Extradition, Deportation and Section 7 of the Charter

Introduction

Individuals in Canada are protected from being forcibly sent to foreign countries whose legal systems may take their lives. Canadian courts have suggested that extraditing an individual from Canada to a place where that individual may receive the death penalty, for example, violates section 7 of the *Charter*. Section 7 guarantees that everyone has the right to life, liberty, or security of the person. Those rights can only be infringed if the government adheres to "the principles of fundamental justice." Thus, the question in extradition cases where an individual faces either danger to their lives or severe punishment if extradited, is whether sending an individual to face either violates the principles of fundamental justice. When the potential danger or punishment does violate those principles, the Government of Canada cannot extradite or deport them without assurances that their life or security would not be unduly threatened.

The Standard

The test for whether or not an extradition from Canada is valid under section 7 of the *Charter* is found in the Supreme Court of Canada's (S.C.C.) judgment in *Canada v. Schmidt*.[1] The test in *Schmidt* looks at the potential danger or punishment an individual faces if extradited. If the nature of criminal procedures or punishments resulting from a prosecution in a foreign country "shocks the conscience," it will violate the principles of fundamental justice.[2] Stated another way, is the surrender of an individual to another country "a compelling [situation]"[3] which "offends against the basic demands of justice"?[4] The Supreme Court in*Schmidt* applied this test to two hypothetical situations. The Court stated that extraditing one to face torture surely shocks the conscience.[5] However, forcing an accused person to face the consequences of a legal system that does not adhere to the presumption of innocence does not shock the conscience.[6]

The Court in *Schmidt*, however left it unclear as to how to apply a standard to a situation that "shocks the conscience." Does one look at the conscience of an objective, "reasonable man" or the conscience of the judge? Subsequent cases have suggested neither of these standards applies. Instead, courts have presumed that judges ought to ascertain whether or not an extradition "shocks the conscience of the Canadian people."[7] The "shocks the conscience" test looks at whether or not a danger or punishment would shock the collective conscience of

ordinary Canadians.

The Court in *Schmidt* noted that section 7 protections will not be applicable where a foreign legal systems was "substantially different" than Canada's.[8] Foreign legal systems are not required to conform to a Canadian standard of justice.

The Death Penalty

The view in *Schmidt* that Canadian courts should be deferential to the values of foreign legal systems has been relaxed over the years. This change is apparent in extradition cases where the possible penalty in a foreign jurisdiction is capital punishment (a death sentence). In 1991, the S.C.C. decided that it did not violate an individual's section 7 right to extradite him to face capital punishment. Ten years later, in 2001, the Supreme Court all but reversed that decision. Extraditing individuals to possibly face the death penalty was a violation of their section 7 *Charter* rights to life, liberty, and security of the person. What had noted shock the conscience 10 years earlier, now did.

Kindler

In the 1991 case *Kindler v. Canada*,[9] the S.C.C, considered whether Canada could extradite John Kindler to the United States, where he faced the death penalty.[10] The majority ruled that Canada could extradite him. It held that extraditing an individual that might face the death penalty does not violate section 7 of the*Charter*. First, to determine whether or not extraditing individuals to face capital punishment violated section 7, the Court looked at the social goals of the decision to extradite. The Court stated that deterring fugitives from fleeing to a perceived safe haven in Canada was a compelling social goal. Second, the Court looked at the acceptance of capital punishment in the international community. It found that even though there are some trends towards abolishing capital punishment, only one regional international agreement prohibits the death penalty.[11] Therefore, capital punishment does not violate any widely held international norms. Finally, the Court ruled that extraditing individuals without assurances that the death penalty would not be sought by a foreign entity did not shock the conscience of the Canadian people.

United States v. Burns

In *United States v. Burns*,[12] the S.C.C. reversed its decision in *Kindler*. Extraditing individuals to a jurisdiction where they may face the death penalty was ruled a breach of the principles of fundamental justice found in section 7 of the *Charter*.

***United States v. Burns* Facts**

The facts of *Burns* are straightforward. Glen Sebastian Burns and Atif Ahmad Rafay were two Canadian citizens accused of murdering Rafay's family in the United States. A decision was made to extradite them to the United States after they allegedly confessed their crimes to undercover police officers in Canada. Prosecutors in the United States made it clear that they would seek the death penalty for Burns and Rafay. In deciding whether to extradite them, the Minister of Justice chose not to exercise section 6 of the extradition treaty between the United States and Canada. Section 6 of that treaty allows Canada to refuse to extradite an individual unless the United States gives assurances that if convicted, an individual will not be given the death penalty.[13] Burns and Rafay argued that despite the ruling in *Kindler*, the principles of fundamental justice enshrined in section 7 of the*Charter*protected them from **"**the potential consequences of the act of extradition," namely the death penalty.**[14]**

***United States v. Burns* Decision**

The S.C.C.was unanimous in its decision. In determining that extraditing an individual to face the death penalty violated the principles of fundamental justice, the Court looked at a number of considerations. Less importance was put on the social goals of the extradition that *Kindler* looked at, and more importance on the possible detrimental effects and international trends of capital punishment.

First, the S.C.C. placed enormous weight on the argument that the finality of capital punishment carries the possibility that a miscarriage of justice may occur. "The unique feature of capital punishment is that it puts beyond recall the possibility of correction."[15] The Court noted the Canadian cases of Donald Marshall, David Milgaard, and Guy Morin as instances of wrongful convictions that, had they been subject to the death penalty, would have resulted in an irreversible injustice.[16] All three would have been executed well before the evidence that proved that they were innocent was brought to the attention of any court. The possibility of such an injustice alone violated the principles of fundamental justice.[17] Marshall, Milgaard and Morin had all been convicted of crimes carrying life sentences, and had later been proven to be innocent. In other countries they would have been subject to death sentences which would have been carried out well before they were later able to prove their innocence.

Second, the S.C.C.examined the use of capital punishment in Canadian law. The Court found that over 40 years of rejecting the use of the death penalty had solidified as a Canadian social value. "[T]he fact that successive governments and Parliaments over a period of almost 40 years have refused to inflict the death penalty reflects, we believe, a fundamental Canadian principle about the appropriate limits of the criminal justice system."[18] This statement by the Court is controversial for 2 reasons. First, it virtually assures that capital punishment, if

ever reinstated as a punishment by Parliament, will be found to be unconstitutional. To critics, the decision is more political than legal in nature.[19] The other controversial aspect of that statement is how boldly the Court pronounces a legislative status quo, one that has rejected capital punishment for 40 years, as being a "Canadian principle." Critics of the judiciary argue that similar laws that were the status quo for decades, such as bans on abortion or same-sex marriage, were not treated as a "Canadian principle" before the judiciary struck them down.[20] Further, surveys still show a divided Canadian public when it comes to support of the death penalty. Despite the unavailability of the death penalty for the past 40 years, polls show that 4 in 10 Canadians support capital punishment.[21] The Court's pronouncement that rejecting capital punishment is a "Canadian principle" is thus very contentious.

Finally, the S.C.C.noted that there was an international trend that rejected capital punishment. Although the Court did not cite any international agreements on the matter, it did note a number of international and domestic resolutions calling on the world community to reject the death penalty.[22] It also noted that since*Kindler* was decided, more countries have abolished the penalty.[23] But like surveys on capital punishment in Canada show, the statistics on international trends are not clearly in favour of any particular position. As of 1998, 102 countries were "abolishionist."[24] In other words, these countries rejected the death penalty in law or by practice. However, 90 countries still carried out the death penalty.[25] Despite this, the Court stated that this international trend of abolition "corroborates the principles of fundamental justice that led to the rejection of the death penalty in Canada."[26]

***United States v. Burns* Conclusion**

In balancing the above factors, the Court decided that, taking all considerations together, the evidence supported the conclusion that extraditing Burns and Rafay to the United States without assurances they would not receive the death penalty violated the principles of fundamental justice enshrined in section 7 of the*Charter of Rights*.[27]

Severe prison sentences

Section 7 of the *Charter* may also protect against extraditing one to face severe punishments. The standard is the same as *Schmidt*; a punishment must "shock the conscience." Courts have shown more deferential to executive discretion in these instances than with capital punishment. In 1996, the S.C.C.heard three similar cases. Each individual facing extradition would, if convicted, face a mandatory sentence of at least 15 years for either possessing or trafficking drugs in the United States.[28] The Court, without giving reasons, allowed the government to extradite the individuals. Constitutional law scholar Peter Hogg has pointed out

the unusualness of these decisions. Hogg notes that in *R. v. Smith*, the Court ruled that a mandatory 7-year sentence for similar drug offences constituted "cruel and unusual punishment," thus violating section 12 of the *Charter*.[29] *Smith* thus seems at odds with the 1996 cases. "This means that long mandatory minimum sentences for drug offences are cruel and unusual, but not shocking or unacceptable!" [30] To Hogg, this paradox underscores the wide discretion the Court exercises in interpreting the *Charter*.[31] As recently as 2008, the Supreme Court affirmed their 1996 approach to extraditing individuals who face severe sentences abroad.[32] Foreign sentences that differ widely from Canadian ones for similar crimes do not sufficiently "shock the conscience." If one commits a crime in another country, one must expect to receive a jail sentence that country deems fit. Canada's standards of punishment do not apply.

Homosexuality

In *Bowen v. Canada*,[33] the Federal Court of Canada considered whether or not section 7 of the *Charter*protects an individual from being deported to a jurisdiction that persecutes homosexuality. Kisha Bowen, who was a citizen of Grenada, claimed to be disowned by her family, the subject of insults by others, and held to ridicule because she was involved in a homosexual relationship in Grenada. Bowen fled to Canada, telling the border agent she was on vacation when she entered Canada. Bowen had lived and worked illegally in Canada for 3 years before the Immigration and Refugee Board held that she could not stay in Canada under refugee status.[34] Bowen claimed that she would be in danger if she was forcibly returned to Grenada.[35] She argued that such danger would force her to be clandestine about her sexual orientation, and violate her section 7 *Charter* rights to life, liberty, and security of the person.[36]

Although the Federal Court disagreed with Bowen's claims, and directed that she be deported, it did leave the door open for other individuals who wish to seek *Charter* protections for their sexual orientation. In Bowen's case, the Court found that there was not enough evidence that her life would be at risk if she returned to Grenada. The Court was satisfied that homosexuality was not socially acceptable there. Homosexual practices were even against the law. However, other evidence before the court suggested that one's sexuality did not limit one's societal success. Many openly gay business people enjoyed success in Grenada. Also, the Court found no evidence that laws prohibiting homosexuality were enforced. Thus, the "dangers" Bowen argued she would face in Grenada amounted to mere speculation.[37] "Speculation as to what [Bowen's] life would be like in Grenada is insufficient to establish a factual foundation to a proper section 7 Charter analysis."[38]

The Court's analysis suggests that sexual orientation *may* be a ground for Charter protection *if* one can factually establish that it may threaten one's life, liberty, or security in a foreign jurisdiction. Because Bowen failed to adduce enough factual evidence to establish that she would be in danger in Grenada, Bowen was not eligible to receive protection under section 7 of the *Charter*. Bowen's request to have her deportation stayed was therefore denied.

Conclusion

Canadians, or other individuals living in Canada, can be extradited to other countries where they are alleged to have committed crimes. The Canadian government has a legal obligation to ensure that the sentence upon conviction does not include capital punishment when deporting individuals. The excuse that the punishment does not fit the crime does not hold, as deported individuals can expect to face a sentence that reflects the government of the country seeking an extradition deems fit. When protesting deportation in noncriminal situations individuals must prove that their lives would be unnecessarily put at risk, it is not enough to protest that they would be put into a situation they would find unpleasant.

Further Reading

Robert J. Currie, "*Charter without Borders? The Supreme Court of Canada, Transnational Crime and Constitutional Rights and Freedoms*" (Spring 2004) 27 Dalhousie L.J. 235.

Lloyd Duhaime, *"Extradition from Canada"* Duhaime Law (June 11, 2007).

Peter Hogg, *Constitutional Law of Canada: Student Edition 2004* (Toronto: Thomson Canada Ltd., 2004).

James W. O'Reilly, "*Ng and Kindler*", Case Comment, (1992) 37 McGill L.J. 873.

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[1]*Canada v. Schmidt*, [1987] 1 S.C.R. 500.
[2] *Ibid*., at para. 47.
[3] *Ibid*. at para. 56.
[4] *Ibid*. at para. 49.
[5] *Ibid*. at para. 47. The Court quoted a decision of the European Commission on Human Rights, *Altun v. Germany* (1983) 5 E.H.R.R. 611.
[6] *Ibid*. at para. 48.
[7] See *Kindler*, *infra* note 9.

[8] *Ibid*. at para. 48.
[9] [1991] 2 S.C.R. 779 .
[10] See also *Reference Re Ng Extradition (Can.)*, [1991] 2 S.C.R. 858, which was heard alongside *Kindler*.
[11] *Protocol No. 6 to the European Convention for the Protection of Human Rights and Fundamental Freedoms Concerning the Abolition of the Death Penalty*, E.T.S. No. 114, Article 1.
[12] [2001] 1 S.C.R. 283 . See also *Suresh v. Canada*, [2002] 1 S.C.R. 3 for a similar decision regarding deportation, as opposed to extradition.
[13] *Extradition Treaty between Canada and the United States of America*, Can. T.S. 1976 No. 3.
[14] *Burns*, supra note 12 at para. 60.
[15] *Ibid*. at para. 1.
[16] *Ibid*. at paras. 1, 97-99.
[17] *Ibid*. at para. 104.
[18] *Ibid*. at para. 77.
[19] Rory Leishman, Against Judicial Activism: The Decline of Freedom and Democracy in Canada (Montreal: McGill-Queen's University Press, 2006) at 135-164.
[20] See F.L. Morton & R. Knoff, eds. *The Charter Revolution & the Court Party* (Peterborough, Ontario: Broadview Press, Ltd., 2000).
[21] Gallup Poll press release, "Death Penalty Gets Less Support from Britons, Canadians than Americans," February 20, 2006; Angus Reid press release, "Death Penalty Backed in Four Countries" Angus Reid Global Monitor (May 4, 2007).
[22] *Burns*, supra note 12 at paras. 85-89.
[23] *Ibid*. at paras. 90-92.
[24] *Ibid*. at para. 91.
[25] *Ibid*.
[26] *Ibid*. at para. 92.
[27] *Ibid*. at paras. 131-132.
[28] *United States v. Jamieson*, [1996] 1 S.C.R. 465. *United States v. Whitley*, [1996] 1 S.C.R. 467; *United States v. Ross*, [1996] 1 S.C.R. 469.
[29] *R. v. Smith (Edward Dewey)*, [1987] 1 S.C.R. 1045. Section 12 of the *Charter of Rights and Freedoms* states that "Everyone has the right not to be subjected to any cruel and unusual treatment or punishment."
[30] Peter W. Hogg, *Constitutional Law of Canada*, 4th Ed. (Toronto: Carswell, 1998) at 893-894.
[31] *Ibid*.
[32] *Lake v. Canada (Minister of Justice)*, 2008 SCC 23.
[33] *Bowen v. Canada (Citizenship and Immigration)*, 2008 FC 112.
[34] *Ibid*., at paras. 3-4.

[35] *Ibid*., at para. 10.
[36] *Ibid*., at para. 30.
[37] *Ibid*., at para. 34.
[38] *Ibid*.