
CASE COMMENTS

CHRONIQUES DE JURISPRUDENCE

Case Comment: *Ng and Kindler*

James W. O'Reilly*

In the companion extradition cases of *Ng*¹ and *Kindler*,² the Supreme Court of Canada applies the approach it developed in the trilogy of *Mellino*,³ *Allard*⁴ and *Schmidt*⁵ to the review of decisions of the Minister of Justice to surrender persons to requesting states. Those cases showed that the Court would take a hands-off approach in determining the content of section 7 of the *Charter*⁶ for purposes of reviewing these decisions, intervening only where the return of a person was "simply unacceptable"⁷ or would "shock the conscience" of Canadians.⁸ In *Ng* and *Kindler*, the Court held, by a 4-3 majority, that the return of these men to the United States, in the absence of assurances by the States of California and Pennsylvania respectively that the death penalty would not be imposed or carried out is not contrary to the *Charter*. Article 6 of the *Extradition Treaty between Canada and the United States* provides:

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.⁹

* Of the Ontario Bar.

© McGill Law Journal 1992

Revue de droit de McGill

To be cited as: (1992) 37 McGill L.J. 873

Mode de citation: (1992) 37 R.D. McGill 873

¹Reference *Re Ng Extradition*, [1991] 2 S.C.R. 858, 84 D.L.R. (4th) 498 [hereinafter *Ng*].

²*Kindler v. Canada (Minister of Justice)*, [1991] 2 S.C.R. 779, 84 D.L.R. (4th) 438 [hereinafter *Kindler* cited to S.C.R.].

³*Argentina (Republic) v. Mellino*, [1987] 1 S.C.R. 536, 40 D.L.R. (4th) 74.

⁴*United States v. Allard*, [1987] 1 S.C.R. 564, 40 D.L.R. (4th) 102 [hereinafter *Allard* cited to S.C.R.].

⁵*Canada v. Schmidt*, [1987] 1 S.C.R. 500, 39 D.L.R. (4th) 18 [hereinafter *Schmidt* cited to S.C.R.].

⁶*Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B of the *Canada Act 1982 (U.K.)*, 1982, c. 11 [hereinafter *Charter*].

⁷*Supra*, note 4 at 572.

⁸*Supra*, note 5 at 522.

⁹*Extradition Treaty between Canada and the United States of America*, 3 December 1971, Can. T.S. 1976 No. 3, 1041 U.N.T.S. 57.

In both cases, the persons sought by the United States argued that the Minister should have sought those assurances and that failure to do so amounted to the imposition of cruel and unusual treatment or punishment (*i.e.* contrary to section 12 of the *Charter*) and infringed their interests in liberty and security of the person (*i.e.* contrary to section 7 of the *Charter*).

There is no doubt that extradition cases present courts with a nettlesome constitutional question. The difficulty arises from the Supreme Court of Canada's clear rule that executive decision-making is subject to constitutional scrutiny.¹⁰ As such, decisions by the Minister of Justice to return a person to face trial or punishment are susceptible of judicial review on constitutional grounds. At the same time, courts will be understandably loath to find a Minister's decision to be constitutionally defective since the result may be that the person sought will not be returned to the requesting state, even though there will have been a finding by the extradition judge that there is sufficient evidence to justify the person's return. We see clearly in *Ng* and *Kindler* that in applying the *Charter* to ministerial decisions in extradition cases, the Supreme Court of Canada has kept open the door to judicial review but has tried to keep the opening to a crack. Even so, as will be discussed below, that opening is probably wide enough to accommodate many challenges to surrender orders founded on the treatment or punishment the person sought is likely to receive on return.

I. The Judgments

La Forest J. and McLachlin J., both joined by L'Heureux-Dubé and Gonthier JJ., wrote the majority judgments in *Kindler* and *Ng*. Sopinka J. and Cory J., both joined by Lamer C.J.C., dissented. As the Court's reasoning is set out principally in *Kindler*, the discussion here will focus on that case.

There is little difference between the positions of La Forest J. and McLachlin J. Both judgments concluded that:

1. Section 7, not section 12, applies to the review of a Minister's decision to surrender a person sought by a foreign state;
2. Review of surrender decisions under section 7 should be extremely circumspect;
3. The surrender to the United States of *Kindler* and *Ng* without assurances that the death penalty would not be imposed on them does not violate section 7 of the *Charter*.¹¹

A. Sections 7 and 12 of the Charter

The majority's holding that section 12 of the *Charter* has no application to the surrender of wanted persons is perplexing. La Forest J. stated simply that "[t]he Minister's actions do not constitute cruel and unusual punishment"¹² and went on to say:

¹⁰*Operation Dismantle Inc. v. R.*, [1985] 1 S.C.R. 441 at 455, 463-64, 118 D.L.R. (4th) 481.

¹¹It should also be mentioned that the Court was unanimous that the process by which the Minister decides whether to surrender a person does not violate s. 7.

¹²*Supra*, note 2 at 831.

The execution, if it ultimately takes place, will be in the United States under American law against an American citizen in respect of an offence that took place in the United States. It does not result from any initiative taken by the Canadian Government.¹³

Similarly, McLachlin J. finds the surrender power given to the Minister in section 25 of the *Extradition Act*¹⁴ is beyond the reach of section 12 of the *Charter* since “[n]either s. 25 nor orders made under it impose or authorize punishment”¹⁵ and “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.”¹⁶

There are four troublesome aspects to this reasoning. First, it is not clear why the majority looks only to the word “punishment” in section 12 of the *Charter*. Section 12 also protects against cruel and unusual *treatment*. While the Minister’s surrender order does not impose punishment directly, the removal of a person from Canada may well amount to “treatment.”

Second, the majority does not explain why the remoteness of the punishment from Canadian conduct results in the inapplicability of section 12 and, simultaneously, the application of section 7. If the surrender order is so distant from the punishment that may be imposed in the requesting state that the order cannot be governed by section 12, how can it be governed by section 7? To put it another way, if the surrender order is remote from the potential punishment, how can it at the same time be proximate to the fugitive’s security of the person? La Forest J. stated, after rejecting the argument that section 12 applies to the surrender decision, “[t]here can be no doubt that the appellant’s right to liberty and security of the person is very seriously affected because he may face the death penalty following his return.”¹⁷ The person’s liberty and security interests are affected because the surrender order will place the person in a situation in which the death penalty may be imposed, even though the order does not in itself prescribe the punishment. The order renders the person before the foreign authorities for the possible imposition of the death penalty. As such, the person’s liberty and security interests and the punishment itself are equidistant from the surrender order. Yet the Court holds that those interests are connected closely enough to the action of Canadian officials to be governed by the *Charter* but the punishment is too remote.

Third, the suggestion that the surrender order is too remote from the death penalty to come within section 12 is particularly difficult to comprehend in the case of Kindler, where the penalty had already been imposed. It remains simply

¹³*Ibid.*

¹⁴R.S.C. 1985, c. E-23, which states:

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.

¹⁵*Supra*, note 2 at 846.

¹⁶*Ibid.*

¹⁷*Ibid.* at 831.

to carry it out. The surrender order puts Kindler on death row, hardly a site far removed from the application of the death penalty. In this respect, *Kindler* is perhaps distinguishable from *Ng*, since in the latter case the person surrendered had not even been tried.

Fourth, in arriving at the conclusion that the death penalty is too remote from the Minister's decision to attract the attention of section 12, La Forest J. considered the degree of the connection to Canadian interests. Here, the accused were United States citizens, charged with crimes in the United States. One wonders, then, what the approach would be, for example, in a situation where the person sought was a Canadian citizen. Would this mean that section 12 would then apply? It would be a peculiar result if the citizenship of the person sought could determine which sections of the *Charter* applied to the review of a surrender decision. This would be a departure from the principle that everyone on Canadian soil is entitled to the protection of the *Charter*.¹⁸ Clearly, the Minister could take citizenship into account when deciding whether to surrender a person. In fact, this is a recognized ground for refusing surrender in international law, although the practice in Canada has been to extradite nationals of this country.¹⁹ In addition, the Minister may take account of the fact that a Canadian citizen is expressly given the right to remain in Canada under section 6 of the *Charter*.²⁰ It would be quite another thing to say, however, that Canadians may be protected from surrender to face cruel and unusual punishments but others will not. The extent to which citizenship influences the application of the *Charter* to surrender is unclear in La Forest J.'s judgment.

The majority's reluctance to deal with surrender on the basis of section 12 may be explained, perhaps, by an understandable desire not to rule on whether the death penalty amounts to cruel and unusual treatment or punishment until the issue comes squarely before the Court. Further, the distinction between the ambit of section 7 and the application of section 12 permits the Court to develop its jurisprudence on the meaning of cruel and unusual treatment or punishment without concern for its impact on extradition matters. Thus, the Court would be free in future to find that the death penalty or some other punishment or treatment was cruel and unusual, but uphold the authority of the Minister to surrender a person to face such a punishment or treatment. In fact, judging from both majority and dissenting opinions, it is quite likely that a majority of the Court would find that capital punishment indeed amounts to a violation of section 12. It is clear that the three dissenting members of the Court believe the death penalty to be cruel and unusual punishment *per se*. In the majority judgments there are *dicta* suggesting that the writers may be inclined to find that the death penalty, if provided for in Canada, would offend section 12 of the *Charter*. La Forest J., with whom L'Heureux-Dubé and Gonthier JJ. concurred, stated:

¹⁸See *Singh v. Canada (Minister of Employment and Immigration)*, [1985] 1 S.C.R. 177 at 202, 17 D.L.R. (4th) 422.

¹⁹See A.W. La Forest, *La Forest's Extradition to and from Canada*, 3rd ed. (Aurora, Ont.: Canada Law Book, 1991) at 98-109.

²⁰See *Germany (Federal Republic) v. Rauca* (1982), 38 O.R. (2d) 705, 70 C.C.C. (2d) 416 (H.C.J.), *aff'd* (1983), 41 O.R. (2d) 225, 4 C.C.C. (3d) 385 (C.A.), holding that extradition is a reasonable limit on s. 6 rights.

There is strong ground for believing that having regard to the limited extent to which the death penalty advances any valid penological objectives and the serious invasion of human dignity it engenders that the death penalty cannot, except in exceptional circumstances, be justified in this country.²¹

Thus, it appears that at least six members of the Court would find the death penalty to be a violation of section 12 of the *Charter*, while three of them would permit Canada to surrender persons to face the death penalty on the reasoning that section 12 does not apply.

In effect, by dealing with surrender to face the death penalty under section 7 rather than section 12, the majority avoids both the question whether the death penalty amounts to cruel and unusual punishment and, given the likely affirmative answer to that question, the difficult exercise of justifying its imposition in the extradition context according to the standards of section 1.²² If the Court had held that surrender orders were governed by section 12, an order to face a punishment that had been found to violate section 12 in the Canadian context (e.g. a mandatory minimum sentence²³) would be constitutional only if it met the requirements of section 1 of the *Charter*. In effect, the majority confines its justification for the potential application of the death penalty entirely within section 7.

The approach of Cory J., in dissent,²⁴ is more straightforward on this issue. He reasons that since the manner in which the foreign state treats the person on return from Canada can give rise to review on *Charter* grounds (citing *Schmidt*²⁵), then "... Canada, as the extraditing state, must accept responsibility for the ultimate consequence of the extradition."²⁶ In other words, the punishment of the person on return and the actions of Canadian authorities sending the person back for that punishment must receive equivalent *Charter* scrutiny. Cory J. goes on to find that the death penalty constitutes *per se* a violation of section 12 not saved by section 1. Therefore, so must the surrender order to face possible imposition of the death penalty.

B. Scope of Section 7 Review of Surrender Decisions

The majority concludes that the scrutiny to be given to the punishment imposed by the requesting state under section 7 is limited because of the special nature and exigencies of extradition. Quite rightly, the majority acknowledges that extradition results from commitments made between states, entered into by the executive by way of treaties. A surrender order by the Minister of Justice represents the fulfilment of that commitment in relation to a particular request. If a court were to overturn such an order, it would frustrate the wishes of the

²¹*Supra*, note 2 at 833.

²²And, therefore, the corresponding analysis set out in *R. v. Oakes*, [1986] 1 S.C.R. 103, 26 D.L.R. (4th) 200.

²³See, for example, *R. v. Smith*, [1987] 1 S.C.R. 1045, 40 D.L.R. (4th) 435 [hereinafter *Smith*].

²⁴In the other dissenting judgment, Sopinka J. declines to decide whether s. 12 applies. He bases his analysis on s. 7 alone.

²⁵*Supra*, note 5.

²⁶*Supra*, note 2 at 820.

states. This could have ramifications in the domain of international relations, affect Canada's reputation among nations, and result in difficulties in having wanted persons returned to Canada. As such, the judiciary's scrutiny of the Minister's decision should not be "over-exacting"²⁷ given "[t]he superior placement of the executive to assess and consider the competing interests involved in particular extradition cases."²⁸

These considerations enter the majority's determination of the principles of fundamental justice that apply in the extradition setting. It appears that these principles have little content when applied to extradition. The "basic tenets of our legal system,"²⁹ according to La Forest J., require simply that those subject to extradition not be treated in a manner that "would place [them] in a position that is so unacceptable as to 'shock the conscience'."³⁰ The majority then goes on to consider whether the possible imposition of the death penalty on Kindler and Ng would be so unacceptable.

McLachlin J. suggested at one point a rather expansive scope of review. She stated:

At the end of the day, the question is whether the provision or action in question offends the Canadian sense of what is fair, right and just, bearing in mind the nature of the offence and the penalty, the foreign judicial system and considerations of comity and security, and according due latitude to the Minister to balance the conflicting considerations.³¹

However, at the same time, she expressly agreed that the test is as stated by La Forest J.

In dissent, Sopinka J. was of the view that the scope of scrutiny proposed by the majority was overly restrictive. He disputed the manner in which the majority determined whether a violation of section 7 had occurred. In his view, the "shock the conscience" test is too narrow in that it focuses on majority opinion. As he stated:

Principles of fundamental justice are not limited by public opinion of the day. The protection offered by s. 7 extends to individuals who face unjust situations which are not recognized as such by the majority.³²

The majority's attempt to fit within section 7, to the exclusion of sections 12 and 1, both the principles of fundamental justice and all of the limitations on them appropriate in the extradition context does indeed appear to result in a diminution of the basic tenets of our legal system to a rather low standard.

C. *Whether Section 7 of the Charter is Violated*

It is clear from the test developed by the majority that it will be the rare case where the judiciary will intervene to overturn a decision of the Minister of

²⁷*Ibid.* at 849, McLachlin J.

²⁸*Ibid.*

²⁹*Reference re Section 94(2) of the Motor Vehicle Act*, [1985] 2 S.C.R. 486 at 503, 24 D.L.R. (4th) 536.

³⁰*Supra*, note 2 at 832, citing *Schmidt*, *supra*, note 5.

³¹*Ibid.* at 850.

³²*Ibid.* at 791.

Justice to surrender a person to a requesting state. In applying the test, La Forest and McLachlin JJ. consider the use of the death penalty in the particular circumstances before them: *i.e.* by assessing Canadian attitudes to capital punishment and taking account of the individuals seeking protection from it — Kindler and Ng. McLachlin J. articulated the approach as follows:

In determining whether ... the extradition in question is “simply unacceptable,” the judge must avoid imposing his or her own subjective views on the matter, and seek rather to objectively assess the attitudes of Canadians on the issue of whether the fugitive is facing a situation which is shocking and fundamentally unacceptable to our society.³³

La Forest J. considered whether the death penalty “would be so outrageous to the values of the Canadian community that the surrender would be unacceptable.”³⁴ He concluded that the surrender of persons sought by foreign states to face the death penalty would not always shock the conscience of Canadians. First, judging by public opinion as evidenced by votes in the House of Commons on the issue, there is no fundamental abhorrence of the death penalty in Canada, even though those votes have defeated attempts to re-instate the death penalty. The most recent vote in 1987 defeated re-instatement by 148 to 127, a relatively narrow margin.³⁵ It may fairly be concluded that Canadians are not united in horror at the possibility of a person being condemned to death.

Second, given that Kindler was convicted of, and Ng has been charged with, “the worst sort of crimes,”³⁶ it is unlikely that Canadians would be shocked by the return of these individuals to the United States to face capital punishment. La Forest J. described the charges against the two men as follows:

The crime of which Kindler has been convicted can only be described as a brutal, premeditated murder. The extradition report shows that after beating the victim about the head with a baseball bat, Kindler allegedly dragged him to a nearby river, tied a cinder block to his neck and threw him into the river while he was still alive. Ng, for his part, has been accused of a series of offences of an almost unspeakable nature. These would seem to me to be precisely the kinds of individuals the Minister would wish to keep out of Canada for the protection of the public.³⁷

Third, the reality that the person may avoid conviction or punishment in the requesting state if not surrendered must be considered. In other words, the extradition setting presents a stark choice, one that would not exist in a purely domestic case. If Canadian law provided for the death penalty and that law was successfully challenged on *Charter* grounds, those who would have been subject to it would receive the next most serious punishment under our law, life imprisonment. However, in an extradition setting, if a Minister does not seek or does not receive assurances that the requesting state will not impose the death penalty on the person sought and a court concludes that the person should not be surrendered to face the death penalty, he or she will have successfully evaded

³³*Ibid.* at 850.

³⁴*Ibid.* at 832.

³⁵*Ibid.* at 852.

³⁶*Ibid.* at 835-36, La Forest J.

³⁷*Ibid.* at 835.

justice by fleeing to Canada. As such, courts reviewing the Minister's decision to surrender in a capital case must be satisfied, before overturning that decision, that it would be better to release the person unconditionally on Canadian soil than send the person back to face the death penalty.

On the latter point, the dissenting justices stated that the choice is not as stark as the majority contended. If the Minister were to seek assurances that the death penalty would not be imposed on Kindler and Ng, those assurances may well be given by United States authorities.³⁸ If so, the persons sought could be returned to face some lesser punishment. If no assurances were forthcoming, then the stark choice would have to be made, at least in the case of Kindler. For Ng, a surrender order could be made in relation to other pending charges that would not attract the death penalty (*i.e.* attempted murder, kidnapping and burglary). Thus, the end result would be the extradition of Ng one way or another.

This issue devolves into a question whether Canada is or could become a safe haven for those seeking to avoid the death penalty. The majority recognized the high rate of homicides in the United States, the vast open border between the two countries and the fact that Kindler and Ng had both fled and committed crimes here. If death penalty assurances were a prerequisite for extradition from Canada, more offenders may seek refuge here and, if they do so, Canadians may become victims of their crimes. While there may be disagreement on offenders' motivations for fleeing to Canada and the rate at which they do so, the majority accepts this as a valid consideration for the Minister in deciding not to seek assurances.

The dissenters' views on this issue are simply not realistic. If Canada were required to seek death penalty assurances in every capital extradition case, surely some offenders would be encouraged to seek refuge here, even if the Minister would be prepared to order surrender if assurances were in fact not given. It would offer hope of avoiding the death penalty and a convenient destination, at least for American fugitives. While Cory J. takes the better approach in regarding this as a section 1 issue rather than as part of the application of section 7, his analysis is unconvincing. He postulated that fugitives flee for many reasons and they are likely to flee here whether or not Canada has a firm anti-death penalty posture.³⁹ Further, he stated that the only empirical evidence we have of an influx of murderers or alleged murderers are the two cases before the Court. It is true that fugitives will likely flee to Canada for a variety of reasons. But it is also true that the hope of avoiding the death penalty would be an incentive to come to Canada. The fact that we do not know how many such persons are in Canada or will come to Canada does not negate the concern that we may inadvertently encourage them. Further, there is little doubt that if Canada were to seek death penalty assurances for Ng and Kindler and failed to surrender them in the absence of assurances, or surrendered them to face lesser punishments, some fugitives would see a benefit to be gained in coming to Canada.

³⁸*Ibid.* at 792, Sopinka J. For example, the U.S. gave a limited assurance in *Soering v. United Kingdom* (1989), Eur. Court H.R. Ser. A, No. 161, 11 E.H.R.R. 439 at 445-47, 461.

³⁹*Supra*, note 2 at 825.

In the result, the majority finds no violation of section 7 and, hence, no ground for disturbing the Minister's decision to surrender. Both men have been returned to the United States.

II. Observations on the Scrutiny of Foreign Laws

The following additional observations may be made with respect to the *Kindler* and *Ng* cases:

1. None of the justices made any reference to the laws of Pennsylvania and California providing for the death penalty.
2. While no reference was made to these laws, scrutiny of foreign laws is likely to occur in future cases where the Minister's decision to surrender is challenged.

A. State Death Penalty Laws

It is a curiosity of the cases that no reference was made by any member of the Court to the laws of Pennsylvania and California that provide for the death penalty. McLachlin J. simply pointed out that these laws were enacted democratically and those subject to the death penalty have opportunities to challenge those laws on grounds of arbitrariness.⁴⁰ But no judgment referred to the actual laws that apply to *Kindler* and *Ng*. In fairness, there was no need for the minority to consider foreign law since it was their position that the death penalty is *per se* cruel and unusual. Thus, however these states go about imposing the death penalty, the very existence of that penalty amounts to cruel and unusual punishment (per Cory J.) and a violation of the principles of fundamental justice (per Sopinka J.).

The majority's failure to consider the state death penalty laws can perhaps be explained by their understandable desire not to be seen to be passing judgment on foreign legal systems. After all, this is one of the reasons why the Minister, rather than the extradition judge, has the general discretion to refuse extradition — to avoid making the merits of a foreign legal system the subject of proof at the extradition hearing. Instead, the Minister can make the necessary inquiries and make a decision whether to surrender without risk of embarrassment to the requesting state. Still, given that the Minister's decision is open to review, some scrutiny will no doubt be given in future cases to the laws to which the persons sought will be subject on return.

The majority considered whether Canadians would be shocked to see the likes of *Kindler* and *Ng* face capital punishment, not whether the laws of Pennsylvania and California are reasonable or accord with principles of fundamental justice in the manner in which they prescribe the death penalty. To do so, according to McLachlin J., would be to give the *Charter* extraterritorial effect.⁴¹

⁴⁰*Ibid.* at 852.

⁴¹*Ibid.* at 846 she stated: "Effective relations between states require that we respect the differences of our neighbours and that we refrain from imposing our constitutional guarantees on other states... ."

This reasoning is difficult to follow. So long as there exists the possibility of reviewing the Minister's decision to surrender there will also exist the possibility of the *Charter* having extraterritorial effect. Even the majority stated that if the surrender of a fugitive would be "simply unacceptable" there would be a violation of the *Charter*. Thus, the *Charter* could operate to prevent prosecution or punishment by the requesting state and, in that sense, have extraterritorial effect. It is not extraterritoriality that prevents the Court from considering the merits of foreign law, nor, as discussed above, does avoidance of extraterritoriality justify a preference of section 7 over section 12.

In the place of considering the content of the laws of California and Pennsylvania, the Court considered whether Canadians would be shocked by the imposition of the death penalty on the "worst sort" of criminals. This approach amounts to a duplication of the very thrust of the various state death penalty statutes. These laws set out a test of who the worst sorts of criminals are, in the estimation of the state legislature, and then leaves it to a jury to decide whether the person falls within the test and whether the death penalty should be imposed.

Under the *California Penal Code*,⁴² death penalty cases are tried in two stages. First the trier of fact determines the matter of the accused's guilt on the crime charged (*i.e.* first degree murder) and then, if there is a finding of guilt, there is a further determination whether any "special circumstances" have been proved. Special circumstances are indications that the offence was unusually serious or brutal. The *Penal Code* contains nineteen such special circumstances, including commission of multiple murders, murder by bombing, murdering a peace officer, witness, prosecutor or judge, murder that is especially heinous, atrocious or cruel, murder committed while in flight from another crime, and murder accompanied by torture.⁴³ Once murder and a special circumstance have been proved beyond a reasonable doubt, the jury determines whether the accused should be sentenced to death or to life imprisonment without parole.⁴⁴ At this stage, the jury may consider mitigating and aggravating factors, such as the circumstances of the crime, moral justification for the offence, impairment by mental disease or intoxication, degree of participation in the crime, the age of the accused and "any other extenuating circumstance."⁴⁵ The jury is obliged to impose the death sentence at this stage if the aggravating factors outweigh the mitigating factors. If a verdict of death penalty is returned, the trial judge must review the evidence and determine whether the verdict is legally and factually sound.⁴⁶

A similar process is provided in Pennsylvania law,⁴⁷ although it is simpler than the California statute. It sets out a series of aggravating circumstances that resemble the special circumstances provided in the *California Penal Code*. The jury must return a death sentence verdict if it unanimously finds at least one

⁴²Cal. Penal Code §190.1 (West 1992).

⁴³*Ibid.* §190.2(a).

⁴⁴*Ibid.* §190.3.

⁴⁵*Ibid.* §190.3(k).

⁴⁶*Ibid.* §190.4(e).

⁴⁷42 Pa. Cons. Stat. Ann. §9711 (1992).

aggravating circumstance has been proved beyond a reasonable doubt and that there are no mitigating circumstances, or that the aggravating circumstances outweigh the mitigating circumstances.⁴⁸ A death penalty verdict is subject to automatic review by the Supreme Court of Pennsylvania, which must affirm it unless it finds that the verdict was the result of passion, prejudice or other arbitrary factor, is inconsistent with the evidence or is excessive or disproportionate.⁴⁹

Given the contents of these statutes, the majority's consideration of the seriousness of the crimes charged against Ng and proved against Kindler appears superfluous as it is only for the worst sort of murders, as defined by these state laws, that the death penalty will in fact be imposed. On the other hand, it is possible that in a future case the Court could find that Canadians would be shocked to see the death penalty imposed on a person who had not committed, by Canadian standards, the "worst sort of crime." For example, a state law may provide the death penalty for a negligent killing.⁵⁰ The Supreme Court of Canada could well determine that this would not be the "worst sort of crime" and that Canadians would be shocked to see a person put to death who did not have actual intent to cause death. If so, the surrender of a person in those circumstances would amount to a violation of section 7. Of course, this would be to give the *Charter* extraterritorial effect as it would amount to a finding that the foreign law does not meet the standards of the *Charter*.

Thus, it appears that the test formulated by the majority is either superfluous or has extraterritorial effect. It is superfluous if it permits the surrender of persons to face the death penalty in just those situations where the state law contemplates its imposition. It is extraterritorial in its reach if it can result in the refusal to surrender someone who falls within the parameters of the state's death penalty statute; in other words, where the Supreme Court's definition of the "worst sort" of offender differs from that of a state legislature. There cannot be a meaningful standard of reviewing the Minister's decision on surrender without passing judgment on foreign law. As such, it would have been preferable if the Court had recognized this by considering the actual operation of the statutes imposing the death penalty rather than creating the "worst sort of crime" test. Both that test and the holding that section 12 does not apply to surrender decisions tend to obscure the fact that courts will ultimately be called on to assess foreign law in reviewing surrender decisions.

B. Future Impact on Surrender Review

An application of the "worst sort of crime" standard from *Ng* and *Kindler* can perhaps be seen in the recent decision of the Minister of Justice to seek

⁴⁸*Ibid.* §9711(c)(1)(iv).

⁴⁹*Ibid.* §9711(h).

⁵⁰See, for example, *California Penal Code, supra*, note 42, §190.2(a)(4) (creating the special circumstance of murder committed by a destructive device (*i.e.* a bomb) if the defendant knew or reasonably should have known that the act would create a risk of death); *ibid.* §190.2(b) (which provides that unless specifically required, the death penalty may be imposed even if the accused did not have actual intent to kill at the time of the commission of the offence).

assurances from the United States State Department that the State of Florida⁵¹ would not impose the death penalty in the O'Bomsawin case. Assurances have now been received.⁵² O'Bomsawin is charged with two counts of first degree murder. It appears that the Minister, in applying the standard articulated in *Kindler*, concluded that this case did not involve the "worst sort of crime" and that the Canadian public would be shocked by the imposition of the death penalty on O'Bomsawin. It is difficult to know what impact, if any, the fact that O'Bomsawin is a Canadian citizen had on the Minister's decision.⁵³ If the Minister had not sought assurances or if the assurances had not been given, a review of her decision to surrender would have amounted to a consideration whether the accused's alleged conduct amounted to the "worst sort of crime," presumably measured against the conduct of Kindler and alleged against Ng. We have no obvious yardstick for making this measurement, particularly where the person sought has yet to be tried. On the other hand, we have a significant body of case law under sections 7 and 12 by which we could assess the foreign law. At the same time, consideration of the differences between states, the interests of international comity and reciprocity and the need for internal security could easily be accommodated in section 1.

The Supreme Court's test will almost certainly require assessment of foreign laws in reviewing a decision to surrender in non-death penalty cases where there is an allegation that surrender would be "unacceptable" or "shocking." An example of this is provided in the recent case of *Jamieson*.⁵⁴ There the appellant was wanted on charges of trafficking in cocaine in the State of Michigan. Under Michigan law, if convicted, the appellant would be liable to a minimum sentence of 20 years of imprisonment without eligibility for parole and a maximum of 30 years. The case arose from a *habeas corpus* application to review the decision of the extradition judge to commit the appellant to await surrender. The Court of Appeal, per Rothman J.A.,⁵⁵ held that the judiciary should generally not make a determination whether the appellant's section 7 and section 12 rights have been infringed before the Minister has made a decision whether to surrender the person. Rothman J.A. stated:

Applying Canadian standards, a minimum sentence of 20 years for trafficking in 273 grams of cocaine is indeed harsh. But, with respect, I do not find that it so shocks the conscience as to require judicial intervention even before the executive has had an opportunity to decide whether the circumstances justify a refusal to surrender the fugitive.⁵⁶

Thus, the Court applied a more stringent test of review than in *Kindler*, given that the appellant raised *Charter* issues related to surrender even before the surrender decision had been made. Rothman J.A. then considered the operation of the Michigan statute to determine whether there was an opportunity for the exer-

⁵¹Florida's death penalty statute may be found at Fla. Stat. Ann. §921.141 (West 1992).

⁵²As announced by the Minister of Justice (Press Release (5 February 1992)).

⁵³See text accompanying notes 18-20.

⁵⁴*Jamieson v. Directeur du Centre de Prévention Parthenais*, [1992] R.J.Q. 561 (C.A.) [herein-after *Jamieson*].

⁵⁵Chouinard J.A. concurring.

⁵⁶*Supra*, note 54 at 566.

cise of judicial discretion by a Michigan sentencing judge to reduce the minimum sentence. He concluded that Michigan law allows for a departure from the minima prescribed where there exist "substantial and compelling reasons" for so doing. Thus, the Michigan statute is not so arbitrary as the Canadian provision creating a minimum sentence that was found by the Supreme Court of Canada to violate section 12 of the *Charter*.⁵⁷ Whether there are in fact such reasons as to justify departure from the minimum sentence should, according to Rothman J.A., be determined by a Michigan court, if the person is returned and found guilty of the offence.

Proulx J.A., in dissent, took a different view of Michigan law. He found that there is not a possibility of departure from the 20-year minimum sentence and, therefore, that it would be fundamentally unfair to surrender the appellant to face the outstanding charges there. He cited an affidavit sworn by a Michigan prosecutor stating that he would seek to have the appellant sentenced under the Michigan law in place at the time Jamieson absconded. That law did not contemplate departures from the minimum sentences. In fact, Jamieson's accomplice was sentenced to the 20-year minimum sentence. In addition, even if the amended law were applied to the appellant, Proulx J.A.'s view was that the meaning of "substantial and compelling reasons" was quite limited. For example, the accused's age, criminal history, remorsefulness, absence of drug use, or family support would not justify departure from the minimum sentence. By Canadian standards, a 20-year sentence without possibility of parole would be even more serious than the penalty for first degree murder, since our law provides for the possibility of a reduction of the 25-year parole ineligibility period after 15 years have been served.⁵⁸ Proulx J.A. cites the Green Paper on sentencing released by the Government of Canada in 1990 in which it was stated that there was a consensus among Canadians that the purposes and principles of sentencing must include a requirement of proportionality and take account of the particular circumstances of the offence.⁵⁹ Michigan law does not accord with this Canadian view. As such, Proulx J.A. concluded:

Quand il apparaît que la loi fait fi complètement de tous les principes de base et qu'elle aboutit finalement à une situation qui devient un non-sens et que rejeterait toute personne raisonnablement informée, les tribunaux ont le devoir d'empêcher qu'un citoyen soit exposé à ce sort.⁶⁰

Thus, we can see from *Jamieson* that courts, inevitably, must inquire into the operation and merits of foreign law in order to determine whether surrender of a person to face trial and punishment in the requesting state would be shocking to Canadians. The majority in *Kindler* and *Ng* refrained from scrutinizing United States law and, instead, established the "worst sort of crime" standard. But that test, even if appropriate for death penalty cases, obviously cannot have

⁵⁷*Smith, supra*, note 23, striking down the seven-year minimum sentence in the *Narcotic Control Act*, R.S.C. 1985, c. N-1, s. 5(2) for importing narcotics.

⁵⁸*Criminal Code*, R.S.C. 1985, c. C-46, s. 745.

⁵⁹Canada, *A Framework for Sentencing, Corrections and Conditional Release — Directions for Reform* (Ottawa: Supply and Services, 1990) at 12, 16, 29.

⁶⁰*Supra*, note 54 at 571.

application to other kinds of punishments. It is clear from *Jamieson* that a determination whether a surrender order comports with the *Charter* requires that some scrutiny be given to the foreign law applicable to the trial and punishment of the person to be surrendered. The Quebec Court of Appeal appeared untroubled by the potential extraterritorial effect of its approach. At the same time, the majority was willing to give ample deference to the Michigan legislature:

We know nothing of the seriousness of the drug problem in the state of Michigan which may have prompted the Legislature of that state to adopt severe minimum penalties for those convicted of trafficking in certain drugs.⁶¹

Conclusion

The Supreme Court in *Ng* and *Kindler* has grappled with the difficult issue of determining the appropriate scope of *Charter* review of a Minister's decision to surrender wanted persons to requesting states. The majority preserves the principle that the executive is accountable under the *Charter* for its decisions, but makes clear that judicial intervention in surrender decisions is likely to be rare. Still, even though the scope of review recognized by the Court is narrow, there is certainly much room for future challenges to surrender decisions, whether in death penalty cases or cases dealing with other forms of treatment or punishment. This opportunity is provided by two sources of uncertainty in the majority judgments. The first is the overall test for setting aside the Minister's decision to surrender. Whatever surrender will be "simply unacceptable" or "shocking" can only be determined by the circumstances of each case. The second source of uncertainty lies in the "worst sort of crime" test for death penalty cases. Those wanted for conduct less repugnant than *Kindler's* and *Ng's* will be better placed to challenge surrender orders made without death penalty assurances. In these cases, and in cases where the person sought will not face the death penalty, review of the foreign law governing the person's treatment or return seems to be inevitable. Thus, while the majority clearly sought to constrain judicial review of the Minister's decision on *Charter* grounds, its standards foreclose it only in the rarest cases. The likes of *Kindler* and *Ng* need not apply, but other candidates will no doubt receive consideration.

⁶¹*Ibid.* at 567.