of the *Charter* as reasonable and demonstrably justifiable in a free and democratic society. The Court has previously noted that it would be rare for a violation of the fundamental principles of justice to be justifiable under s. 1: *Re B.C. Motor Vehicle Act*, *supra*, at p. 518. Nevertheless, we do not foreclose the possibility that there may be situations where the Minister's objectives are so pressing, and where there is no other way to achieve those objectives other than through extradition without assurances, that a violation might be justified. In this case, we find no such justification.

134 The Minister must show that the refusal to ask for assurances serves a pressing and substantial purpose; that the refusal is likely to achieve that purpose and does not go further than necessary; and that the effect of unconditional extradition does not outweigh the importance of the objective: *R. v. Oakes*, [1986] 1 S.C.R. 103. In our opinion, while the government objective of advancing mutual assistance in the fight against crime is entirely legitimate, the Minister has not shown that extraditing the respondents to face the death penalty without assurances is necessary to achieve that objective.

135 The Minister cites two important policies that are integral to Canada's mutual assistance objectives, namely, (1) maintenance of comity with cooperating states; and (2)

avoiding an influx to Canada of persons charged with murder in retentionist states for the purpose of avoiding the death penalty.

136 With respect to the argument on comity, there is no doubt that it is important for Canada to maintain good relations with other states. However, the Minister has not shown that the means chosen to further that objective in this case – the refusal to ask for assurances that the death penalty will not be exacted – is necessary to further that objective. There is no suggestion in the evidence that asking for assurances would undermine Canada's international obligations or good relations with neighbouring states. The extradition treaty between Canada and the United States explicitly provides for a request for assurances and Canada would be in full compliance with its international obligations by making it. More and more states are becoming abolitionist and reserving to themselves the right to refuse to extradite unconditionally, as already mentioned.

137 In *Soering*, *supra*, the European Court of Human Rights held that, in the circumstances of that case, extradition of a West German national from the United Kingdom to face possible execution in the United States would violate the European Convention on Human Rights. West Germany was willing to try Soering in Germany on the basis of his nationality. The European Court ruled that the option of a trial of Soering in West Germany was a "circumstance of relevance for the overall assessment under Article 3 in that it goes to the search for the requisite fair balance of interests and to the proportionality of the contested extradition decision in the particular case" (para. 110) and that "[a] further consideration of relevance is that in the particular instance the legitimate purpose of extradition could be achieved by another means which would not involve suffering of such exceptional intensity or duration" (para. 111). By "another means", the court had in mind the trial of Soering in West Germany. In the present appeal as well, "the

legitimate purpose of extradition could be achieved by another means", namely extradition with assurances, in perfect conformity with Canada's commitment to international comity.

138 We have already addressed the speculative argument that an American government might prefer to let accused persons go without trial by refusing to give assurances. As European states now routinely request assurances that the death penalty will not be imposed on an extradited person, there is little indication that U.S. governments would ever refuse such guarantees. A state seeking to prosecute a serious crime is unlikely to decide that if it cannot impose the ultimate sanction – the death penalty – it will not prosecute at all. Seeking assurances that the death penalty will not be imposed does not amount to asking for lawlessness.

139 An issue could also arise where a treaty did not contain an assurance clause equivalent to Article 6 of the Canada-U.S. treaty. The argument would then be raised that the Canadian government violated the s. 7 rights of fugitives by failing to insist on such a provision. That issue is not raised by the facts of this case and we leave consideration of the point to an appeal where it is fully argued.

140 As noted, the Minister's second argument is that it is necessary to refuse to ask for assurances in order to prevent an influx to Canada of persons who commit crimes sanctioned by the death penalty in other states. This in turn would make Canada an attractive haven for persons committing murders in retentionist states. The "safe haven" argument might qualify as a pressing and substantial objective. Indeed, it was accepted as such in *Kindler*, *supra*, by both La Forest J. (at p. 836) and McLachlin J. (at p. 853).

141 International criminal law enforcement including the need to ensure that Canada does not become a "safe haven" for dangerous fugitives is a very legitimate

objective, but there is no evidence whatsoever that extradition to face life in prison without release or parole provides a lesser deterrent to those seeking a "safe haven" than the death penalty, or even that fugitives approach their choice of refuge with such an informed appreciation of tactics. If Canada suffers the prospect of being a haven from time to time for fugitives from the United States, it likely has more to do with geographic proximity than the Minister's policy on treaty assurances. The evidence as stated is that Ministers of Justice have on at least two occasions (since *Kindler* and *Ng*) refused to extradite without assurances, and no adverse consequences to Canada from those decisions were brought to our attention. The respondents pointed out that "[s]ince the execution by the United States of two Mexican nationals in 1997, Mexican authorities have consistently refused to extradite anyone, nationals or non-nationals, in capital cases without first seeking assurances" (respondents' factum, at para. 63).

142 The fact is, however, that whether fugitives are returned to a foreign country to face the death penalty or to face eventual death in prison from natural causes, they are equally prevented from using Canada as a safe haven. Elimination of a "safe haven" depends on vigorous law enforcement rather than on infliction of the death penalty once the fugitive has been removed from the country.

143 We conclude that the infringement of the respondents' rights under s. 7 of the *Charter* cannot be justified under s. 1 in this case. The Minister is constitutionally bound to ask for and obtain an assurance that the death penalty will not be imposed as a condition of extradition.

VIII. Conclusion

144 The outcome of this appeal turns on an appreciation of the principles of fundamental justice, which in turn are derived from the basic tenets of our legal system. These basic tenets have not changed since 1991 when *Kindler* and *Ng* were decided, but their application in particular cases (the "balancing process") must take note of factual developments in Canada and in relevant foreign jurisdictions. When principles of fundamental justice as established and understood in Canada are applied to these factual developments, many of which are of far-reaching importance in death penalty cases, a balance which tilted in favour of extradition without assurances in *Kindler* and *Ng* now tilts against the constitutionality of such an outcome. For these reasons, the appeal is dismissed.

Appeal dismissed.

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