Canadian Extradition and the Death Penalty: Seeking a Constitutional Assurance of Life

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Introduction

Capital punishment has intrigued and troubled the minds of leaders throughout the world. Although the Supreme Court of the United States has refused to hold such method of punishment as per se unconstitutional, seventeen other countries have abolished the death penalty for a specified group of crimes, while forty-four countries have abolished the punishment altogether.

The existence of such dichotomous views emerging in the world today is illustrated by the divergent views of the United States and Canada, which recently abolished the death penalty for all offenses under its Criminal Code. Despite sharing both a common border and similar cul-

1. Gregg v. Georgia, 428 U.S. 153, 187 (1976) ("We now hold that the punishment of death does not invariably violate the Constitution. . . . [I]t is not a form of punishment that may never be imposed, regardless of the circumstances of the offense, regardless of the character of the offender, and regardless of the procedure followed in reaching the decision to impose it.").


4. In 1976, the majority of the House of Commons voted to abolish capital punishment for all offenses under its Criminal Code. This anti-death penalty sentiment was later reiterated and reinforced in a 1987 House of Commons vote, when the reinstatement of capital punishment was again met with stern disapproval. Id. at 792.

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tural and judicial values, these two nations adhere to diametrically different notions of punishment.

Global disagreement concerning the death penalty poses a special problem between those countries standing on opposite sides of the debate. In particular, the dichotomy has created a growing concern in the area of international extradition, where one country makes an official request to another country for the surrender of an escaped fugitive.5 The prevailing question that arises is whether a country firmly opposed to the death penalty should refuse to surrender a foreign fugitive to a nation that supports capital punishment knowing that such action may result in the individual's death, or whether that country's notion of international comity should rise above such domestic considerations.

This evolving concern has recently found its way into the international relationship between the United States and Canada. On September 26, 1991, in a controversial four to three decision, the Supreme Court of Canada upheld the Canadian Minister of Justice's decision to extradite two American fugitives to the United States who were likely to face capital punishment upon their return.6 The Court confirmed the order to extradite the fugitives despite the Minister's failure in both instances to seek assurances from the United States that the death penalty would not be imposed, a discretionary alternative made available by the Extradition Treaty between Canada and the United States of America ("Extradition Treaty").7 In deciding, the Supreme Court ruled that the Minister's discretionary authority to order such unconditioned surrender8 pursuant to the Canadian Extradition Act9 is neither inconsistent with the Canadian Charter of Rights and Freedoms ("Charter")10 nor any established

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5. Extradition is defined as "[t]he surrender by one state or country to another of an individual accused or convicted of an offense outside its own territory and within the territorial jurisdiction of the other, which, being competent to try and punish him, demands the surrender." Black's Law Dictionary 585 (6th ed. 1990); see also G. V. La Forest, Extradition to and from Canada 15 (1961).


7. Extradition Treaty between Canada and the United States of America [hereinafter Extradition Treaty], December 3, 1971, Can.-U.S., art. 6, Can. T.S. 1976 No. 3, reprinted in U.S. Treaties and Other International Agreements, Volume 27, part 1, at 983 (1976) ("[E]xtradition 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.").

8. "Unconditioned extradition" as used here and throughout this Note simply refers to extradition absent Article 6 treaty assurances from the requesting country, namely, assurances that the death penalty will neither be imposed nor executed.

9. Extradition Act, R.S.C. ch. E-23, § 25 (1985) (Can.) ("[T]he Minister of Justice ... may order a fugitive ... to be surrendered to the person or persons who are, in the Minister's opinion, duly authorized to receive the fugitive ... ").

10. Relevant Sections of the Canadian Charter of Rights and Freedoms [hereinafter Charter] provide:

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.
national pronouncement against the death penalty.11

This Note examines the validity of the Canadian Supreme Court's decision to confirm the unconditioned extradition of Joseph John Kindler and Charles Chitat Ng in light of Canada's constitutional precepts and national position against capital punishment. Part I begins with a general overview of the Canadian extradition procedure and the relevant statutory provisions. Part II then discusses the facts involved in the cases of Joseph Kindler and Charles Ng. Part III analyzes the constitutional considerations as set forth by the Court and argues that Section 25 of the Extradition Act,12 insofar as it authorizes the Minister to order the unconditioned extradition of the American fugitives, infringes upon both Section 12 and Section 7 of the Charter.13 It also argues that neither constitutional violation can be justified by the "reasonable limits prescribed by law" as set forth in Section 1 of the Charter. Finally, Part IV proposes a modification of the present extradition procedure in Canada as it is applied to such circumstances, and suggests that a new provision be added to the existing Extradition Act.

I. Background

A. Canadian Extradition

Extradition is the surrender, requested by one state, of a person within another state's jurisdiction who is accused or has been convicted of a crime committed within the requesting state's jurisdiction.14 In light of modern expansions in international transportation, what was once impracticable for the fugitive of the past evading capture is today a simple purchase of a train or plane ticket to a remote destination. Current technological advances have provided the fugitive with a viable means of escape from the crimes that he committed and from the jurisdiction that seeks to prosecute him. Consequently, countries throughout the world have jointly recognized the practical necessity of implementing an effec-

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.
11. Kindler, [1991] 2 S.C.R. at 810. In addition to Canada's House of Commons vote to abolish capital punishment in 1976, supra note 4, see also infra Section III.B.3 for a further discussion of Canada's national pronouncements against the death penalty.
12. Section 25 of the Extradition Act, supra note 9, provides:

25. Subject to this Part, the Minister of Justice, upon the requisition of the foreign state, may, under his hand and seal, order a fugitive who has been committed for surrender to be surrendered to the person or persons who are, in his opinion, duly authorized to receive him in the name and on behalf of the foreign state, and he shall be so surrendered accordingly.
13. See supra note 10 for the relevant Charter provisions.
14. See supra note 5.
tive extradition procedure. For the nation requesting the surrender of an escaped criminal, extradition provides an assurance that such persons will be returned to face proper judicial proceedings; and for the requested country, in addition to its interest in future reciprocity, extradition provides these countries with a means to avoid becoming a safe haven for dangerous malefactors. Thus, nations such as Canada and the United States, who share a common border and consequently are more readily susceptible to criminals both escaping and entering their respective countries, have in their mutual interests entered into extradition arrangements.\footnote{15}

In 1877, Canada passed the \textit{Extradition Act},\footnote{16} which authorizes the surrender of a fugitive\footnote{17} to any country with which Canada has an extradition treaty.\footnote{18} The statute does more than guide the extradition procedures within the country; it incorporates the nation's international extradition treaties into the domestic law of the land. According to Section 3 of the \textit{Extradition Act}:

3. In the case of any foreign state with which there is an extradition arrangement, this Part applies during the continuance of such arrangement; but no provision of this Part that is inconsistent with any of the terms of the arrangement has effect to contravene the arrangement; and this Part shall be so read and construed as to provide for the execution of the arrangement.\footnote{19}

Hence, the statute prescribes that the \textit{Extradition Act} be read and construed to provide for the successful implementation of the treaties, and that nothing in the \textit{Extradition Act} that is inconsistent with a treaty be determined to override any aspect of that treaty.\footnote{20}

In addition, according to Canadian Supreme Court Justice La Forest, "[i]n construing extradition treaties and statutes, it is a well established rule that courts should give them a fair and liberal interpretation with a view to fulfilling Canada's international obligations."\footnote{21} Consequently, the reviewing courts should assume that the extradition proceedings have been executed in all fairness, and that the extradition of a fugitive to a requesting jurisdiction will in the end best serve the inter-
ests of justice. Such a rule reflects Canada's recognition of the importance of extradition, and the need to ensure its successful implementation.

B. Extradition Procedure
According to Article 8 of the Extradition Treaty, "[t]he determination that extradition should or should not be granted shall be made in accordance with the law of the requested State . . . ." As this Note focuses on the implications surrounding extradition requests made by the United States to Canada, and not vice versa, this section shall discuss the extradition procedure as implemented by Canadian law.

1. Preliminary Proceedings
The apprehension of a foreign fugitive in Canada requires that a warrant be issued for his arrest. An extradition judge, pursuant to Section 10(1) of the Extradition Act, will ordinarily satisfy this procedural necessity and issue a warrant of arrest as if the alleged crime occurred in Canada. Canadian extradition judges obtain jurisdiction to issue such warrants either by the issuance of an arrest warrant in the requesting nation (a "foreign warrant") or by the presentation of an information or complaint before the issuing judge. If a foreign warrant provides the necessary jurisdiction, the original warrant must be presented, along with a showing that the warrant is still in legal force. On the other hand, should jurisdiction derive from the presentation of an information

22. As stated by the Canadian Encyclopedic Digest:
Where it appears that a crime has been committed and probable that the accused has fled to Canada for refuge, then a spirit of fairness, expecting that a foreign country will treat extradition proceedings in the same spirit, requires that the [extradition] court act reasonably and justly having reference more to the substance then to the form of the proceedings.

CANADIAN ENCYCLOPEDIC DIGEST (ONTARIO), Vol. 12, Title 61, § 5.

23. LA FOREST, supra note 5, at 21. Although a liberal construction of extradition treaties and statutes is encouraged in order to facilitate extradition proceedings, such open-ended interpretation is still limited by the concepts of justice and liberty. CANADIAN ENCYCLOPEDIC DIGEST (WESTERN), Vol. 14, Title 62, § 5. Thus, judges in the past have refused to surrender a foreign fugitive where the proceedings were instituted to serve the prosecutor's private interests, Loosberg v. Séguin, [1934] 2 D.L.R. 218 (1933) (Can.); or where evidentiary complications may have proved to be unduly prejudicial to the accused, United States v. Link and Green, 111 C.C.C. 225, [1955] 3 D.L.R. 386 (1954) (Can.).

24. Extradition Treaty, supra note 7, art. 8 (emphasis added).

25. LA FOREST, supra note 5, at 50.

26. According to Section 10(1) of the Extradition Act, "a judge may issue a warrant for the apprehension of a fugitive . . . after such proceedings as in his opinion, justify the issue of his warrant if the crime of which the fugitive is accused, or of which he is alleged to have been convicted, had been committed in Canada." Extradition Act, supra note 9, § 10(1).

27. Section 10(1) of the Extradition Act states that "a judge may issue his warrant for the apprehension of a fugitive on a foreign warrant of arrest, or an information or complaint laid before him . . . ." Id.

or complaint, the document must charge that the fugitive has committed one or more extradition crimes in the foreign country and set forth clearly the substance of the offense(s) alleged.  

Upon issuing the warrant for the fugitive's arrest in Canada, the extradition judge must immediately report such action to the Minister of Justice. The reason for this procedural technicality is simply to inform the Minister of every extradition proceeding arising in Canada, and thereby allow him to properly effectuate his duties under the *Extradition Act*.  

2. The Hearing

Pursuant to Section 13 of the *Extradition Act*, the fugitive must be brought before an extradition judge following his arrest and must be given an opportunity to be heard. The purpose of this hearing is not to establish the guilt or innocence of the fugitive, but rather, to establish whether sufficient evidence exists to warrant his surrender to the requesting state under the *Extradition Act*.  

The state must necessarily establish two things at the hearing stage of the extradition procedure before the fugitive can be committed for surrender. First, the evidence produced must present a *prima facie* case that the fugitive actually committed the act charged in the foreign country. Since the hearing need not establish criminal guilt, the degree of proof necessary is not to the extent of the typical "reasonable doubt" standard, but rather is only that a reasonably cautious man would believe that the fugitive committed the charged offense. Second, although the state may clearly establish a *prima facie* case as to the commission of the crime, it must also qualify the crime itself as an extraditable crime.

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29. La Forest, *supra* note 5, at 53. See Ex Parte Seitz (No. 1), [1899] 8 Que. Q.B. 345, 3 CAN. CRIM. CASES (C.C.C.) 54.

30. According to Section 10(2) of the *Extradition Act*, "[t]he judge shall forthwith send a report of the fact of the issue of the warrant, together with certified copies of the evidence and foreign warrant, information or complaint, to the Minister of Justice." *Extradition Act*, *supra* note 9, § 10(2).

31. La Forest, *supra* note 5, at 55.

32. According to Section 13 of the *Extradition Act*, "[t]he fugitive shall be brought before a judge, who shall, subject to this Part, hear the case, in the same manner, as nearly as may be, as if the fugitive was brought before a justice of the peace, charged with an indictable offence committed in Canada." *Extradition Act*, *supra* note 9, § 13.

33. La Forest, *supra* note 5, at 61.

34. Id. at 64.

35. The typical reasonable doubt standard requires that the prosecution demonstrate *beyond a reasonable doubt* that the defendant committed the alleged crime.


The degree of proof standard applied to extradition hearings is similar in nature to that of a preliminary criminal hearing for one accused of a crime committed in Canada. According to Section 18(1)(b) of the *Extradition Act*:

18. (1) The judge shall issue his warrant for the committal of the fugitive...
An extradition crime for these purposes is defined by a combination of several propositions. First, the alleged crime must have been committed within the jurisdiction of the requesting nation. Absent any specific arrangements within an extradition treaty, Canada will not surrender a fugitive to a country for crimes committed outside of that country's jurisdiction. Second, the crime must be specifically enumerated in an extradition treaty between the states involved. A fugitive may not be extradited for a crime that both parties to the treaty have not agreed upon and incorporated within their international arrangement.

(b) in the case of a fugitive accused of an extradition crime, if such evidence is produced as would, according to the law of Canada, subject to this Part, justify his committal for trial, if the crime had been committed in Canada. Extradition Act, supra note 9, § 18(1) (emphasis added).

According to Section 2(d) of the Extradition Act, the "jurisdiction" of the requesting nation "includes every colony, dependency and constituent part of the foreign state; and every vessel of a foreign state is deemed to be within the jurisdiction of and to be part of the state." Extradition Act, supra note 9, § 2(d).

Under the present treaty between Canada and the United States, made effective in 1976, there are thirty specifically enumerated extradition crimes which qualify for the proper application of the treaty. For example, to name a few of the more common crimes listed:

1. Murder; assault with intent to commit murder.
2. Manslaughter.
3. Wounding; maiming; or assault occasioning bodily harm.
4. . .
5. Rape; indecent assault.
8. Kidnapping; child stealing; abduction; false imprisonment.
9. Robbery; assault with intent to steal.
10. Burglary; housebreaking.
11. Larceny, theft or embezzlement.

Extradition Treaty, supra note 7 (Annexed Schedule).

Note that the offenses which are listed in the Extradition Treaty are expressed in a very general and comprehensive manner and should not be interpreted subject to subtle distinctions of the applicable law in either country. This principle is congruous with the liberal interpretation generally afforded extradition treaties, as discussed earlier. La Forest, supra note 5, at 41.

40. Notwithstanding the three characteristics of extradition crimes just discussed, there are specific crimes that, although they may qualify as extradition crimes in all.
Third and finally, in order for the alleged crime to be characterized as an "extradition crime," the alleged crime must not only be an offense in the requesting state, but must also be a crime in Canada as well. This requirement of "double criminality" is premised on two underlying justifications. The first is simply that Canadian extradition laws were intended to accommodate only those crimes that are commonly recognized by civilized nations. Those domestic crimes that may be unique to the requesting nation's jurisdiction are thereby excluded from the class of extraditable crimes. Thus, "double criminality" provides a form of "moral safeguard" for Canada by prohibiting extradition where there is the possibility of "arbitrary" criminality in the requesting nation. The second, more practical, justification for "double criminality" is derived from the prima facie case requirement mentioned earlier. Double criminality facilitates the satisfaction of this requirement simply because it is easier for a court to determine whether there is a prima facie case of an offense that is classified under its own familiar criminal law.

Once the extradition judge determines that a prima facie case exists as to the commission of the alleged offense and establishes that the alleged crime is an extradition crime in accordance with the three qualifications discussed above, the judge must "issue his warrant for the surrender of the fugitive to proceed. According to Article 4(1)(iii) of the Extradition Treaty:

(1) Extradition shall not be granted in any of the following circumstances:

(iii) When the offense in respect of which extradition is requested is of a political character, or the person whose extradition is requested proves that the extradition request has been made for the purpose of trying or punishing him for an offense of the above-mentioned character. If any question arises as to whether a case comes within the provisions of this subparagraph, the authorities of the Government on which the requisition is made shall decide.

Extradition Treaty, supra note 7, art. 4(1) (emphasis added).


The extradition arrangement between Canada and the United States further requires that extradition crimes be punishable by the laws of both countries by a term of imprisonment exceeding one year. Article 2(1) of the Extradition Treaty, provides:

(1) Persons shall be delivered up according to the provisions of this Treaty for any of the offenses listed in the Schedule annexed to this Treaty, which is an integral part of this Treaty, provided these offenses are punishable by the laws of both Contracting Parties by a term of imprisonment exceeding one year.

Extradition Treaty, supra note 7, art. 2(1) (emphasis added).

42. This moral justification of course assumes that what is adopted by the majority of civilized nations is the morally correct perspective, and likewise, that the "arbitrary" view adopted by the individual non-congruous nation is morally incorrect. In other words, "double criminality" can only serve as a true "moral safeguard" if extraditing a fugitive for a universally accepted crime is indeed morally correct, while the surrender of a fugitive for a crime unique to the requesting state is morally incorrect.

43. See supra text accompanying note 34. See also LA FOREST, supra note 5, at 64.

44. LA FOREST, supra note 5, at 124-125.

45. In summary, for an alleged crime to be characterized as an "extradition crime" the state must demonstrate that the crime: (1) occurred within the jurisdic-
committal of the fugitive to the nearest convenient prison, there to remain until surrendered to the foreign state, or discharged according to law . . . " Upon issuing the warrant for committal, the judge must inform the fugitive that he will not be surrendered until fifteen days after the hearing and that, during that period, he has a statutory right to apply for a writ of *habeas corpus*. In addition, the extradition judge must also deliver a certificate of the committal, along with all relevant evidence, to the Canadian Minister of Justice.

3. Post-Hearing Proceedings

The proceedings that immediately follow the hearing depend upon whether the extradition judge decides to commit the fugitive for surrender or discharge him altogether. Should the latter be the case, the prosecution may institute new proceedings against the fugitive and repeat the entire extradition process if it considers it advisable. This is possible because an extradition hearing is only a preliminary inquiry, and consequently not a final adjudication. On the other hand, if the extradition judge decides to commit the fugitive for surrender, the fugitive can have the decision subsequently reviewed by obtaining a writ of *habeas corpus*. The purpose of the writ is to examine the legality of his imprisonment in the hopes of procuring a discharge.

As mentioned earlier, Section 19(b) of the *Extradition Act* provides that "[w]here the judge commits a fugitive to prison, he shall, on such committal, transmit to the Minister of Justice a certificate of the committal, with a copy of all the evidence taken before him not already so transmitted, and such report upon the case as he thinks fit." This

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46. *Extradition Act*, supra note 9, § 18(1).
49. *La Forest*, supra note 5, at 79.
50. *See supra* text accompanying note 33.
51. *See supra* note 47.
52. *La Forest*, supra note 5, at 80-81. According to the *Canadian Encyclopedic Digest*:

The position of a judge sitting upon an application by way of habeas corpus after the accused has been committed for surrender seems to be restricted in that he does not sit in appeal from the extradition judge or commissioner, but is simply called upon to decide such matters as (a) whether the charge is or is not of a political character; (b) whether the offence charged is or is not an extradition crime; (c) whether the extradition judge or commissioner has jurisdiction to order the committal; (d) whether the evidence offers reasonable grounds of suspicion against the accused; (e) whether the extradition proceedings are strictly regular; (f) not to review the sufficiency of the evidence but rather (g) to see if a prima facie case has been made out.

*Canadian Encyclopedic Digest (Ontario)*, supra note 22, § 60.
notification is necessary because the ultimate decision to surrender a fugitive from Canada lies not within the bounds of judicial authority, but is a political decision exercised solely by the Minister of Justice.

Thus, once the extradition judge has committed the fugitive for surrender (and after the expiration of fifteen days, or if a writ of *habeas corpus* has been issued, until after the remanding court’s decision), the Minister of Justice is duly authorized to surrender the fugitive to the country requesting his extradition.

C. Extradition Treaty Allowances

The extradition authority conferred upon the Minister of Justice pursuant to Section 25 of the *Extradition Act* is a purely discretionary power. The statute does not state that the Minister of Justice must surrender the fugitive upon satisfaction of the procedural formalities discussed above; it only indicates that he may order the extradition. Such discretionary denial is, however, seldom utilized because a refusal to oblige a foreign nation’s request for extradition, absent any specific treaty allowances, might constitute a breach of Canada’s international obligations and jeopardize any hopes of future reciprocity.

There are, however, certain arrangements made between countries, as set forth in their extradition treaties, that allow a degree of discretion in specific instances, and consequently would permit a refusal to extradite without threatening to infringe upon international obligations.

54. Judges are confined to decisions of committing a fugitive to surrender. They have no authority to actually surrender the fugitive. See *Reg. v. Reno and Anderson*, [1868] 4 P.R. 281, 4 C.L.J. 315.

55. According to Section 25 of the *Extradition Act*:

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

*Extradition Act*, supra note 9, § 25 (emphasis added).

56. See id. § 23.

57. See id. § 25.

58. Id. ("[T]he Minister of Justice . . . may . . . order a fugitive who has been committed for surrender to be surrendered. . . .") (emphasis added).

59. In order for the Minister of Justice to properly authorize surrender under the *Extradition Act*: (1) the fugitive must have been previously committed for surrender; (2) the surrender must occur after fifteen days from the date of committal, or, if a writ of *habeas corpus* is issued, after the decision of the remanding court; and (3) there must be a formal request made by the requesting state to the Minister of Justice. See id. §§ 23, 25.

60. See id. § 25. According to Section 22 of the *Extradition Act*:

22. (1) The Minister of Justice may at any time refuse to make an order for surrender referred to in section 25 where he determines that

(a) the offence in respect of which proceedings are being taken under this Part is one of a political character;

(b) the proceedings are, in fact, being taken with a view to try or punish the fugitive for an offence of a political character; or

(c) the foreign state does not intend to make a requisition for surrender.

*Extradition Act*, id. § 22.
According to Article 6 of the Extradition Treaty between Canada and the United States:

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.\(^6\)

In light of Canada’s national pronouncement against the death penalty in 1976, and the United State’s position allowing capital punishment, this allowance provides the Minister of Justice “additional” discretion to refuse the surrender of a fugitive when the extradition crime is punishable by death and the United States does not provide reasonable assurances that the punishment will not be imposed or executed.\(^6\) Thus, under these circumstances, Canada is not bound by its extradition treaty to surrender fugitives to the United States, and the Minister of Justice may appropriately refuse to oblige a formal extradition request without infringing upon Canada’s international obligations or threatening future reciprocity.\(^6\)

II. The Kindler and Ng Cases

A. The Case of Joseph John Kindler

On November 15, 1983 a Pennsylvania jury found Joseph John Kindler guilty of first degree murder, conspiracy to commit murder, and kidnapping.\(^6\) At trial, evidence showed that Kindler brutally beat his victim in the head with a baseball bat, dragged him to a nearby river, and then proceeded to tie a cinder block around the victim’s neck and throw him into the water.\(^6\) After weighing both the aggravating and mitigating circumstances of the case, the jury unanimously recommended a sentence of death for the defendant.\(^6\)

Prior to the imposition of the sentence, Kindler managed to escape from Pennsylvania custody and successfully cross the border into Can-
Several months later, Canadian authorities arrested Kindler near St. Adéle, Quebec and placed him in their custody. On July 3, 1985 the United States requested that Canada surrender Kindler pursuant to the 1976 Extradition Treaty.

The Quebec Superior Court held a hearing, allowing the United States' application for Kindler's extradition, and committed the fugitive for surrender. On July 3, 1985 the United States requested that Canada surrender Kindler pursuant to the 1976 Extradition Treaty. Extradition Judge Pinard determined that the court lacked jurisdiction to request Article 6 assurances from the United States that the death penalty would not be imposed or executed because, in his opinion, such assurances were left to the discretion of the Minister of Justice. Kindler then filed an application for habeas corpus relief, seeking to review the Article 6 decision of the extradition judge; and on September 20, 1985, his application was dismissed.

On January 17, 1986, the then Minister of Justice of Canada, the Honourable John Crosbie, proceeded to order the extradition pursuant to § 25 of the Extradition Act. Invoking his discretion, Justice Minister Crosbie refrained from seeking U.S. assurances that the death penalty would not be imposed or executed under Article 6 of the Extradition Treaty. Subsequent to this decision, Kindler applied to the Federal Court Trial Division, and then to the Federal Court of Appeal, to review the Minister's decision to order the unconditioned extradition. After both applications were dismissed, Kindler made a final appeal to the Supreme Court of Canada.

B. The Case of Charles Chitat Ng

Charles Chitat Ng, a thirty-year-old Hong Kong native and former United States marine, faces twenty-five charges of murder and kidnapping for his alleged connection with a series of gruesome murders that occurred in 1984 and 1985 at an isolated cabin in Calaveras County, California. In light of the heinous nature of the crimes alleged, should the California jury find him guilty, Ng would almost surely receive the death penalty. Prior to trial, however, Charles Ng managed to escape from incarceration and successfully cross the border to Calgary, Canada.
where he sought refuge with his sister. On July 6, 1985, during an attempted robbery, Ng was arrested and apprehended by Canadian authorities after resisting and ultimately shooting a security guard. Subsequently, the United States requested the fugitive's surrender pursuant to the Extradition Treaty.

At the extradition hearing on November 29, 1988, Justice Trussler committed Ng on twelve counts of murder, two counts of conspiracy to commit murder, one count of attempted murder, three counts of kidnapping and one count of burglary. Ng then proceeded to file a habeas corpus application to review the court's findings. On February 2, 1989, the application was reviewed and dismissed. The dismissal was subsequently upheld by the Alberta Court of Appeal and leave to appeal to the Supreme Court of Canada was denied.

Ng then requested that the Minister of Justice, the Honourable Douglas Lewis, obtain assurances from the United States for either the non-imposition or non-execution of the death penalty, pursuant to Article 6 of the Extradition Treaty. On October 26, 1989, after reviewing Ng's representations, the Minister of Justice formally denied Ng's request and proceeded to order his unconditionally extradited. On appeal, the Supreme Court of Canada considered the implications of the Minister's decision for an unconditioned surrender in conjunction with the similar appeal of Joseph Kindler.

Counsel for the two fugitives argued that Section 25 of the Extradition Act, insofar as it permits the unconditioned extradition of a fugitive facing capital punishment in the requesting nation, is inconsistent with both Section 12 and Section 7 of the Canadian Charter. According to Kindler and Ng, the unconditioned extradition infringed upon their constitutional right "not to be subjected to any cruel and unusual treat-

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80. Re Ng, [1991] 2 S.C.R. 858, 863.
81. Id.
82. Id.
83. Re Ng, 93 A.R. 204 (1988). Under California law, the twelve counts of murder and two counts of conspiracy to commit murder would be sufficient, upon conviction, for the imposition of the death penalty. See CAL. PENAL CODE ANN. § 190.2 (West Supp. 1992).
84. Re Ng, [1991] 2 S.C.R. at 863.
85. Id.
89. Id. at 864.
90. Id. at 867.
91. Kindler, [1991] 2 S.C.R. at 831; Re Ng, [1991] 2 S.C.R. at 859. Section 12 and Section 7 of the Charter respectively provide:
12. Everyone has the right not to be subjected to any cruel and unusual treatment or punishment.
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.

Charter, supra note 10, §§ 12, 7.
ment or punishment,” and deprived them of their right to “life, liberty and security of the person,” in violation of Canadian principles of fundamental justice. Furthermore, they argued that neither infringement is justifiable under Section 1 of the Charter by the “reasonable limits” prescribed by Canadian law.92

The Canadian Supreme Court wholly rejected appellants’ arguments and, on September 26, 1991, confirmed the Minister’s order for the unconditioned extradition of both Joseph John Kindler and Charles Chitat Ng. In deciding, the Court ruled that the Minister’s authority to order the unconditioned extradition pursuant to Section 25 of the Extradition Act was neither inconsistent with Section 12 nor Section 7 of the Canadian Charter.93 Moreover, considering that no constitutional violation had occurred, there was no reason for the Court to consider the appellants’ Section 1 justification argument.94

III. Constitutional Analysis

A. Section 12 of the Canadian Charter of Rights and Freedoms

The Minister of Justice’s decision to extradite the American fugitives without seeking assurances that the death penalty will neither be imposed nor executed upon their return is a discretionary authority made available by the Canadian Extradition Act. More specifically, according to Section 25 of the Extradition Act:

25. Subject to this Part, the Minister of Justice, on the requisition of the foreign state, may, under his hand and seal, order a fugitive who has been committed for surrender to be surrendered to the person or persons who are, in the Minister’s opinion, duly authorized to receive the fugitive in the name and on behalf of the foreign state, and the fugitive shall be so surrendered accordingly.95

In determining that the Minister’s authority to order such an unconditioned surrender pursuant to the above statutory provision was not inconsistent with the Charter, the Canadian Supreme Court held that the ministerial authority does not infringe upon the constitutional “right not to be subjected to any cruel and unusual treatment or punishment.”96 As stated by the Court, “[t]he Minister’s actions do not constitute cruel and unusual punishment;”97 and furthermore, “the guarantee against cruel and unusual punishment found in s. 12 of the Charter does not apply to s. 25 of the Extradition Act or to ministerial acts done pursu-

92. Kindler, [1991] 2 S.C.R. at 842. Section 1 of the Charter provides that “[t]he 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.” Charter, supra note 10, § 1.
94. Id.
95. Extradition Act, supra note 9, § 25 (emphasis added).
ant to s. 25."

The Court reasoned that the execution itself, if it eventually 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;" and consequently, will not be a punishment imposed or executed by the Canadian Government. Canada's role in the extradition procedure, according to the Court, is merely to surrender the fugitive "to be extradited to face the consequences of the judicial process elsewhere." Thus, the Court reasoned that because Canada is not directly responsible for the ultimate outcome of the procedure, the Minister's decision to order an unconditioned extradition cannot be viewed as a deprivation of the fugitive's constitutional guarantee against "cruel and unusual punishment."

This Note argues, however, that Section 25 of the Extradition Act, insofar as it authorizes the Minister of Justice to order the unconditioned surrender of fugitives to face a penalty of death upon their return, is a clear violation of the Charter's "cruel and unusual treatment" provision. First, irrespective of any extradition considerations and notwithstanding that the United States will eventually impose the punishment, the death penalty violates Section 12 of the Charter if the execution of the American fugitives were to be carried out solely within Canadian jurisdiction. Second, considering that the death penalty is "cruel and unusual treatment" if imposed in Canada, it follows that the Minister of Justice's decision to extradite a death penalty fugitive without seeking assurances that the penalty will not be imposed or executed is likewise a violation of Section 12 of the Charter. That is, the extradition itself is "cruel and unusual treatment" in light of the eventual outcome of the surrender in the United States.

I. The Death Penalty Violates Section 12 of the Charter

a. The Principle of Human Dignity

The basic tenet underlying the Canadian constitutional guarantee against "cruel and unusual" treatment, as interpreted in the Supreme Court's pronouncements in several recent cases, is the notion of human dignity. According to the Supreme Court in Re B.C. Motor Vehicle Act, the Canadian principles of fundamental justice, as addressed by Sections

98. Id. at 846.
99. Id. at 780-81.
100. Id. at 846.
101. The Court in the present case fails to consider the constitutional implications of the death penalty in Canada. The issue before the Court, at least as the majority viewed it, was not whether capital punishment is unconstitutional in Canada, but whether the extradition of an individual to face the death penalty elsewhere is unconstitutional. According to Justice La Forest, "[t]here is strong ground for believing that... the death penalty cannot, except in exceptional circumstances, be justified in this country. But that, I repeat, is not the issue." Id. at 833 (emphasis added).
8 through 14 of the Charter,\textsuperscript{103} are basic concepts:

... 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.\textsuperscript{104}

Furthermore, Justice McIntyre, writing for the Court in Andrews v. Law Society of British Columbia,\textsuperscript{105} stated that "[t]he promotion of equality entails the promotion of a society in which all are secure in the knowledge that they are recognized at law as human beings equally deserving of concern, respect and consideration."\textsuperscript{106} In addition, the Supreme Court emphasized in R. v. Oakes,\textsuperscript{107} that:

\begin{quote}
[t]he underlying values and principles of a free and democratic society are the genesis of the rights and freedoms guaranteed by the Charter and the ultimate standard against which a limit on a right or freedom must be shown, despite its effect, to be reasonable and demonstrably justified.\textsuperscript{108}
\end{quote}

The death penalty is an exercise of the most extreme state limitation of individual freedom and deprivation of human dignity. Despite its possible deterrent or retributive justifications, capital punishment serves only in the end to completely destroy "the very essence of [an individual's] human dignity."\textsuperscript{109} Thus, viewing the death penalty as the most

\textsuperscript{103} Section 8 (right to be secure against unreasonable search and seizure); Section 9 (right not to be arbitrarily detained or imprisoned); Section 10 (rights implicated when arrested or detained); Section 11 (rights implicated when charged with an offense); Section 12 (right against cruel and unusual treatment); Section 13 (right of a testifying witness not to have any incriminating evidence that he provides be used against him in any other proceeding); and Section 14 (right of a party or witness to have the assistance of an interpreter if he is unable to understand or speak the language in which the proceedings are conducted). Charter, supra note 10, §§ 8-14.

\textsuperscript{104} Motor Vehicle Act, [1985] 2 S.C.R. at 512 (emphasis added).


\textsuperscript{106} Id. at 171.


\textsuperscript{108} Id. at 136.

\textsuperscript{109} Kindler, [1991] 2 S.C.R. at 817 (Cory, J., dissenting). Capital punishment can be advocated through use of the traditional justifications of punishment in general, namely, rehabilitation, deterrence, and retribution. Obviously, rehabilitation is neither a strong nor valid argument as executing a prisoner cannot be viewed as improving the individual's behavior. Those advocating the death penalty, however, have found great support for the deterrent and retributivist justifications. First, capital punishment may arguably serve to deter those people who are thinking of committing crimes of a similar nature. See, e.g., Peck, The Deterrent Effect of Capital Punishment: Ehrlich and His Critics, 85 Yale L.J. 359 (1976); and Ehrlich, The Deterrent Effect of Capital Punishment: A Question of Life and Death, 65 Am. Econ. Rev. 397 (June 1975). The argument is that if one is thinking about committing murder, perhaps that person will think twice knowing that his or her action may consequently result in a sentence of death. Second, capital punishment may be viewed simply as retribution for the crimes that these individuals have committed. According to Lord Justice Denning, Master of the Rolls of the Court of Appeal in England, "[t]he truth is that some crimes are so outrageous that society insists on adequate punishment, because the wrong doer deserves it, irrespective of whether it is a deterrent or not." Gregg v. Georgia, 428 U.S. 153, 184, n.30 (quoting Lord Justice Denning). Under this justifi-
severe restriction of an individual's rights or freedoms, and placing that limitation against a backdrop of the Court's "ultimate standard" of human dignity, such a punishment would evidently violate the Charter's guarantee against "cruel and unusual" treatment as interpreted by the Canadian Supreme Court.

b. The Smith Criteria

In addition to the basic tenet of human dignity discussed previously, the Supreme Court's 1987 decision in *R. v. Smith*\(^{110}\) also lays out helpful criteria in determining whether the death penalty would violate the Canadian constitutional guarantee against "cruel and unusual" treatment. The issue before the Court in *Smith* was whether the seven-year minimum sentence imposed by Section 5(2) of the *Narcotics Control Act*\(^{111}\) violated the Charter's provision against "cruel and unusual" treatment.\(^{112}\) In deciding that the minimum sentence of the Act violated Section 12 of the Charter, the Court held that although a mandatory minimum imprisonment term is not in and of itself cruel and unusual, the statute would result in disproportionate punishments for crimes because Section 5(1) "covers many substances of varying degrees of danger, totally disregards the quantity imported and treats as irrelevant the reason for importing and the existence of any previous convictions."\(^{113}\) Hence, the Court in its ruling suggested two criteria to consider when evaluating a possible infringement of Section 12 of the Charter, namely, (1) whether the form of punishment is grossly disproportionate to the crime at hand,\(^{114}\) and (2) whether the punishment is in and of itself unacceptable irrespective of the nature of the crime or the offender.

Although any form of punishment deprives the individual of a degree of human dignity, certain modes of punishment are generally recognized to demean the individual to an extent that far exceeds a
cation, those individuals on death row are being punished purely for the crimes that they have committed—"an eye for an eye."

A thorough discussion of these justifications is well beyond the scope of this Note. Nonetheless, even assuming that capital punishment may indeed serve these deterrent and retributivist functions, it is difficult to deny that the penalty does so at the expense of depriving the individual of all vestiges of human dignity.


111. Section 5 of the *Narcotics Control Act* reads:

5. (1) Except as authorized by this Act or the regulations, no person shall import into Canada or export from Canada any narcotic.

(2) Every person who violates subsection (1) is guilty of an indictable offence and is liable to imprisonment for life but *not less than seven years*.


113. *Id.* at 1046-47.

114. Justice Lamer, speaking for the Court in *Smith*, provided examples of when certain punishments would be disproportionate to the crime and would therefore violate Section 12 of the Charter. As noted, "[f]or example, twenty years for a first offence against property would be grossly disproportionate, but so would three months of imprisonment if the prison authorities decide it should be served in solitary confinement." *Id.* at 1073.
state’s punitive objectives. Accordingly, Justice Lamer noted in *Smith*
that:

... some punishments or treatments will always be grossly disproportionate
and will always outrage our standards of decency: for example, the infliction
of corporal punishment, such as the lash, irrespective of the number
of lashes imposed, or, to give examples of treatment, the lobotomisation
of certain dangerous offenders or the castration of sexual offenders. 115

Similarly, one can hardly argue that the termination of a human life is
any less grossly disproportionate, or any more appealing to our standards
of decency than lashing, lobotomisation, or castration. 116 In fact,
the death penalty is even more unique than the punishments that Justice
Lamer refers to as always grossly disproportionate in that it removes any
semblance of dignity from the punished individual. 117 It is the ultimate

115. *Id.* at 1073-74 (emphasis added).
116. One might attempt to argue here that capital punishment is actually less
grossly disproportionate and more appealing to our standards of decency than lashing,
lobotomization, or castration. The former provides a more "quick" and "dignified" manner of punishment, whereas the latter forms of punishment are generally
more "tortuous" and "demeaning," and would consequently outrage our standards
of human decency.

This viewpoint, however, is flawed in two very basic and significant ways. First, the
argument is premised on the perspective of an outside, unaffected observer, completely
ignoring the viewpoint of the individual being punished. The argument disregards the fact that the individual himself may not see his imminent death as more proportional, or more appealing to human decency, than the other forms of punishment. Instead, the argument assumes that the individual sitting in the electric chair, or waiting in the gas chamber, views the situation in the same manner as the politicians and other spectators sitting safely behind the glass partition. For these people, capital punishment is indeed more proportional than lashing, lobotomisation, or castration, and sits better with our ("their") standards of human decency.

Second, the argument is inherently flawed because of its assumption that capital
punishment provides a more "quick" and "dignified" manner of punishment than other more tortuous and reprehensible forms of punishment. While this may be the depiction offered in the movies, reality demonstrates that both electrocution and death by lethal gas can drag on interminably. See infra note 117. Furthermore, there is the notion of the "death row phenomenon," which is particularly troublesome in the United States and therefore applicable in the present case. Because it is not unusual for prisoners sentenced to death in the United States to spend many years on death row as they pursue various appeals in the judicial system, critics have claimed that this inhumanely adds to the psychological stress of the prisoner's ensuing death. *Cf. Kindler*, [1991] 2 S.C.R. at 838 (rejecting the validity of the death row phenomenon as a reason to avoid extradition). In short, reality dictates that capital punishment, at least as it is imposed in the United States, is not as "quick" and "dignified" as some would like to believe.

117. According to another author referring to death by electrocution, "Electrocution has been described by one medical doctor as a form of torture [that] rivals burning at the stake. Electrocutions have been known to drag on interminably, literally cooking the prisoners." *Robert Johnson, Condemned to Die: Life under Sentence of Death* 86 (1981) (quoting The Washington Research Project, *The Case Against Capital Punishment* 35 (1981)). George V. Bishop further depicts the unnerving nature of electrocution:

[The prisoner], convulsed by the electric charge, lurched against the straps,
and the chair, inadequately mounted, began a macabre rocking motion as
though the condemned man was straining backwards and forwards to free
himself. Because of the general fear that the charge would not kill, an extra
lashing, the most demeaning lobotomisation, and the most unnerving castration of human dignity that can be inflicted upon a human being. In short, capital punishment is a grossly disproportionate and inherently unacceptable mode of punishment, and consequently violates the Canadian Constitutional guarantee against “cruel and unusual” treatment.

c. The Sentiment of the Canadian Supreme Court

Interestingly, three members of the majority in the present case—Justice La Forest, Justice L’Heureux-Dubé, and Justice Gonthier—have voiced their opinion that the death penalty, if imposed by the Canadian Government rather than by the United States Government, might violate the Charter’s Section 12 constitutional guarantee against “cruel and unusual” treatment. According to these Justices, “[t]here is strong ground for believing that having regard to the limited extent to which the death penalty advances any valid penological objectives and the serious invasion of human dignity it engenders that the death penalty cannot, except in exceptional circumstances, be justified in this country.”118 Hence, the Supreme Court of Canada, the interpreters of the nation’s Constitution, would by a nearly unanimous decision agree that the death penalty if imposed in Canada violates Section 12 of the Charter.119

2. The Unconditioned Extradition Violates § 12 of the Charter

As stated earlier, the Kindler Court held that the Minister’s decision to order the unconditioned surrender of the American fugitives did not constitute cruel and unusual punishment because “[t]he execution...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,” and “[i]t does not result from any initiative taken by the Canadian Government.”120 Furthermore, Justice McLachlin of the majority states that, “[t]o apply s. 12 directly to the act of surrender to a foreign country

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118. Kindler, [1991] 2 S.C.R. at 833. The majority, however, makes clear that the issue in the present case is not whether the death penalty if executed in Canada violates the Charter, but whether the extradition of an American fugitive to face the death penalty in the United States violates the Charter. Id. While these justices have stipulated to the former in the affirmative, they have addressed the latter in the negative, holding that extradition of an American fugitive to face the death penalty in the United States does not violate the Charter.

119. Although the Supreme Court has ruled in the present case that the unconditioned extradition of a death penalty fugitive does not violate the Canadian Constitution, the fact that three of the four Justices in the majority have voiced their opinion that the death penalty if executed within Canada is unconstitutional predicates the future survival of the abolition of capital punishment in Canada. Adding Justice Lamer, Justice Sopinka, and Justice Cory to the dissent of the present case, six of the seven Supreme Court Justices would hold that the death penalty, if executed in Canada, violates the Charter, and would consequently support the continued abolition of the punishment in the 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.\textsuperscript{121}

Although the Canadian Supreme Court is reluctant to apply the Charter extraterritorially, the Court has expressed its opinion in the past that the Charter’s protection at least extends to those persons who are present within Canadian jurisdiction. In \textit{Singh et. al. v. M.E.I.},\textsuperscript{122} Justice Wilson, speaking for the Court, made clear that the term “everyone” in Section 7 of the Charter includes “every human being who is physically present in Canada and by virtue of such presence amenable to Canadian law.”\textsuperscript{123} Similarly then, the term “everyone” in Section 12 of the Charter\textsuperscript{124} should be interpreted accordingly, and the constitutional guarantee against “cruel and unusual” treatment should at least extend to all those physically present in Canada, including those individuals facing extradition to foreign countries.\textsuperscript{125}

Hence, because the Supreme Court would hold capital punishment executed within Canada as violative of Section 12 of the Charter, and also that all individuals present within Canadian jurisdiction are protected by the constitutional guarantee against “cruel and unusual” treatment, the only remaining justification for the unconditioned extradition of the fugitives to face the death penalty in the present case is that the extradition itself, as opposed to the actual imposition of the punishment by the Canadian government, is not “cruel and unusual” treatment. In other words, the Court may grant that the death penalty is “cruel and unusual” treatment, and that the fugitives here are indeed protected against such treatment, but deny that the extradition of the fugitives itself is “cruel and unusual” as defined under the Charter. According to Justice McLachlin, “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.”\textsuperscript{126}

The Supreme Court has essentially limited the constitutional protection offered by Section 12 of the Charter under this “remoteness”

\begin{itemize}
\item[121.] \textit{Id.} at 846.
\item[123.] \textit{Id.} at 202. According to Section 7 of the Charter, “[e]veryone 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.” \textit{Charter, supra} note 10, § 7 (emphasis added).
\item[124.] According to Section 12 of the Charter, “[e]veryone has the right not to be subjected to any cruel and unusual treatment or punishment.” \textit{Charter, supra} note 10, § 12 (emphasis added).
\item[125.] Nations often extend their constitutional protections to those individuals who are merely present within their jurisdictional boundaries. For example, the United States has extended its constitutional protections to illegal immigrants, i.e., individuals who are not American citizens and who have not been legally recognized by the American Government. \textit{See, e.g., Plyler v. Doe}, 457 U.S. 202, 210 (“Aliens, even aliens whose presence in this country is unlawful, have long been recognized as ‘persons’ guaranteed due process of law by the Fifth and Fourteenth Amendments.”).
\end{itemize}
interpretation. What is to prevent the Canadian government from now deciding to send any of its own prisoners to the United States to be executed? What is to prevent a Canadian law from declaring that any citizen who is caught shoplifting will be sent to another country to face otherwise unconstitutional punishments? For as long as a foreign nation is the body executing the punishment, the actions of the Canadian government, as seemingly viewed by the Kindler majority, may similarly be deemed "too remote from the possible imposition of the penalty complained of to attract the attention of s. 12." The Court, through its "remoteness" interpretation, makes it impossible to distinguish such cases from the case at hand, consequently narrowing the applicability of Section 12's constitutional guarantee against "cruel and unusual" treatment.

In addition, under the Court's remoteness interpretation, a controversial degree factor is unnecessarily added into the Section 12 analysis. That is, the Court leaves open the question of when the effect of a Canadian law or government act is not "too remote from the possible imposition of the penalty complained of to attract the attention of s. 12." If the situation in the present case had involved the Minister of Justice physically handing over the fugitives to the individuals who would then immediately execute them, would the Court then decide that the Minister's actions violated Section 12 of the Charter? In other words, would the degree of physical proximity or degree of exigency determine the required remoteness necessary to trigger Section 12's constitutional protection?

The Supreme Court's remoteness interpretation is a poor attempt to constitutionally justify the unconditioned extradition of the American fugitives. If the death penalty violates Section 12 of the Charter when executed in Canada, and if foreign fugitives are afforded the Charter's Section 12 protection, then it follows that the extradition of individuals within Canadian jurisdiction to face the death penalty in another juris-

127. Id.
128. Some may argue that the examples I have provided are indeed distinguishable scenarios, since in the present case the ultimate execution will be "[1] under American law [2] against an American citizen [3] in respect of an offence that took place in the United States . . . " Id. at 780-81. Note, however, that if the Canadian Supreme Court holds that the death penalty, if imposed in Canada, is "cruel and unusual" treatment, and that all individuals present in Canada are afforded the constitutional protection against "cruel and unusual" treatment, the distinction becomes less persuasive. For if the Canadian government were hypothetically the body imposing the death penalty (as opposed to the United States), even if the execution was [1] under American law [2] against an American citizen [3] in respect to an offense that occurred in the United States, the Canadian Supreme Court would still deem such action as "cruel and unusual" treatment under Section 12. These other circumstantial factors could not reasonably make such execution any less "cruel and unusual." Hence, the critical issue which the Court has emphasized under its "remoteness" interpretation, and which I wish to suggest through my chosen examples, is not the amount of circumstantial remote factors, but solely that the Canadian government's role in extradition is too remote from the actual imposition of the punishment.
diction also violates Section 12 of the Charter. According to Justice La Forest in Canada v. Schmidt:130

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.131

The Canadian government cannot purge itself of the outcome of its actions simply because the imposition of the death penalty is "too remote" from its own actions. Why would the United States' imposition and execution of the death penalty on the fugitives be any less "cruel and unusual" than the Canadian imposition and execution of the death penalty on the fugitives in Canada, if Canada alone is responsible for their surrender? Canada is the extraditing body, and as such, is directly responsible for the ultimate deaths of the two fugitives, irrespective of who actually "pulls the trigger."132

B. Section 7 of the Canadian Charter of Rights and Freedoms

The unconditioned extradition of Joseph Kindler and Charles Ng to face the death penalty pursuant to Section 25 of the Extradition Act not only violates Section 12 of the Charter, but violates Section 7 of the Charter as well. Section 7 of the Charter provides that “[e]veryone 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.”133 As discussed earlier, the Supreme Court in Singh made clear that Section 7's protection would extend to the fugitives in the present case when it interpreted the term “everyone” to include “every human being who is physically present in Canada and by virtue of such presence amenable to Canadian law.”134 In addition, according to Justice Wilson, speaking for the Singh Court, “‘security of the person’ must encompass freedom from the threat of physical punishment or suffering as well as freedom from such punishment itself.”135 Consequently, it is no surprise that the Supreme Court in the present case acknowledges that the

131. Id. at 522.
132. This is especially true where, as in the present case, the Canadian government is aware of the requesting state's system of punishment and the likelihood that the death penalty will be imposed and executed. On the other hand, I would agree that if the Canadian Government was truly unaware of the eventual outcome of the fugitives' extradition, or if the chance of the death penalty being imposed was unlikely, that such action would not constitute a Section 12 violation. In other words, the amount of certainty in the eventual outcome of the extradition is a determinative factor in whether Canada's extradition of an individual to face capital punishment is functionally equivalent to the actual imposition of the death penalty by Canada, and therefore unconstitutional. See infra Section IV for a further discussion of this "certainty" standard of interpretation.
135. Id. at 207.
fugitives' Section 7 guarantee of "life, liberty, and security of person" "is very seriously affected because [they] may face the death penalty following [their] return."  

Hence, the Court concedes that Section 7 indeed applies to the American fugitives, and moreover, that their unconditioned surrender deprives them of their constitutional right to "life, liberty, and security of person."

The controversy surrounding the Court's Section 7 analysis of the Minister's decision to order the unconditioned surrender, however, focuses not on the deprivation of the fugitives rights, but on whether that deprivation has occurred "in accordance with the principles of fundamental justice." According to the Court, Section 7's principles of fundamental justice have been violated if the "surrender would place the fugitive in a position that is so unacceptable as to 'shock the conscience.'"  

Hence, the Court, in determining that the unconditioned surrender does not violate Section 7, reasoned:

Bearing in mind the nature of the offence and the penalty, the justice system of the requesting state including the safeguards and guarantees it affords the fugitive, the considerations of comity and of security, and according due latitude to the Minister to balance the competing interests involved in particular extradition cases, the extradition of a fugitive to a state where he may face capital punishment, if convicted, is not a situation which is shocking and fundamentally unacceptable in our society.

The deprivation of the fugitives' constitutional guarantee to "life, liberty, and security of person" as a result of their unconditioned surrender, however, is not "in accordance with the principles of fundamental justice" as described in Section 7 of the Charter. Contrary to the "shock the conscience" standard applied by the Supreme Court, the more appropriate mode of analyzing whether an individual has been deprived of "life, liberty, and security of person," within the confines of the principles of justice, is to determine whether the deprivation is one that is "simply unacceptable." According to Justice La Forest in United States v. Allard, "[t]o arrive at the conclusion that the surrender of the respondents would violate the principles of fundamental justice, it would be necessary to establish that the respondents would face a situation that is simply unacceptable." Rather than limit the scope of Canadian principles of fundamental justice to those values adhered to by the majority opinion, as is suggested by the Court's "shock the conscience" standard, a proper analysis of Canadian fundamental justice should consider a broad array of factors that help to determine whether a given situation is simply unacceptable. As Justice Lamer noted in Re B.C.

137. Id. at 831-32 (citing Schmidt, [1987] 1 S.C.R. 500, 522).
138. Id. at 783.
140. Id. at 572 (emphasis added).
141. The Court's "shock the conscience" standard in the present case is quite distinct from the "simply unacceptable" standard referred to in the Allard case. Rather than define infringements of Canadian principles of justice as those that subjectively
Motor Vehicle Act: 142

[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. 143

Hence, one may better define Canadian principles of fundamental justice by analyzing a totality of factors, rather than focusing on the subjective attitudes of the majority Canadian opinion.

1. Nature of the Punishment

To determine whether the unconditioned surrender of the American fugitives is "simply unacceptable" and thereby violates Canadian notions of fundamental justice, one must first consider the nature of the punishment imposed by the requesting country. The Supreme Court in Schmidt recognized that certain procedures instituted against the extradited fugitive by the requesting country may still prove to be a violation of Canadian principles of fundamental justice notwithstanding that the actions may be justifiable under the laws of that country. 144 According to Justice La Forest in Schmidt:

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. 145

Thus the emphasis here in defining what is "simply unacceptable" focuses not on the legality of the punishment procedure in the foreign nation, as the Court in the present case has suggested, but rather upon the per se nature of the action itself, the inherent "unacceptability" of the foreign procedure. 146

"shock the conscience" of the Canadian people, the latter standard looks to the objective unfairness of those situations that are inherently ("simply") unacceptable. The "simply unacceptable" standard thus better defines Canadian principles of fundamental justice by avoiding the unwanted results of an ever-changing subjective standard. For example, under a purely subjective standard, notions of torture, slavery, abortion, etc., may be viewed as justified deprivations of an individual's right to "life, liberty, and security of person" so long as these procedures are supported by popular Canadian opinion, and consequently do not "shock" the prevailing Canadian conscience.

143. Id. at 512.
145. Id. (emphasis added).
146. The Kindler Court, in defining what "shocks the conscience" of the Canadian people, states that "the reviewing court must consider the offense for which the penalty may be prescribed, as well as the nature of the justice system in the requesting
The death penalty, by its very nature, violates Canadian principles of fundamental justice irrespective of the crime for which it is imposed and regardless of its legal acceptability in the United States. In *R. v. Smith*, Justice Lamer stated that:

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

The death penalty, like those punishments which Justice Lamer refers to, is even more unique in that it strips away all dignity from the individual being punished. It is the ultimate and most demeaning deprivation of human dignity that society can inflict upon a human being. At the very least, according to the language used by Justice La Forest in *Schmidt*, the death penalty is a form of punishment that falls within the realm of punishments that includes torture, and should thereby make the extradition of the fugitives here a *per se* breach of fundamental justice. Hence, the demeaning and devaluing nature of the death penalty itself deems the unconditioned extradition of the fugitives here as "simply unacceptable," and consequently characterizes the punishment as inconsistent with Canadian principles of fundamental justice.

2. Values of Juries Throughout Common Law History

This view of the death penalty as *a per se* unacceptable procedure is reinforced by the reluctance of juries over the years to impose the penalty. Dating as far back as the fourteenth century, at a time when capital punishment was the penalty for all felonies, English juries were averse to convict those individuals brought before them for felonies. Rather, the jurors find it necessary, for example, to underestimate the value of stolen goods in order to convert the charged offense from felony to trespass jurisdiction and the safeguards and guarantees it affords the fugitive." *Kindler*, [1991] 2 S.C.R. at 849-50. There is no mention or consideration for the nature of the punishment itself. Rather, the Court finds it more imperative to emphasize the crime for which the punishment is being imposed, and the quality of judicial fairness afforded the fugitive. Under this insufficient interpretation of Canadian principles of justice, torture, castration, and lobotomization might then be allowed merely because a reviewing court determines that the punishment suited the offense, or that the violator is guaranteed a fair trial. The inherent unacceptability and nature of the punishment itself would be irrelevant in the consideration.

148. *Id.* at 1073-74.
149. *See supra* Section III.A.1.a.
150. Recall that according to Justice La Forest in *Schmidt*, "[s]ituations falling far short of [torture] 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 . . . ." *Schmidt*, [1987] 1 S.C.R. at 522.
pass, a crime not punishable by death.\textsuperscript{152} Consequently, convictions for felonies during that period were remarkably low—approximately 18 percent—and as such, the imposition of the death penalty was also accordingly minimal.\textsuperscript{153} This general disinclination to impose the death penalty in England continued into the seventeenth century,\textsuperscript{154} and even extended throughout the eighteenth century, during a period of history where the number of crimes punishable by death increased dramatically.\textsuperscript{155} Juries were simply unwilling to convict, or if they did convict, were unwilling to impose the death penalty.

In the twentieth century, Canadian disregard for the death penalty as a useful method of punishment is evidenced by the 1976 majority vote of the House of Commons to abolish capital punishment for all offenses under the \textit{Criminal Code}.\textsuperscript{156} This attitude toward the penalty, as voiced by the elected members of Parliament, was reiterated and reinforced as recently as 1987, when the reinstitution of the death penalty was again firmly rejected.\textsuperscript{157} Hence, the compassion and values of the Canadian people, as reflected by their continued reluctance to impose the death penalty in the past, and their recent decision to abolish the penalty altogether, suggests that the death penalty is “simply unacceptable” according to Canadian principles of fundamental justice.

3. \textbf{Canada's International Commitment Against Capital Punishment}

Canadian regard for human dignity and opposition to the death penalty is also reflected by the nation’s position on the international level. Within the past half-century, Canada has acceded to the United Nations Charter in 1945;\textsuperscript{158} has voted in favor of the \textit{Universal Declaration of Human Rights} in 1948;\textsuperscript{159} has acceded to the \textit{International Covenant on Civil

\textsuperscript{152} \textit{Id.}


\textsuperscript{154} During this time, juries increasingly found ways to avoid the imposition of the death penalty. Charges of burglary were reduced to larceny; charges of grand larceny to petty larceny; and charges of murder to manslaughter. J.S. Cockburn, \textit{Twelve Silly Men? The Trial Jury at Assizes, 1560-1670, in} \textit{Twelve Good Men, supra note 153}, at 158, 171-72.


\textsuperscript{156} \textit{Kindler, [1991] 2 S.C.R. at 792.}

\textsuperscript{157} \textit{Id.}

\textsuperscript{158} The preamble of the \textit{United Nations Charter} provides in part: 

\textit{WE THE PEOPLE OF THE UNITED NATIONS DETERMINED to save succeeding generations from the scourge of war, which twice in our lifetime has brought untold sorrow to mankind, and to reaffirm faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women and of nations large and small...}

\textit{U.N. Charter, preamble.}

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and Political Rights and the Optional Protocol to the International Covenant on Civil and Political Rights in 1976; has acceded to the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment in 1987; and has recently voted in favor of the Second Optional Protocol to the International Covenant on Civil and Political Rights ("Second Optional Protocol") in 1989. In support of its most recent international commitments

Article 1. All human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act toward one another in a spirit of brotherhood.

Article 3. Everyone has the right to life, liberty and the security of person.

Article 5. No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.


163. The Second Optional Protocol to the International Covenant on Civil and Political Rights, December 15, 1989, preamble, arts. 1, 2, provides in part:

THE STATE PARTIES TO THE PRESENT PROTOCOL, BELEIVING that abolition of the death penalty contributes to enhancement of human dignity and progressive development of human rights,

RECALLING article 9 of the Universal Declaration of Human Rights adopted on 10 December 1948 and article 6 of the International Covenant on Civil and Political Rights adopted on 16 December 1966,

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

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

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

HAVE AGREED as follows:

ARTICLE 1

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

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

ARTICLE 2
mitment, the Second Optional Protocol, Canada has suggested that by adhering to the abolition of the death penalty within an international instrument, the United Nations would effectually be honoring the value of human dignity.164 In short, Canada's participation and support for international recognition of human dignity and abolition of the death penalty reflects the nation's conscious stance against capital punishment in the eyes of nations throughout the world.

Thus, in light of Canadian values of human dignity and the nation's general abhorrence of the death penalty (as evidenced by Canadian juries throughout the nation's history, the 1976 and 1987 House of Commons votes to abolish the death penalty, and recent international commitments by the Canadian government), the inherent nature of the death penalty, and any procedure that implements its use, must be viewed as "simply unacceptable." Consequently, the deprivation of the fugitives' right to "life, liberty, and security of person" in the Kindler case, via their extradition to the United States to possibly face the death penalty, cannot reasonably comply with Canadian principles of fundamental justice, and therefore violates Section 7 of the Charter.165

C. Neither Constitutional Infringement Is Justified under Section 1 of the Canadian Charter of Rights and Freedoms

Section 1 of the Charter introduces its constitutional guarantees against a background of justifiable limitations on those rights. The provision provides that "[t]he 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." Accordingly, the constitutional guarantee "not to be subjected to cruel and unusual treatment," pursuant to Section 12 of the Charter, along with the guarantee to "life, liberty and security of person" of Section 7, are both guarantees subject to the "reasonable limits" of Section 1. Consequently, although this Note has suggested that the unconditioned surrender of the American fugitives to face the death

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


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

165. See supra note 10 for text of Section 7 of the Charter.

penalty in the United States is a violation of both Section 12 and Section 7 of the Charter, the question remains whether these constitutional infringements are justified by the “reasonable limits” of a “free and democratic society.” This Note shall argue that the Minister’s action in the present case, pursuant to his authority under Section 25 of the Extradition Act, is neither a reasonable nor justified limitation on those constitutionally guaranteed rights embodied in Sections 12 and 7 of the Charter.167

The Canadian Supreme Court, in *R. v. Oakes*,168 provided the two criteria necessary to establish a reasonable and demonstrably justified limitation pursuant to Section 1 of the Charter. First, the government objective for which the limitation has been imposed—in this case the objective of the unconditioned extradition—must be “of sufficient importance to warrant overriding a constitutionally protected right or freedom.”169 Second, upon recognizing a “sufficiently important” government objective, the state has the burden of showing that the means chosen to achieve this objective are reasonable and demonstrably justified.170 As to this latter criteria, the *Oakes* Court stipulated that three essential components be satisfied in order for the chosen means to be deemed “reasonable and demonstrably justified”—(1) the measures adopted “must be rationally connected to the objective;” (2) the measures “should impair ‘as little as possible’ the right or freedom in question,” even if it is rationally connected to the objective; and (3) the effects of the measures adopted must be proportional to the “sufficiently important” government objective.171

According to the then Minister of Justice, John Crosbie, the government objectives for ordering the unconditioned extradition of the American fugitives in the present case were: (1) to prevent murderers of foreign countries, particularly those of a nation which shares a vast and

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167. Because the Court in the present case held that the Minister’s decision, pursuant to Section 25 of the Extradition Act, did not infringe either Section 12 or Section 7 of the Charter, the majority found it unnecessary to consider possible Section 1 justifications. *Kindler*, [1991] 2 S.C.R. at 839.
170. *Id.* at 139.

Interestingly, the Canadian Constitutional Section 1 analysis is quite similar to the constitutional “strict scrutiny” test implemented by the United States Supreme Court when dealing with problems involving equal protection. According to another author:

From time to time the [American] justices have used slightly different phrases to describe this “upper tier-test,” but essentially it means that the burden of proof shifts from the challenger to the government to show that: (1) a “compelling” governmental interest is at stake; (2) the connection (or fit) between the challenged governmental action and that compelling governmental interest is very close (on occasion the Court has said the connection must be “necessary”); and (3) [the] government could not secure that compelling interest by a different classification or by a lesser infringement on a fundamental right—by “less drastic means,” was the way Shelton v. Tucker (1960) put it. *Walter M. Murphy et al., American Constitutional Interpretation* 750 (1986).
common border with Canada, from seeking a "safe haven" in Canada as a way of escaping the severity of the punishment that might be imposed by the state in which the crime was committed; and (2) to maintain international obligations arising out of the Extradition Treaty in a manner that allows both countries to "work together to support law enforcement in the two nations."

This Note shall concede that the government's stated objectives of the unconditioned surrender may be "of sufficient importance to warrant overriding a constitutionally protected right or freedom." National governments might reasonably be concerned with the possible influx of dangerous criminals that may pose a threat to its population. In addition, the maintenance of international comity through adherence to international treaties is a vital and widely accepted national concern, and can serve to ensure that other nations offer similar consideration in the future. Hence, both government objectives in the present case probably satisfy the first criteria necessary to establish a reasonable and demonstrably justified limitation pursuant to Section 1 of the Charter.

Nonetheless, despite the recognition of "sufficiently important" government objectives in the present case, the state still has the burden of showing that the means chosen to achieve these governmental objectives are reasonable and demonstrably justified. This Note shall argue that the unconditioned extradition of the American fugitives to face the death penalty in the United States fails to satisfy the latter criteria necessary for a sufficient Section 1 justification. First, the unconditioned extradition is not rationally connected to the government's "safe haven" objective mentioned earlier. Second, in light of the treaty provision for conditional extradition made available to the Minister of Justice pursuant to Article 6 of the Extradition Treaty, the unconditioned extradition did not impair the fugitives' rights and freedoms "as little as possible." Finally, the effects of the unconditioned extradition,

172. This argument is actually posed in the alternative, i.e., the government holds that if Canada does not order an unconditioned surrender here, but rather, orders extradition contingent upon the requesting country assuring that the death penalty will neither be imposed nor executed, fugitive murderers will consequently seek "safe haven" in Canada.
175. See supra text accompanying note 15 discussing extradition as a means of assuring the surrendering country that the requesting nation will reciprocate its obligations and return any requested fugitives should their positions be switched in the future.
176. Recall that according to the Oakes Court, in order for the chosen means to be deemed "reasonable and demonstrably justified"—(1) the measures adopted "must be rationally connected to the objective;" (2) the measures "should impair 'as little as possible' the right or freedom in question," even if it is rationally connected to the objective; and (3) the effects of the measures adopted must be proportional to the "sufficiently important" government objective. Oakes, [1986] 1 S.C.R. 139 (emphasis added) (quoting Big M Drug, [1985] 1 S.C.R. at 352).
177. See supra text accompanying note 172.
178. Extradition Treaty, supra note 7, art. 6.
namely, the imposition and execution of the death penalty in the United States, are not proportional to either the government's "safe haven" or "international obligations" objectives.\textsuperscript{179}

1. No Rational Connection (The "Safe Haven" Argument)

The unconditioned extradition of the American fugitives is not rationally connected to the government's "safe haven" objective. First, it is unlikely that fugitive murderers will be more reluctant to seek "safe haven" in Canada as a result of the Minister's decision to order an unconditioned extradition. The Court in the present case does not suggest that extradition of fugitive murderers should always be carried out without first obtaining Article 6 assurances that the death penalty will neither be imposed nor executed. Rather, the Court argues that such extraditions should be determined on a case-by-case basis.\textsuperscript{180} Thus, there is no reason to believe that a single instance of unconditioned extradition would effectuate the deterrence which the government speaks of. For as long as it is recognized that Canada will on some occasions seek Article 6 assurances, an incentive for fugitive murderers to seek "safe haven" in Canada will continue to exist.

Furthermore, there is little evidentiary proof that extradition contingent upon assurances would actually result in a drastic influx of fugitive murderers. Article 6 of the Extradition Treaty, which allows extradition to be refused unless an assurance is provided that the death penalty will neither be imposed nor executed, has been in effect since 1976, yet only two known cases of American murderers fleeing into Canada have been recognized, namely, the present cases of Joseph Kindler and Charles Ng.\textsuperscript{181}

Second, if the government contends that conditional surrenders lead to the influx of fugitive murderers, and that unconditional surrenders deter this "safe haven" result, then it must consequently presume that these fugitive murderers intending to flee are not only aware of the extradition practices of Canadian law, but are basing their decision to choose Canada as an appropriate destination upon this knowledge. In other words, the strength of the "safe haven" argument lies on the assumption that the fugitive escaping maximum imprisonment in a foreign nation is aware of the various capital punishment practices of neighboring countries. Contrary to this assumption, however, the average murderer up for the death penalty in this country is unlikely to be

\begin{itemize}
  \item \textsuperscript{179} See supra text accompanying note 173.
  \item \textsuperscript{180} According to Justice La Forest, speaking for the Court in the case at hand, "I find that it is reasonable to believe that extradition in this case does not go beyond what is necessary to serve the legitimate social purpose of preventing Canada from becoming an attractive haven for fugitives." \textit{Kindler, [1991]} 2 S.C.R. at 839 (emphasis added).
  \item \textsuperscript{181} \textit{Id.} at 825. In addition, in Europe, where the authority to refuse surrender contingent upon assurances that the death penalty will neither be imposed nor executed is frequently implemented, there is also no evidence of a flood of murderers escaping from one state to another. \textit{Id.}
\end{itemize}
terribly familiar with American legal formalities, let alone the legal ramifications surrounding extradition in other nations. In addition, to assume that a fugitive chooses a destination based on the favorable extradition practices of a foreign country would necessarily assign a self-defeating attitude to the fleeing fugitive. Logic dictates that a fugitive evading capture would choose a destination based upon the ease with which he might enter a country and avoid detection, rather than choose a country which he has predetermined will detect and capture him, and subsequently might provide him with protection under its extradition laws.

Third, and finally, even assuming the possibility that fugitive murderers might actually intend to seek "safe haven" in Canada to avoid a more severe punishment, the ingenious fugitive must still overcome several practical barriers before Canada can actually become that desired "safe haven." We would demonstrate little faith in both United States and Canadian authority if we were to presume that every American criminal facing the possibility of capital punishment could escape maximum security in the United States, and then successfully manage to slip by through Canadian borders. That is to say, the possibility of Canada actually becoming a "safe haven" is far from likely, and thus there is little reason to believe that the unconditioned extradition of the fugitives will strengthen this inherent improbability.

In short, the government fails to overcome its burden of demonstrating that unconditional extraditions are a reasonable and demonstrably justified means in preventing Canada from becoming a "safe haven"

182. Note the implications of assuming, as the government does here, that the fugitive murderer is aware of the extradition practices in Canada. According to Section 24 of the Extradition Act:

24. A fugitive who has been accused of an offence within Canadian jurisdiction, not being the offence for which his surrender is asked, or who is undergoing sentence under a conviction in Canada, shall not be surrendered until after he has been discharged, whether by acquittal or by expiration of his sentence, or otherwise.

Extradition Act, supra note 9, § 24.

Hence, if we are to assume that an American fugitive would be aware of Canada's decision to order conditional extradition (and would consequently flee to Canada as a "safe haven"), then it is likewise reasonable to assume that an American fugitive would also be aware of the preceding extradition provision which forbids a fugitive accused of a crime within Canadian jurisdiction to be surrendered until the expiration of his Canadian sentence. Considering this then, there would be little strength left in the government's "safe haven" argument. Unconditioned extradition, as the Court in the present case has advocated, would no longer deter a fugitive from fleeing into Canada as a "safe haven" since the above provision allows them to avoid the severity of punishment waiting them in the United States by committing a crime in Canada of equal proportion (if not more) than the crime for which they have been demanded. In other words, the fleeing fugitive, to avoid the death penalty in the United States, merely has to commit some heinous crime which would result in life imprisonment in Canada. The "knowledgeable" fugitive, weighing his options, would much rather face maximum imprisonment in Canada than return to face capital punishment in the United States. Thus Section 24 of the Extradition Act gives fugitives an incentive to seek a "safe haven" in Canada regardless of whether Canada supports conditioned or unconditioned extradition.
for fugitive murderers. First, there is little chance that fugitive murderers will actually seek "safe haven" in Canada due to the unconditioned extradition of the American fugitives. Second, the government's fear that Canada will become a "safe haven" mistakenly attributes a conscious choice, as well as a self-defeating attitude, to the fleeing fugitive murderer. Lastly, considering the difficulty in actually escaping a maximum security prison and successfully entering into Canada, the possibility of Canada becoming the "safe haven" that the government here wishes to prevent is highly improbable. In summary, and in the words of the Court in *Oakes*, the state fails to show that the measure adopted, the unconditioned extradition of the American fugitives, is "rationally connected to the [government] objective."1

2. Less Restrictive Alternatives (Treaty Obligations)

While one may consider the maintenance of international obligations arising out of the *Extradition Treaty* to be a "sufficiently important" government objective, the means adopted to achieve this objective, namely, the unconditioned extradition of the American fugitives in the present case, is not reasonable or demonstrably justified pursuant to Section 1 of the *Charter*. According to the Court in *Oakes*, in order for the chosen means to be found "reasonable and demonstrably justified," the adopted measure "should impair 'as little as possible' the right or freedom in question."184 Given that the fugitives here have been deprived of their rights and freedoms by way of their unconditioned extradition, the question that remains is whether such extradition impaired their rights and freedoms "as little as possible." Is there a less restrictive alternative to achieve the stated government objective?

As mentioned earlier, Article 6 of the *Extradition Treaty* between Canada and the United States allows for the refusal of extradition in a capital punishment situation "unless the requesting State provides such assurances as the requested States considers sufficient that the death penalty shall not be imposed, or, if imposed, shall not be executed."185 The provision reflects a conscious decision by both participating nations to recognize and incorporate into the international agreement a specific method of handling situations where the requesting nation may impose the death penalty on an extradited individual and the requested nation does not favor capital punishment. Consequently, if the government objective is to maintain obligations to its international treaties, and conditional extraditions are an integral part of Canada's *Extradition Treaty* with the United States, then the Minister's decision to extradite without these Article 6 assurances was totally unnecessary to achieve its stated governmental aims. In short, the unconditioned extradition did not impair the fugitives' rights and freedoms "as little as possible," and therefore was not a reasonable and demonstrably justified means in

184. Id. at 139 (quoting *Big M Drug*, [1985] 1 S.C.R. at 352).
185. Extradition Treaty, supra note 7, art. 6.
maintaining Canada's international obligations arising out of the *Extradition Treaty*.

3. Proportional Effects

Even if the unconditioned extradition of the American fugitives was indeed "rationally connected to the [government] objective," and impaired "as little as possible" the fugitives' rights and freedoms, the government still has the burden of showing, according to the Court in *Oakes*, that the effects of the unconditioned extradition are proportional to the "sufficiently important" government objective.\(^{186}\) As the Chief Justice emphasized in that case:

> Even if an objective is of sufficient importance, and the first two elements of the proportionality test are satisfied, it is still possible that, because of the severity of the deleterious effects of a measure on individuals or groups, the measure will not be justified by the purposes it is intended to serve. The more severe the deleterious effects of a measure, the more important the objective must be if the measure is to be reasonable and demonstrably justified in a free and democratic society.\(^{187}\)

The effects of the unconditioned extradition in the present case are quite extreme. As Justice Lamer noted in *Smith*, "[t]he effect of the sentence is often a composite of many factors and is not limited to the quantum or duration of the sentence but includes its nature and the conditions under which it is applied."\(^{188}\) Capital punishment is the most extreme case of cruel and inhuman treatment, and deprives the fugitives of their right to "life, liberty and security of person." Moreover, the delayed execution of the actual punishment in the United States due to the various appellate processes through the American court system, may result in the psychological condition known as the "death row phenomenon."\(^{189}\) Accordingly, considering the severe nature of the deleterious effects of the unconditioned extradition of the fugitives in the present case, the government can no longer satisfy its burden by merely providing a sufficiently important government objective. Rather, the government must demonstrate a more important objective proportional to the severity of the effects.

The government's stated objectives in the case at hand cannot satisfy such a standard. The possible prevention of Canada becoming a "safe haven," or the goal of maintaining international treaty obligations, cannot arguably be viewed as so important as to reasonably justify the execution of a human being. If this were the case, there would be very little that the Canadian government could not justify. Hence, in light of the severe nature of the death penalty itself, and the manner in which

\(^{186}\) Recall *supra* text accompanying note 171 discussing the three components necessary to establish that the government's adopted measure is reasonable and demonstrably justified pursuant to Section 1 of the Charter.

\(^{187}\) *Id.* at 140.

\(^{188}\) *Smith,* [1987] 1 S.C.R. at 1073 (emphasis added).

the United States may impose the punishment, the government fails to show that the unconditioned extradition was a reasonable or demonstrably justified means to achieve any of its stated objectives, pursuant to Section 1 of the Charter.

IV. Suggestions for Reform
A. A "Certainty" Standard Should Be Applied
Although the Minister of Justice’s decision in the present case to order the extradition of Joseph Kindler and Charles Ng without seeking Article 6 assurances violates both Section 12 and Section 7 of the Canadian Charter, as argued in this Note, not all such cases are similarly unconstitutional. Only where the fugitives’ return to the United States would likely result in the imposition and execution of the death penalty, would such extradition violate the Charter. If capital punishment would not likely result from the extradition, the unconditioned extradition would not violate the Charter’s applicable provisions. Where capital punishment is unlikely to be imposed and executed, the unconditioned extradition of a fugitive can no longer be viewed as “cruel and unusual” treatment by the Canadian government, and similarly, is no longer a deprivation of the fugitive’s “right to life, liberty and security of the person” not in accordance with the principles of fundamental justice. The extradition, in light of the uncertainty, ceases to be the proximate cause of the punishment ultimately imposed. In other words, the degree of certainty in the eventual outcome of the extradition is a determinative factor in whether Canada’s unconditioned extradition of an individual to face capital punishment is functionally equivalent to the actual imposition of the death penalty by Canada, and therefore unconstitutional.

190. Apparently, the Court in the present case did not consider this issue in light of the certainty that both fugitives would receive the death penalty upon their return to the United States. Kindler, prior to his escape to Canada, had already been convicted and sentenced by a Pennsylvania jury to the death penalty, see Kindler, [1991] 2 S.C.R. at 784; and considering the heinous nature of the crimes alleged, if found guilty, Ng would surely receive the death penalty in California, see Re Ng, [1991] 2 S.C.R. at 863. Hence, neither the state, the fugitives, nor the Court in the present case considered the issue of the certainty of the ensuing death penalty in the United States upon the fugitives’ return.

191. For example, if a parent were to send his child to a day care center, acknowledging with certainty that the methods of discipline employed by the center are quite physical and abusive, the parent’s decision to send the child would be considered the proximate cause of any harm that might come to the child. Although the day care center is the actual body directly inflicting the harm, the parent could not wash his hands clean and take no responsibility for the action. On the other hand, if the parent were to send the child to a day care center, merely acknowledging that some centers have been known to physically abuse their enrolled children, then depending upon the degree of certainty of imminent harm, the parent could not likewise be considered the proximate cause of possible subsequent harm to the child.
B. Application of the "Certainty" Standard

The problem arises, however, in determining when there is enough "certainty" of the imposition of the death penalty by the requesting nation such that Canada's unconditioned extradition becomes the functional equivalent of Canada actually imposing the punishment. Moreover, there is the additional difficulty in assessing who shall carry the burden of demonstrating that the ultimate outcome of the extradition will likely result in the imposition of capital punishment. Finally, the question remains as to who will finally determine whether the degree of necessary certainty has been established.

First, I propose that for extradition of a death penalty fugitive to be functionally equivalent to imposing capital punishment itself, and hence be deemed unconstitutional, likely imposition of the punishment in the requesting nation must be demonstrated by a preponderance of the evidence. This may be accomplished by evidence of the nature of the crime and the historical treatment of such crimes if convicted in the requesting nation (or state).\textsuperscript{192} In light of such factors, if the imposition of the penalty is more likely than not to ultimately result from the extradition, the extradition would violate the \textit{Charter}. Considering the weight of the constitutional rights in jeopardy, requiring a higher degree of proof, e.g., proof beyond a reasonable doubt or proof by clear and convincing evidence, might unfairly deprive the fugitive of adequate constitutional protection.

Second, the fugitive seeking to avoid extradition on these grounds should have the burden of demonstrating the likelihood of capital punishment by a preponderance of the evidence. Recall that at the hearing stage of the extradition procedure, the state has the burden of (1) presenting a \textit{prima facie} case that the fugitive actually committed the act charged in the foreign country, and (2) classifying the alleged crime as an extradition crime.\textsuperscript{193} Once the state has established these two elements, the extradition judge "shall issue a warrant for the committal of the fugitive to the nearest convenient prison . . . ".\textsuperscript{194} Hence, at this committal stage, the state has successfully demonstrated both that the fugitive committed the alleged crime, and that he may be properly surrendered under current extradition practices. Consequently, if the fugitive wishes not to challenge the findings of the extradition judge, but rather, to claim that he will face the death penalty if returned and should therefore not be surrendered, then the burden of demonstrating the likelihood of capital punishment should rest on his shoulders alone as

\begin{itemize}
\item 192. Evidence merely demonstrating the likelihood of the fugitive's conviction by the requesting nation is not applicable here. The "certainty" standard that I am proposing only applies to the possible imposition and execution of the death penalty, and not to the possible conviction of the crime alleged. The pertinent question is whether, if convicted, the requesting nation will by a preponderance of the evidence impose and execute the death penalty.\textsuperscript{192}
\item 193. \textit{See supra} Section I.B.2.
\item 194. \textit{Extradition Act, supra} note 9, § 18(1).
\end{itemize}
an affirmative defense to his extradition.\footnote{195}

Lastly, the fugitive should present the likelihood of capital punishment at the hearing stage before an extradition judge, and the presiding judge should be authorized to determine whether the necessary degree of certainty has been established. If the fugitive fails to show by a preponderance of evidence that capital punishment will likely result from his extradition, then such extradition will not violate the Charter, and he may properly be committed for surrender. On the contrary, if by a preponderance of evidence the extradition judge determines that the imposition of the death penalty is more likely than not, then extradition of the fugitive would consequently violate the Charter, and surrender should be allowed only if the Minister of Justice seeks assurances that the penalty will neither be imposed nor executed. This determinative authority does not necessarily provide extradition judges with a newly created power, but merely extends the authority already conferred upon them by the existing Extradition Act.\footnote{196}

C. Modification of Present Extradition Provisions

Presently, the Canadian Extradition Act neither reflects the possible constitutional violation of an unconditioned extradition of a death penalty fugitive, nor considers the viability of a “certainty” standard. This Note proposes that a modification of existing Canadian extradition law be made in accordance with these significant considerations. Specifically, a new provision should be added to the present Canadian Extradition Act. The new Section, immediately following Section 18 of the Extradition Act (“Evidence sufficient to justify committal” and “Discharge”), should read as follows:

18*. (1) Where a fugitive has shown by a preponderance of evidence that his surrender will likely result in the imposition and execution of the death penalty by the requesting nation, the judge shall commit him to surrender such that the Minister of Justice will seek assurances from the requesting nation that the death penalty will neither be imposed nor executed.

\footnote{195. For a parallel example, consider the affirmative defense of self-defense in the United States. Presumably, at the point a defendant raises the self-defense issue, the state has successfully shown that the defendant committed the alleged crime. The purpose then of such a defense is not to deny the commission of the crime, but to suggest extenuating circumstances that might deem state action on the crime unjust. See generally 22 C.J.S. CRIMINAL LAW § 53 (1989). Hence, the defendant seeking such a favorable conclusion at this stage should necessarily carry the burden of proof.}

\footnote{196. According to Section 18(2) of the Extradition Act, supra note 9, “[i]f the evidence . . . [i.e., prima facie evidence that the fugitive committed the crime alleged] is not produced, [at the extradition hearing], the [extradition] judge shall order the fugitive to be discharged.” Thus, the extradition judge is already empowered to determine whether sufficient evidence exists at the hearing stage to either commit the fugitive for surrender or discharge him altogether. This authority to determine capital punishment certainty would simply provide the judge with additional jurisdiction to decide whether a conditional extradition would be constitutionally necessary in the case before him.}
(2) If the fugitive fails to produce such a preponderance of evidence, the judge shall issue his warrant for the committal of the fugitive as provided by Section 8 of this Act.

Conclusion

Contrary to the decision of the Canadian Supreme Court on September 26, 1991, Section 25 of the Extradition Act, insofar as it authorized the Minister of Justice to order the unconditioned extradition of Joseph John Kindler and Charles Chitat Ng to face the death penalty in the United States, is a clear violation of both Section 12 and Section 7 of the Canadian Charter of Rights and Freedoms. First, considering that capital punishment would infringe Section 12's constitutional guarantee against "cruel and unusual treatment" if the penalty was executed in Canada, the extradition of the fugitives to face such punishment in the United States absent Article 6 treaty assurances must likewise violate the Charter. The Canadian government cannot absolve itself of the eventual outcome of its actions merely because the United States government, as opposed to the Canadian government, is the body ultimately executing the punishment. Second, the deprivation of the fugitives' Section 7 right to "life, liberty, and security of the person," as a result of their unconditioned extradition, is not in accordance with Canadian principles of fundamental justice. Such principles are defined by a broad array of factors, including, the demeaning and devaluing nature of the punishment itself, the sentiment of the Canadian people against the death penalty, and the nation's position in the international community supporting the abolition of capital punishment.

In addition, neither constitutional infringement is a reasonable or justified limitation under Section 1 of the Charter. Although the Canadian government's stated objectives for the fugitives' surrender (namely, those of preventing Canada from becoming a "safe haven" for dangerous criminals and maintaining international obligations with the United States) may arguably be of sufficient importance, the unconditioned extradition was not a reasonable and demonstrably justified means in achieving these goals. First, the unconditioned extradition was not rationally connected to the government's "safe haven" objective. Second, in light of Article 6's treaty provision for conditional extradition, the unconditioned extradition did not impair the fugitives' rights and freedoms "as little as possible." Lastly, the severe effects of the unconditioned extradition, namely, the ultimate executions of the fugitives upon their return, are not proportional to either of the government's stated objectives.

In conclusion, considering the "certainty" that the unconditioned extradition of both fugitives would result in their executions upon their return to the United States, and in light of Canada's constitutional precepts in support of human dignity and against the death penalty, the Supreme Court of Canada incorrectly upheld the Minister of Justice's
decision to extradite Joseph Kindler and Charles Ng without seeking Article 6 assurances that the death penalty would neither be imposed nor executed. A civilized nation such as Canada, which has abolished the death penalty as an appropriate mode of punishment, and has supported this national position on an international level, cannot at the same time advocate the extradition of these fugitives to be ultimately executed upon their return. Such action is wholly inconsistent with the nation's position against the death penalty, and human dignity in general.¹⁹⁷

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¹⁹⁷. Interestingly, Canada has recently appeared to have recognized this inconsistency. In early February of 1992, Canadian Minister of Justice, Kim Campbell, sought Article 6 assurances from Florida that the government would neither impose nor execute the death penalty upon the surrender of Leo Robert O'Bomsawin. See John F. Burns, Canada Wins U.S. Extradition Deal, N.Y. TIMES, Feb. 14, 1992, at A3. According to Florida prosecutors, Mr. O'Bomsawin murdered his wife, Denise Vinet, and her lover, Vaughan Williams, in a Jacksonville motel parking lot on March 4, 1987. Id. Apparently, Mr. O'Bomsawin followed the couple from a grocery store, shot Mr. Williams in the head with a .357 Magnum, chased Ms. Vinet into an adjacent highway, dragged her to the roadside, and shot her twice (once in the head). Id. Rather than face the unfortunate outcome awaiting Joseph Kindler and Charles Ng, Florida's Article 6 assurance has provided Mr. O'Bomsawin with a possible life imprisonment with no parole for 25 years on each of the two homicide counts. Id.