Charter Without Borders? The Supreme Court of Canada, Transnational Crime and Constitutional Rights and Freedoms

Robert J. Currie
Dalhousie University

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The first decades of the Supreme Court of Canada’s Charter jurisprudence have coincided roughly with an increase in the extent to which Canada is affected by transnational crime and the nation’s consequential participation in inter-state efforts to combat it. The Court itself has remarked on its discrete “jurisprudence on matters involving Canada’s international co-operation in criminal investigations and prosecutions.” This article examines the Court’s adoption of a different approach to Charter analysis in cases involving transnational elements and surveys where the Court has “drawn the line” in terms of Charter application.

By way of analyzing jurisprudence on exclusion of evidence gathered abroad, extradition, deportation and mutual legal assistance, the author critiques the Supreme Court’s approach to Charter analysis in cases with a transnational criminal aspect. He argues that deference to the government in its perceived need for inter-state comity has led to less rigour in the Court’s application of domestic human rights standards to individuals who are facing extradition or who are being criminally investigated by and/or in another state. In conclusion, the author calls for a more robust approach to Charter application in such cases and argues that concern about extra-territorial application of the Charter does not necessarily justify a diminished level of human rights protection for individuals facing foreign process.

Les premières décennies de l’application, par la Cour suprême du Canada, des dispositions de la Charte ont coïncide avec une intensification des répercussions de la criminalité transnationale pour le Canada et, conséquemment, de sa participation à la lutte concertée des pays contre cette criminalité. La Cour même a d’ailleurs affirmé que «le fait d’établir une distinction... est compatible avec la jurisprudence de notre Cour en ce qui concerne la participation du Canada à des enquêtes et poursuites criminelles internationales». Cet article examine l’adoption par la Cour suprême d’une analyse distincte de la Charte qu’elle applique spécifiquement aux affaires où sont en cause des éléments transnationaux, et tente de déterminer où la Cour a tracé la ligne de démarcation pour ce qui est de l’application de la Charte.

Par le biais de son analyse de la jurisprudence sur l’exclusion d’éléments de preuve recueillis à l’étranger, sur l’extradition, sur l’expulsion et sur l’entraide juridique en matière criminelle, l’auteur critique l’approche adoptée par la Cour suprême face à la Charte dans les affaires où entre en jeu la criminalité transnationale. L’auteur avance que le fait de s’en remettre à l’État, à cause du besoin perçu de faire preuve de courtoisie envers d’autres États, a mené à un affaiblissement de la rigueur avec laquelle la Cour applique les normes nationales relatives aux droits de l’homme aux particuliers susceptibles d’extradition ou qui font l’objet d’enquêtes criminelles par un autre pays ou dans un autre pays. En conclusion, l’auteur réclame une approche plus musclée pour ce qui est de l’application de la Charte dans les affaires de ce type, et il allègue que les préoccupations quant à l’application de la Charte à l’étranger ne justifient pas nécessairement la réduction de la protection des droits de l’homme pour les particuliers qui risquent de faire face à des procédures étrangères.

* Faculty of Law, Dalhousie University. This paper is an updated and partially revised version of one presented at the Annual Conference of the Canadian Law and Society Association at Dalhousie University, Halifax, Nova Scotia, on June 4, 2003, and I am grateful for the thoughtful and intriguing feedback I received during and after that presentation. Special thanks are due to my colleagues Hugh Kindred, Jennifer Llewellyn and Constance Macintosh, and to Donald A. Macintosh, for their insights and assistance. I am particularly indebted to my colleague Steve Coughlan for generously donating time and energy to engaging me on various aspects of my analysis.
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Introduction

A society is defined by the manner in which the state treats the people over whom it exercises power. This is, perhaps, one of the philosophical concerns that motivated the birth and subsequent development of legal regimes protecting human rights, both in Canada and internationally. In the twenty-plus years since the advent of the *Canadian Charter of Rights and Freedoms*, the Supreme Court of Canada has engaged in a fascinating and visionary expansion of the individual rights constitutionalized by that document, producing a jurisprudence that has earned respect on an international scale. Every corner of our criminal law, in particular, has been infused with *Charter* values, as the Court and Parliament continue to develop the permissible balance between crime suppression and protec-

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tion of human rights. A vast jurisprudence (and a vast literature) is accessible for every part of criminal law enforcement, be it search warrants, suspect questioning or the inclusion or exclusion of evidence at trial.

A topic that has received less attention is the kind of limitation that the Court has placed on Charter rights where there is an international or transnational aspect to the matter being adjudicated. The first decades of Charter jurisprudence have roughly coincided with a significant expansion in Canada's co-operation in international (and specifically inter-state) efforts to combat both transnational and international crime. What makes this interesting is that the Court's perceptions of how Charter standards should be applied domestically, and how they should be applied when there is a transnational aspect to the matter, are different. The Court itself has remarked on the existence of a seemingly separate "jurisprudence on matters involving Canada's international co-operation in criminal investigations and prosecutions." I have suggested elsewhere that the nexus between individual rights and the international aspect of a criminal matter has been central to the Court's "re-jigging" of Charter application in such cases. My starting point is that litigants before Canadian courts who are facing extradition or criminal investigation by another state appear to come under a different, though Charter-based, regime wherein human rights can be subordinated to the larger interests of inter-state comity. This essay

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3. For present purposes, "transnational crime" denotes domestic crimes that involve, for some reason, another state; a simple example would be the murderer who flees from one country to another, or a drug trafficker who deals in one country but banks in another. See generally Louise I. Shelley, "Transnational Organized Crime: An Imminent Threat to the Nation-State?" (1995) 48 J. Int'l Aff. 463; Grenhard O.W. Mueller, "Transnational Crime: Definitions and Concepts," in Phil Williams & Dimitri Vlassis, eds., Combating Transnational Crime (London: Frank Cass, 2001). This term is used as distinct from "international crime," properly understood as dealing with acts for which individual criminal liability attaches at the international level, such as war crimes, crimes against humanity and genocide. These crimes may be subject to actual international penalty; the foregoing offences, for example, make up most of the list of crimes over which the International Criminal Court has jurisdiction. International crimes may also be prosecuted domestically by states under treaty regimes and/or customary international law principles of jurisdiction (e.g., torture, piracy), which gives rise to the potential for intersection between the two. For interesting background, see Neil Boister, "'Transnational Criminal Law?'" (2003) 14 E.J.I.L. 953. Also see generally Antonio Cassese, International Criminal Law (Oxford: Oxford University Press, 2003).


represents a first attempt to articulate what the Supreme Court of Canada has found to be different about such cases, and also a critical inquiry as to the propriety and limits to such “difference” as does exist.

At issue, then, is a fundamental decision to be made when a state administers its human rights law in a context that has international dimensions: how much protection do individuals merit when they are facing legal process (usually criminal), or extra-legal “treatment,” in another state? Does what is going, or likely, to happen to them in the other state matter? I will argue here that deference to the government in the face of obligations to other states, as well as inter-state comity generally, has led to less rigour in the Court’s application of our domestic human rights standards to individuals who are facing extradition or who are being criminally investigated by another state.

This is, I submit, an interesting time to make this inquiry, as the Supreme Court has recently taken the opportunity to answer a couple of the major questions which crop up. In United States v. Burns and Rafay, the Court faced the issue of whether Canada could, and constitutionally should, extradite people to face the death penalty in the requesting jurisdiction. In Suresh v. Canada (Minister of Citizenship and Immigration), a similar question: will Canada deport an individual to a state where they face torture? In each case, the answer from a unanimous Court was a troublingly qualified “no.” Similar questions are beginning to develop from the practice of providing mutual legal assistance in criminal matters, though the case law is much less developed. These three settings, in part because of the international aspects, entail an odd mixture of criminal law, criminal procedure, and administrative law.

What concerns me is this: where does the Charter end? To what extent should the Courts use the Charter to protect the human rights of people who have faced or are facing violation of those rights by another state? It may seem something of a tidy-desk question. However, how Canada answers these questions has serious implications, not just for the individuals shipped off to face certain or uncertain fates in other states but for our own human rights jurisprudence and, potentially, our commitments under international human rights conventions. Using the above-noted cases, inter alia, as touchstones, I will attempt to articulate exactly where it is that the Court draws the line, and the implications that the line has for matters where both human rights and inter-state criminal co-operation are engaged.

This essay will proceed in three sections. The first section will deal with the basics of Charter application in terms of to whom it applies and where. It will focus on the Supreme Court’s jurisprudence on the idea of extra-territorial application of the Charter as expressed in criminal cases concerning the admissibility of evidence taken abroad. The next section will focus on extradition and especially the Burns decision, critically examining the case law which led to it and the implications which flow from the current constitutional analysis being used by the Court. In terms of where the Court has drawn the line regarding Charter application I will argue that the Court’s reliance on section 7 of the Charter is misplaced, in particular where the possibility of gross human rights violations in the requesting state is an issue, and that section 12 is the more appropriate lens through which to scrutinize extradition (and, since Suresh, deportation). The third section will survey how the Charter is applied to mutual legal assistance law and practice, and posit some indication that Charter standards are being applied more loosely than would be the case domestically, though without a great deal of thoughtful consideration of the issue. Some justification for re-ordering the priority of relationship between human rights and international criminal co-operation will be offered thereafter.

I. The Application of the Charter

1. Personal Application

The most important sections for present purposes are 7, 8, 9 and 12, all of which begin “everyone has the right.” These sections clearly have a wider application than some of the others, for example sections 3, 6 and 23, which apply to “citizens of Canada.” In Singh v. Minister of Employment and Immigration, Wilson J. interpreted “everyone” as including everyone who entered Canada, even those who entered illegally. This broad interpretation was supported in Suresh, where the Court confirmed what appeared to be a Crown concession that “everyone” included refugees who were subject to deportation.

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8. Section 7 protects life, liberty and security of person and the right not to be deprived thereof "except in accordance with the principles of fundamental justice"; Section 8 protects against unreasonable search or seizure; Section 9 protects against arbitrary detention or imprisonment; and Section 12 protects against any cruel and unusual treatment or punishment.

9. And, in the case of Section 23, is even further narrowed to apply to certain citizens based on their linguistic status.


11. Suresh, supra note 7 at para. 44, though this was not much of a concession given Federal Court jurisprudence relating to the application of section 7 in deportation cases — as well as the Supreme Court of Canada’s own approach to the application of section 7. In this regard, see Dehghani v. Canada (M.E.I.), [1993] 1 S.C.R. 1053 at 1075. I am grateful to Donald Macintosh for this insight.
It may be sufficient to note that the above-noted Charter rights apply to at least every corporeal human being who faces some interaction with the state and its agencies. Indeed, as set out in the Cook case (discussed below), this interaction need not even occur on Canadian soil.

2. Territorial Application
Section 32 of the Charter states that it applies to "the Parliament and government of Canada" (including the Territories) and "the legislature and government of each province." For the most part, the Charter has been utilized to test the actions of governmental bodies on Canadian soil. The general principle at international law is that states may not exercise jurisdiction (particularly criminal jurisdiction) outside their own borders. The Court has been willing to apply the Charter to domestic processes that engage international issues; for example, in Schmidt, La Forest J. stated: "There can be no doubt that the actions undertaken by the Government of Canada in extradition as in other matters are subject to scrutiny under the Charter (s. 32)." However, it has shown great distaste for the prospect of extra-territorial application, and has generally relied upon international law principles regarding jurisdiction to buttress a territorial interpretation of section 32.

Perhaps unsurprisingly, what judicial debate has taken place about potential extraterritorial application of the Charter has been in cases where either extradition (dealt with below) or transnational crime was involved. R. v. Harrer dealt with the latter category of case. The appellant had been questioned in Michigan by U.S. officials and gave statements implicating herself in criminal conduct in Canada. At trial in Canada, she sought to have these statements excluded on the basis that she had not received a right-to-counsel warning in accordance with Charter standards. In his majority reasons dismissing the appeal, Justice La Forest concluded that the Charter did not apply to the interrogations "because the governments mentioned in s. 32(1) were not implicated in these activities." To apply

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12. I.e., excluding corporations, insofar as some of the Charter rights are not amenable to application to these "legal persons"; see the discussion of this point in Peter W. Hogg, Constitutional Law of Canada, 4th ed., looseleaf (Toronto: Thomson, 1997) at 34-1 to 34-7.
15. Supra note 4 at 518.
the Charter to foreign state agents acting within their own country "would truly be giving the Charter impermissible extraterritorial application. ... [I]t is obvious that Canada cannot impose its procedural requirements in proceedings undertaken by other states in their own territories."18

Justice La Forest did, however, leave the door open to what one might call "permissible" extraterritorial application of the Charter, stating that different issues would arise if (1) it had been Canadian police questioning Harrer, or (2) if the American authorities had been acting as agents of the Canadian police.19 It was not clear at the time what either of these meant, and the second door, at least, appeared to be closing the following year in R. v. Terry: a case where the appellant fled to California after allegedly committing a murder in British Columbia. He was questioned by (and gave a statement to) U.S. police acting on a request from Canadian police, and was advised of his right to counsel in accordance with U.S. procedure, which did not conform to Canadian standards. Refusing to exclude the statement on this basis, McLachlin J. for the Court referred to "the exclusivity of the foreign state's sovereignty within its territory, where its law alone governs the process of enforcement."20 She confirmed the Court's refusal to apply Charter standards to foreign police even if they were co-operating with Canadian authorities, stating specifically that "any cooperative investigation involving law enforcement agencies of Canada and the United States will be governed by the laws of the jurisdiction in which the activity is undertaken."21

In R. v. Cook,22 however, Justice La Forest's speculation in Harrer about extra-territorial application of the Charter bore fruit. Cook fled to the U.S. after committing a murder in Canada. Detained by local authorities in Louisiana, he was questioned by two Canadian detectives who gave a defective right-to-counsel warning. At his trial in Canada, Cook sought to have the statement given to the Canadian detectives excluded. A majority of the Court held that Charter standards applied to the actions of the Canadian detectives while they were in the U.S. A two-part justification was posited: first, this was not an objectionable extra-territorial application of the Charter because the Canadian law was being applied to the detectives on the basis of their nationality, another well-known "[j]urisdictional competence under international law."23 As arms of the Canadian state, they

18. Ibid. at paras. 10, 15.
19. Ibid. at para. 11.
20. Terry, supra note 16 at para. 19.
21. Ibid.
22. Supra note 13.
23. Ibid., para. 41.
were inherently amenable to *Charter* jurisdiction — irrespective, apparently, of their geographical location. Second, applying the *Charter* to this interrogation, even though it occurred on U.S. territory, did not interfere with American sovereignty since it was directed at the activities of Canadian officers acting within the context of a Canadian investigation, aimed at the ultimate result of a criminal trial in Canada. For a domestic court to apply the *Charter* at the subsequent trial did not engage American sovereign rights in any way, and thus applying the *Charter* extra-territorially was permissible in such "rare circumstances" as this case demonstrated.

The rather original application of the nationality principle of jurisdiction in *Cook* notwithstanding, this line of cases demonstrates what I submit is a well-placed exercise in line-drawing by the Court. The idea of applying *Charter* standards to foreign authorities is largely unworkable, since those authorities can only operate according to the laws of their own state. Their practices will, one would think, inevitably conflict with some aspects of what the Canadian courts have deemed to be constitutionally acceptable practice, even in a state with similar individual rights standards such as the U.S. Canadian courts are ill-suited to adjudicating upon foreign legal process, and any insistence on so doing would have the potential to create political problems best left to resolution by the federal government under its foreign relations jurisdiction. This is why there is a presumption against this practice in our domestic law and at international law. Even if the Court was stretching in *Cook* to find that the *Charter* application was not impermissibly extra-territorial in effect, it did so modestly in that our courts did not have to adjudicate upon foreign legal process, nor upon the acts of foreign officials, in making their findings.

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24 *Ibid.* at paras. 41-47; for what appears to be the *ratio decidendi*, see para. 48, and also para. 53.
26 "Original" in that this basis of jurisdiction usually relates to the nationality of the *offender*, as opposed to a law enforcement officer; and that "[c]ommon law countries... have been reticent in their use of this principle" (Kindred *et al.*, supra note 14 at 517).
27 As well as the Court's decision in *Schreiber v Canada (A.G.),* [1998] 1 S.C.R. 841 [Schreiber], discussed below at 286-88, see also Currie, "Schreiber Case Comment", *supra* note 5.
28 Professor Morgan pithily describes *Harrer* as follows. "Taking as a starting point the notion that *Charter* rights pertain to the time of arrest or detention rather than to the time of trial at which the evidence is admitted, Justice La Forest led the majority of the Court on a journey to see how far into the international arena—how far toward a foreign arrest and interrogation—the Canadian constitution could travel. As it turned out, the *Charter* did not travel well at all, and was yanked back home by a special *Dolphin Delivery* almost as soon as it threatened to take flight" (Ed Morgan, "In the Penal Colony: Internationalism and the Canadian Constitution" (1999) 49 U.T.L.J. 447 at 462).
29 *R. v. Spencer,* [1985] 2 S.C.R. 278; *Schmidt, supra note 4.* *Harrer, supra note 16* at para. 16. See also *Terry,* *supra* note 16 at para. 16: "This Court has repeatedly affirmed the territorial limitations imposed on Canadian law by the principles of state sovereignty and international comity."
Applying Canadian law to the conduct of Canadian police officers at a Canadian trial is not particularly offensive.\textsuperscript{30}

This is particularly the case with the arrest and detention rights under section 10 of the Charter; it may be noteworthy that 
\textit{Harrer, Terry} and \textit{Cook} were all about allegedly defective right-to-counsel cautions. As the Court has pointed out, when a person leaves Canada they leave behind Canadian procedural protections and must submit to the law of the state to which they have gone.\textsuperscript{31} The \textit{locus} of their interaction with the authorities of the foreign state is not within the purview of our courts. If the acts of the foreign authorities are so egregious as to make the resulting trial in Canada unfair, then the accused can apply to have the evidence excluded under sections 7, 11(d)\textsuperscript{32} and 24(2)\textsuperscript{33} of the \textit{Charter}.\textsuperscript{34} Whether the conduct of foreign authorities is in conformity with Canadian standards, or even their own domestic standards, are factors that the courts can consider in deciding whether to exclude.\textsuperscript{35}

The ultimate goal, as Justice La Forest stated in \textit{Harrer}, is “a just accommodation between the interests of the individual and those of the state in providing a fair and workable system of justice.”\textsuperscript{36} In this respect, the Court’s concern about not adjudicating upon the legal processes of other states makes sense. However, all of these cases involved people who ended up in Canada and faced Canadian legal process; \textit{Charter} fair trial protection was ultimately available to them \textit{ex post facto} even without the benefit of its procedural protections \textit{ex ante}. To put it simply, we know what’s going to happen to them here. We know specifically that they will

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\item[30.] Still open is the question of whether the \textit{Charter} might be applied to foreign police if they were acting as “agents” of Canadian police. The Court discussed this in \textit{Harrer, Terry} and \textit{Cook} but has shown what is likely prudent reluctance to say much about it. For a discussion, see Currie, “\textit{Schreiber Case Comment}”, \textit{supra} note 5 at 211, n. 21
\item[31.] \textit{Schreiber}, \textit{supra} note 27 at paras. 23-24. Lamer J.; \textit{Terry}, \textit{supra} note 16 at para. 24; \textit{Harrer}, \textit{supra} note 16 at para. 50.
\item[32.] Affirming the accused’s presumption of innocence until proven guilty by an independent tribunal.
\item[33.] Providing for the exclusion of evidence when obtained in a manner that would bring the justice system into disrepute.
\item[34.] An interesting ruling on the related point of the admissibility of evidence obtained by the violation of human rights of persons other than the individual litigant was recently made in a refugee case, \textit{Lai v. Canada (Minister of Citizenship and Immigration)}, 2004 FC 179 at para. 24: “…evidence obtained by torture, or other means precluded by the International Convention against Torture and other Cruel, Inhuman and Degrading Treatment or Punishment, ought not to be relied upon by a panel considering a refugee application.”
\item[35.] \textit{Harrer}, \textit{supra} note 16 at paras. 13-18; \textit{Terry}, \textit{supra} note 16 at para. 25. Though I realize that this does lead to the question of the effectiveness of the \textit{Charter} regime regarding exclusion of evidence at trial, see Don Stuart, “Eight Plus Twenty-Four Two Equal Zero” (1998), 13 C.R. (5th) 50.
\item[36.] \textit{Harrer}, \textit{supra} note 16 at para. 14.
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not be executed upon conviction, or tortured, or imprisoned for thirty years for a minor drug possession offence. Where the presumption against scrutinizing foreign process becomes disturbing is where the person involved will face process or treatment in another state, and it is to those kinds of settings I will now turn.

II. Extradition and Deportation

Charter engagement with transnational criminal issues is perhaps at its highest pitch when the state physically detains individuals and sends them to another state, particularly where they may face legal process or extra-legal harm there. This has traditionally been done by way of extradition, on the basis of a treaty or other arrangement between Canada and other states. In recent years, the practice of deportation/refoulement of individuals has taken on some relation to Canadian transnational criminal law practice, particularly after the Supreme Court’s decision in R. v. Finta when the government began to deport alleged war criminals rather than extradite or prosecute them. The Charter has application to both processes, and the Supreme Court of Canada’s adoption of its analysis in Burns for the purpose of evaluating deportation in Suresh gives deportation particular significance here.

This section begins with brief overviews of extradition and deportation as mechanisms for the rendition of individuals. It then outlines the


39. Kindred et al., supra note 14 at 710, n. 15 and accompanying text.

manner in which the *Charter* has been applied in both settings, and specifically the ultimate decision of surrender/deportation made by the relevant government Minister. The *Charter* analysis used by the Supreme Court will be critiqued, and an alternative approach offered.

1. **Overview of Extradition**

Extradition is a form of inter-state cooperation, “an act, usually pursuant to treaty, under which the executive of one state, the requested state, surrenders a person within its territory to another state, the requesting state, in order to face criminal proceedings in the latter state.” It is a technique of ancient origin that has become a fundamental tool in enabling states to prosecute crimes over which they have jurisdiction, and represents a workable way to deal with impediments created by the primarily territorial basis of the criminal law in most national legal systems. While it is formally an executive act, most states provide some judicial participation in the process, and persons facing extradition are able to invoke human rights protection schemes in those states which have them.

A thorough review of Canadian extradition law and practice is far beyond the scope of this paper, particularly given that a new *Extradition Act* was brought in by the federal government in 1999. Thus, the vast bulk of the existing case law deals with extradition legislation that is no longer in existence. Suffice it to say for the moment that extradition has two primary phases: the judicial phase, where an “extradition judge” (of the Supreme Court or Queen’s Bench level) evaluates the materials

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42. See generally Gilbert, *ibid.* at 78-141, c. 4.


submitted by the foreign state and decides whether the individual should be committed for rendition to the requesting state; and the ministerial phase, where the Minister of Justice renders a discretionary decision on whether the person should ultimately be surrendered.45

Human rights issues, and in particular Charter application, are engaged at both of these stages. However, consideration of an individual’s ultimate fate at the hands of the requesting state occurs in the ministerial phase, in both the Minister’s decision and judicial review thereof. This is where the Court has drawn lines regarding the extent of Charter protection of these individuals vis-à-vis their potential fate in the requesting state, and it is on this phase that I intend to focus here.46

2. Overview of Deportation
Deportation is, in Canada, a creature of immigration and refugee law.47 A deportation order is the most compulsory form of “removal order”48 and provides for the physical removal of an individual from Canada where he/she is ruled to be “inadmissible” on the basis of various grounds outlined in the Immigration and Refugee Protection Act, such as security,49 serious criminality,50 or misrepresentation.51 If the Minister of Immigration and Citizenship receives a report indicating that an individual may be inadmis-

45. See the remarks of Watt J. in Germany v. Schreiber, [2004] O.J. No. 2310 (S.C.J.) (QL) at para. 7: "The extradition process includes two discrete phases: the judicial phase[,] the ministerial or executive phase[.] The judicial phase includes court proceedings whose objective it is to decide whether a factual and legal basis for extradition exists. In the end, and only if the judicial phase results in an order of committal, it will be for the Minister to say whether the fugitive will be surrendered."
46. For an excellent and critical examination of the judicial phase under the new legislation, and particularly evidentiary standards therein, see La Forest, “The Balance Between Liberty and Comity,” supra note 41. See also the reasons of Koenigsberg J. in United Mexican States v. Ortega, [2004] B.C.J. No. 402 (B.C.C.)(QL).
47. Which is governed in Canada by the Immigration and Refugee Protection Act, S.C. 2001, c. 27 (IRPA), most of which came into force on June 28, 2002. The proceedings in Suresh were held under the former Immigration Act, R.S.C. 1985, c. I-2, which IRPA repealed. IRPA contains some significant changes to the deportation processes, including adding some restrictiveness to appeals (see Andrew Z. Wlodyka, “Appeal Rights for Foreign Nationals, Permanent Residents and their Family Members Found Inadmissible on Grounds Concerning Security, Human Rights Violations, Organized Criminality, Other Criminality and Misrepresentation” (Paper presented to the Canadian Bar Association’s National Citizenship and Immigration Law Conference, 30 April 2004) [unpublished, on file with author]. For concordance between the old and new acts, see Frank N. Marrocco and Henry M. Goslett, The 2004 Annotated IRPA of Canada (Toronto: Thomson/Carswell, 2003). References herein are to IRPA.
48. The term also encompasses “exclusion orders” and “departure orders”; see generally Davies B.N. Bagambire, Canadian Immigration and Refugee Law (Aurora, Ont.: Canada Law Book, 1996), c. 7.
49. IRPA, supra note 47 at s. 34.
50. Ibid., s. 36.
51. Ibid., s. 40.
sible, the matter can be referred to the Immigration Division\(^5\) for a hearing to determine the matter. This decision is appealable to the Immigration Appeal Division,\(^6\) which is in turn subject to judicial review.\(^7\)

For the purpose of the present discussion, it will suffice to note that deportation applies to foreign nationals, including refugee claimants.\(^8\) Also noteworthy is section 115 of IRPA, which provides that refugees cannot be removed to a country "where they would be at risk of persecution for reasons of race, religion...or at risk of torture or cruel and unusual treatment or punishment,"\(^9\) unless they are inadmissible on grounds including serious criminality or security, \emph{inter alia}.\(^10\)

3. Charter Application at the Ministerial Phase of Extradition:

\emph{Schmidt} to \emph{Burns}

Extradition is a unique animal, a strange intersection of the outer boundaries of criminal law, criminal procedure, administrative law, international law and constitutionalized human rights.\(^11\) The Court's post-Charter jurisprudence on extradition\(^12\) displays a tension between Canada's need to fulfill its objectives in facilitating the sending of fugitives to face criminal justice in appropriate jurisdictions, and the protection of the rights of individuals while they are in Canada. While never questioning that the Charter does apply to extradition proceedings,\(^13\) the Court has repeatedly emphasized the vital need for Canada to be an active participant in crime

\begin{footnotes}
\item[5] \emph{Ibid.}, ss. 45-46.
\item[6] \emph{Ibid.}, Division 7.
\item[7] \emph{Ibid.}, Division 8.
\item[8] \emph{Ibid.}, Part 2.
\item[9] \emph{Ibid.}, s. 115(1).
\item[10] \emph{Ibid.}, s. 115(2).
\item[11] It has been described less charitably: [Extradition] is a procedure on the margins of the criminal justice system, enjoys few formally protected due process safeguards, and often concerns cases that challenge any claim to fairness at all. The requesting state needs only to produce, in documentary form, a \emph{prima facie} case. The process relies upon the "good faith of nations" to ensure that the fugitive is not in effect being hijacked with false evidence to face an unfair trial. The fugitive, whose probable guilt is assumed for the purposes of the process, has no right of confrontation, no right to challenge the facts or the witnesses brought against him (Dianne L. Martin, "Extradition, The Charter and Due Process: Is Procedural Fairness Enough?" (2002) 16 Sup. Ct. L. Rev. (2d) 161 at 166-67).
\item[12] Which was heavily dominated by Justice La Forest until his departure from the Court; see Robert Sze-Kwok Wai, "Justice Gérard La Forest and the Internationalist Turn in Canadian Jurisprudence," in Rebecca Johnson \emph{et al.}, \emph{Gérard V. La Forest at the Supreme Court of Canada 1985-1997} (Winnipeg: Canadian Legal History Project, 2000) at 471, particularly at 478-480. For this reason, I will refer to the "La Forest Court" when discussing the decisions from that time.
\item[13] \emph{Schmidt, supra} note 4 at 518.
\end{footnotes}
suppression on the international level. It has identified this need as being "pressing and substantial" in terms of the applicability of the *Oakes* test for the application of section 1 of the *Charter*. As La Forest J. wrote in *United States of America v. Cotoni*:

> The investigation, prosecution and suppression of crime for the protection of the citizen and the maintenance of peace and public order is an important goal of all organized societies. The pursuit of that goal cannot realistically be confined within national boundaries. That has long been the case, but it is increasingly evident today. ... The trafficking in drugs, with which we are here concerned, is an international enterprise and requires effective tools of international cooperation for its investigation, prosecution and suppression. Extradition is an important and well-established tool for effecting this cooperation.

Later in *Cotoni*, in the context of approving rendition under the *Extradition Act* as a justified violation of section 6 of the *Charter*, La Forest J. invoked favourably an earlier statement of the Ontario Court of Appeal which sought to validate applying the *Charter* differently in the extradition context:

> For well over one hundred years, extradition has been part of the fabric of our law. Though this does not exempt it from *Charter* scrutiny, nevertheless, as the Ontario Court of Appeal noted in *Rauca* ...: "the *Charter* was not enacted in a vacuum and the rights set out therein must be interpreted rationally having regard to the then existing laws and, in the instant case, to the position which Canada occupies in the world and the effective history of the multitude of extradition treaties it has had with other nations."

Another major point which drove the Court’s extradition discourse was that it necessarily involved executive function, and in particular that extradition was ultimately set within the federal government’s conduct of foreign affairs and contained a political component which had to be incorporated into the process. As Professor Anne La Forest has written, "[i]t has always been accepted that a significant objective of extradition is to ensure comity, reciprocity and respect [for the legal processes of other

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62. *Ibid*.
63. Protecting mobility rights of Canadian citizens.
Concomitant with this was reluctance on the part of the Court to be seen to be judging or evaluating foreign legal process. As noted in the discussion above, it was consistently held that the Charter was not to be applied so as to scrutinize the legal process to which the extradited individual would become subject, as this would give the Charter extraterritorial effect. Indeed, Justice La Forest on occasion displayed actual distaste for the idea:

The judicial process in a foreign country must not be subjected to finicky evaluations against the rules governing the legal process in this country. A judicial process is not, for example, fundamentally unjust — indeed it may in its practical workings be as just as ours — because it functions on the basis of an investigatory system without a presumption of innocence or, generally, because its procedural or evidentiary safeguards have none of the rigours of our system.

Any suggestion that the requesting state might have human rights standards which were in some respect deficient was to be treated very carefully, since such a suggestion was “offensive to notions of comity and amounts to a serious adverse reflection ... on foreign governments to whom Canada has a treaty obligation.” This view is consistent with what is termed the “rule of non-inquiry” in extradition matters: that courts will not inquire into the rule of law or level of human rights protection in the requesting state, such matters being “best left to executive determination.” The courts of the requesting state were to be “trust[ed] ... to give the fugitive a fair trial.”

At the same time, the Court has consistently spoken to the need for Charter rights to be protected within the extradition context. As Justice La Forest stated in Cotroni, extradition procedure is “tailored with an eye to the liberty of the individual.” Specifically, the Court must be engaged

66. La Forest, “The Balance Between Liberty and Comity,” supra note 41 at 140.
68. Schmidt, ibid. at 522-523.
71. Dugard & Van den Wyngaert, supra note 37 at 189.
72. Schmidt, supra note 4 at 524.
73. Cotroni, supra note 61 at 1500; Schmidt, ibid. at 515.
with the ultimate fate of the fugitive, and the appropriate lens was section 7 of the Charter, which:

... is concerned not only with the immediate consequences of an extradition order but also with "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."

While the legal process of the foreign state could not be Charter-tested, the Minister’s discretionary decision to surrender the individual was subject to scrutiny under section 7 — the goal being to ensure that surrender was, in all the circumstances, in accordance with "the principles of fundamental justice."

However, fundamental justice was different in this context, shaped as it was by "the concepts of reciprocity, comity and respect for differences in other jurisdictions." In the foundational 1987 decision of Schmidt, the Court stated that the Minister’s decision is to be given curial deference and the courts must be "extremely circumspect" in interfering with a surrender decision. For a surrender decision to be overturned, the conditions to be faced by the individual in the requesting state must be dire: "where the nature of the criminal procedures or penalties in a foreign country sufficiently shocks the conscience ..." Justice La Forest used as an example a European Commission on Human Rights case where it was found that the fugitive faced the possibility of torture upon rendition, but noted that the conscience might be shocked in "[s]ituations falling far short of this."

The Court expanded on the "shocks the conscience" test in an infamous pair of decisions released just a few years later, Kindler v. Canada (Minister of Justice) and Reference Re Ng Extradition. Both Kindler and Ng were accused of horrific crimes, and both faced the death penalty

74. Suresh, supra note 7 at para. 56, quoting Schmidt, ibid. at 522.
75. Kindler, supra note 4 at para. 160. As Professor Morgan comments in an article written before Burns, "...the post-Charter extradition cases display a reversal of roles from the primacy of constitutional rights to the submergence of those rights to the country's international obligations..." (Morgan, supra note 28 at 461).
76. Schmidt, supra note 4 at 523. However, the Court has recently noted that in this specific regard, "much less deference is due on the issue of whether the Minister properly considered the fugitive's constitutional rights ..." (United States v. Kwok, [2001] 1 S.C.R. 532 at 580) [Kwok].
77. Schmidt, ibid. at 522 [emphasis added]. See also United States v. Allard, supra note 67, a companion case to Schmidt and Mollino, where the language "simply unacceptable" was used (at 572).
79. Schmidt, supra note 4 at 522.
80. Supra note 4.
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in the U.S. upon surrender (in Pennsylvania and California respectively). In both cases, the Court refused to overturn the Minister’s surrender orders.

In *Kindler*, the leading judgment of the two, the Court expanded upon the use of the “shocks the conscience” test in assessing constitutionality of surrender under section 7, in a passage worth setting out fully:

> [T]he reviewing court must consider the offence for which the penalty may be prescribed, as well as the nature of the justice system in the requesting jurisdiction and the safeguards and guarantees it affords the fugitive. Other considerations such as comity and security within Canada may also be relevant to the decision to extradite and if so, on what conditions. At the end of the day, the question is whether the provision or action in question offends the Canadian sense of what is fair, right and just, bearing in mind the nature of the offence and the penalty, the foreign justice system and considerations of comity and security, and according due latitude to the Minister to balance the conflicting considerations.

In determining whether, bearing all these factors in mind, the extradition in question is “simply unacceptable”, the judge must avoid imposing his or her own subjective views on the matter, and seek rather to objectively assess the attitudes of Canadians on the issue of whether the fugitive is facing a situation which is shocking and fundamentally unacceptable to our society.82

A certain perplexity greeted these judgments, given that they emerged from a Court which just four years before (in *Schmidt*) had used the possibility of torture as an example of a violation of section 7 sufficient to overturn a surrender order, but was now refusing to do so with regard to the death sentence. Both decisions were roundly criticized in fairly strong language;83 one learned commentator referred to *Kindler*, in particular, as “a blemish on the Court.”84 Ng’s case, in fact, went to the United Nations Human Rights Committee, which ruled85 that in extraditing Ng to face execution by gas asphyxiation Canada had violated its obligations under article 7 of the *International Covenant on Civil and Political Rights*.86 The conscience

82. *Kindler* at paras. 176-77.
83. See e.g. James W. O’Reilly, “Case Comment: Ng and Kindler” (1992) 37 McGill L.J. 873.
86. 23 March 1976, 999 U.N.T.S. 171.
of many, it appeared, had been shocked.\textsuperscript{87}

The state of the law remained unchanged for a decade, when the Court abruptly reversed itself on the question of extraditing to face the death penalty.\textsuperscript{88} The 2001-2002 period was something of a “banner year” for Supreme Court of Canada and other appellate extradition cases, in that a number of decisions were released that relieved the pall cast by \textit{Kindler} and \textit{Ng}.\textsuperscript{89} The most noteworthy is \textit{Burns}, where the Court found that, absent exceptional circumstances (which it declined to define), extradition to face execution will always infringe section 7, and the Minister is constitutionally required to seek assurances from the requesting state that the death penalty will not be imposed prior to surrender.\textsuperscript{90}

Glen Burns and Atif Rafay were Canadian citizens who were accused of the murder of Rafay’s family in the state of Washington.\textsuperscript{91} Apprehended in British Columbia by an RCMP sting operation,\textsuperscript{92} they were committed for extradition to Washington by then-Justice Minister Allan Rock. While it was open to the Minister under the relevant extradition treaty to seek assurances from the U.S. government that the death penalty would not be imposed, he declined to do so.\textsuperscript{93} The Respondents challenged the Minister’s decision on the basis that sections 6, 7 and 12 of the \textit{Charter} prohibited the Minister from extradition without assurances in the circumstances.

The Court upheld the British Columbia Court of Appeal’s direction of

\textsuperscript{87} The Human Rights Committee recently made a similar decision in the case of Roger Judge, who was deported back to Pennsylvania’s death row in 1998 (\textit{Judge} v. \textit{Canada} (No. 829/1998), U.N. Doc. CCPR/C/78/D.829/1998, decision date August 13, 2003).

\textsuperscript{88} Though, as pointed out by Professor Haigh, the Court chose merely to distinguish \textit{Kindler} and \textit{Ng} on the basis of “changing conditions” affecting the section 7 evaluation, rather than overrule; see his interesting discussion in Richard Haigh, “A \textit{Kindler}, Gentler Supreme Court? The Case of \textit{Burns} and the Need for a Principled Approach to Overruling” (2001) 14 Sup. Ct. L. Rev. (2d) 139.

\textsuperscript{89} Aside from \textit{Burns} and \textit{Canada (Minister of Justice)} v. \textit{Pacificador} (2002), 60 O.R. (3d) 685 (C.A.) (leave to appeal dismissed, S.C.C. Bulletin, 2003, p. 286) [\textit{Pacificador}], dealt with below, see also Kwok, supra note 76; \textit{United States} v. \textit{Shulman}, [2001] 1 S.C.R. 616; \textit{United States v. Cobb}, [2001] 1 S.C.R. 587 [\textit{Cobb}]; \textit{United States v. Tsioubris}, [2001] 1 S.C.R. 613. \textit{Cobb} is perhaps the most noteworthy of these, the Court finding that the extradition judge had the jurisdiction to dismiss an extradition request for abuse of process, where U.S. authorities televised a threat to make Cobb “the boyfriend of a very bad man” if he continued to exercise his procedural rights under Canadian extradition law (para. 8).

\textsuperscript{90} At least, in those cases where, as here, the extradition treaty specifically provides for assurances; the Court specifically declined comment on cases where there was no such clause in the treaty (\textit{Burns}, supra note 6 at para. 139).

\textsuperscript{91} The specific allegation was that Rafay had engaged Burns as a “contract killer” to dispose of his family so that he could collect the proceeds of their estates and life insurance benefit; Burns was to receive a portion of the money.

\textsuperscript{92} Which apparently produced confessions from both (\textit{Burns}, supra note 6 at paras. 10-11).

\textsuperscript{93} Ibid., para. 19.
the Minister to seek assurances prior to surrendering Burns and Rafay. In so doing, it re-affirmed that such decisions were properly made under section 7, as “[t]he death penalty is overwhelmingly a justice issue” and thus the fundamental principles of justice were engaged. It rejected the applicability of section 6 mobility rights, which had formed the basis of the Court of Appeal’s decision, and also rejected the respondents’ argument that the section 12 prohibition against cruel and unusual treatment or punishment should prevent the surrender, an argument previously rejected by the La Forest Court in Kindler and Ng.

Specifically, the Court re-affirmed the applicability of its Kindler balancing test, in particular the “shocks the conscience” standard, which it stated was “intended to underline the very exceptional nature of circumstances that would constitutionally limit the Minister’s discretion in extradition cases.” It continued:

Use of the “shocks the conscience” terminology was intended to convey the exceptional weight of a factor such as the youth, insanity, mental retardation or pregnancy of a fugitive which, because of its paramount importance, may control the outcome of the Kindler balancing test on the facts of a particular case. The terminology should not be allowed to obscure the ultimate assessment that is required: namely whether or not the extradition is in accordance with the principles of fundamental justice. The rule is not that departures from fundamental justice are to be tolerated unless in a particular case it shocks the conscience. An extradition that violates the principles of fundamental justice will always shock the conscience. The important inquiry is to determine what constitutes the applicable principles of fundamental justice in the extradition context.

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

95. Burns, supra note 6 at para. 48.
96. See discussion of this below.
97. Burns, supra note 6 at para. 67.
98. Ibid. at paras. 68-69.
The Court expanded upon exactly how the punishment, in this case, did "overwhelm the analysis," and ultimately rested its decision on its finding that both domestic and international perception of the death penalty had changed since Kindler and Ng were decided. In particular, the Court appeared to find influential the increased profile of wrongful convictions in the Canadian and American justice systems. It also noted that many states now seek assurances in death penalty cases as a matter of course, and that assurances were routinely granted: "there is little indication that U.S. governments would ever refuse such guarantees."

A possible indication of what the heritage of Burns will be became apparent in the Ontario Court of Appeal's recent decision in Canada (Minister of Justice) v. Pacificador. Pacificador was a Philippine national who was caught on the wrong side of the divide during that country's revolution in 1980s, and was accused of various offences in the Philippines arising out of a political assassination in 1986. During the course of a ten-year extradition process, Pacificador submitted a considerable record of convincing evidence that he was facing what could only be described as a "kangaroo court" should he be extradited, including serious potential for indefinite pre-trial detention and denial of bail. The Minister, having sought and received assurances from the Philippine government that Pacificador would have a speedy trial upon his return, ordered his surrender.

In a fairly terse judgment setting aside the Minister's surrender order, the Court of Appeal stitched together a précis of how section 7 should be applied to surrender orders, utilizing passages from Schmidt, Kindler and Burns. Significantly, it was able to avail itself of a less deferential standard of review, relying on the Supreme Court of Canada's statements in Kwok that, unlike a truly prosecutorial decision by the Minister, "much less deference" is required for ministerial decisions concerning the violation of constitutional rights. It reviewed the evidence that Pacificador had led to the effect that some of his co-accuseds in the same matter had been imprisoned without bail since 1989, as well as a number of other matters. In particular, the Court was disturbed by the Minister's reliance upon assurances by the Philippine government that their courts would afford Pacificador due process upon his return, since these assurances were

99. Ibid. at para. 138.
100. Supra note 89.
101. The Court notes that the potential for extraditing Pacificador was what motivated the government of the Philippines to strike an extradition treaty with Canada in the first place (ibid., para. 7).
102 Ibid., paras. 44-46.
103. Supra note 76.
104 Pacificador, supra note 89 at para. 43.
demonstrably "unpersuasive and unreliable."\textsuperscript{105} In the end, the evidence established "[a]t the very least, ... a significant risk that the appellant will not be fairly treated upon his surrender."\textsuperscript{106} since there had already been "serious violations of the fundamental right to trial within a reasonable time and the fundamental right not to be held indefinitely in custody without bail."\textsuperscript{107} The Court concluded with a brief summary of the law as developed:

Ministerial decisions assessing the appropriate balance between the rights of the individual and the considerations favouring surrender are entitled to curial deference. Extradition is based upon principles of comity and mutual cooperation and respect between states. Extradition plays a vital role in the international community’s effort to fight crime and to ensure those accused of serious wrongdoing are brought to trial. On the other hand, these important values are subject to the rights guaranteed by the Charter. Where an individual establishes that he or she would face a situation that would be “simply unacceptable” or that would “shock the conscience”, a s. 7 claim has been established and a Ministerial surrender order must be set aside.\textsuperscript{108}

The order was set aside, and the Supreme Court of Canada refused leave to appeal shortly thereafter.\textsuperscript{109}

4. Charter Application to Deportation: Suresh

The Suresh case\textsuperscript{110} was released (along with three companion cases including Ahani\textsuperscript{111}) early in 2002, just months after the events of September 11, 2001, and found the Court delicately stepping around transnational crime issues in the wake of the political climate change wrought by that event.\textsuperscript{112}

\textsuperscript{105} Ibid. at para. 50, followed by the following: “This, combined with the fact that the cause of the unconscionable delay is the unexplained order of the Supreme Court of the Philippines, seriously undermines the respondent’s argument that the appellant should be surrendered on the faith the Minister expressed in the Philippines’ justice system.”

\textsuperscript{106} Ibid. at para. 53.

\textsuperscript{107} Ibid. at para. 54.

\textsuperscript{108} Ibid. at para. 55.


\textsuperscript{110} Supra note 7.


Suresh was a Convention refugee from Sri Lanka, who had initially supported his refugee status in Canada by claiming that he would face torture if sent back, specifically from the Liberation Tigers of Tamil Eelam (LTTE, the “Tamil Tigers”). As it turned out, the government was able to collect what the Court perceived to be fairly compelling evidence that he was, in fact, a member of the group, and was in Canada for the purpose of fundraising for it.

The Department of Immigration and Citizenship sought to deport Suresh as a terrorist fundraiser. He then adduced at least a prima facie case that he would be tortured by the Sri Lankan government if he was deported. While a number of important administrative law issues were raised by the case, it is worthy of review here because one of the most important issues the Court was facing was virtually the same as in Burns: could Canada deport a person to face torture in another country?

In terms of application of the Charter, the Court found that deportation is ultimately indistinguishable from extradition, and in fact simply inserted the Burns analysis into this context. This included the entire section 7 analysis as laid out in Schmidt, Kindler and Burns, since “the governing principle [is] a general one — namely, that the guarantee of fundamental justice applies even to deprivations of life, liberty or security effected by actors other than our government, if there is a sufficient causal connection between our government’s participation and the deprivation ultimately effected.”

Consistently with Burns, the Court concluded that a proper application of section 7 would preclude deportation to face torture “barring extraordinary circumstances.” Finding a strong presumption against torture in both domestic and international law, it ruled that “insofar as the Immigration Act leaves open the possibility of deportation to torture, the Minister should generally decline to deport refugees where on the evidence there is a substantial risk of torture.” The Court left open the possibility that

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114. Though the Court's discussion of this issue in Suresh could formally be characterized as obiter dicta, since a new hearing for Suresh was ordered on procedural grounds (Suresh, supra note 7 at para. 27).

115. Ibid., para. 54.

116. Ibid., para. 76.

117. Ibid., para. 77.
such deportation might be justified "in exceptional circumstances... either as a consequence of the balancing process mandated by s. 7 of the Charter or under s. 1."\(^{118}\)

5. To Close the Open Door

Clearly, Burns, Pacificador and Suresh bode well for the future. Burns demonstrates an enlightened approach to the death penalty, one commensurate with what I and others hope is the inexorable movement towards abolition, retentionist U.S. states notwithstanding.\(^{119}\) Suresh contained explicit condemnation of the practice of torture, emphasizing its illegality at international law and its inconsistency with Canadian principles of fundamental justice. Pacificador gave some indication of how effectively the new Kindler/Burns test can work in cases where human rights violations short of official execution are at play, insofar as the Court reviewed a fairly intense evidentiary record and properly found that the "shocking" facts of the case rendered the Minister’s decision to extradite unconstitutional.

Intriguingly, the latter case turned on the Court’s finding that ministerial reliance upon diplomatic communication from a treaty partner was an error, specifically because the assurances provided by the foreign government were themselves unreliable. This seems a bit out of step with the La Forest Court’s earlier, scrupulous avoidance of “finicky evaluations” of the foreign process\(^ {120}\) and its unwillingness to interfere with inter-state reliance and communications which, after all, are executive and political matters.\(^ {121}\) It would also seem to undermine the strength of a Crown submission the Court appeared to have considered favourably in Burns, that “[t]he Minister points out that Canada satisfies itself that certain minimum standards of criminal justice exist in the foreign state before it makes an extradition treaty in the first place.”\(^ {122}\)

In both Burns and Suresh, however, the Supreme Court displays what

118. Ibid., para. 78.
120. Per Schmidt, supra note 68 and accompanying text.
121. What is interesting as well is that the Court of Appeal refers to the rights to trial within a reasonable time and to protection against indefinite imprisonment without trial as “fundamental.” While this is certainly consistent with Canadian law and international human right standards generally, it does smack of the kind of evaluation of foreign legal process which the La Forest Court had spoken against.
122. Burns, supra note 6 at para. 73.
in my view is a disturbing reluctance to completely foreclose the rendition of individuals to face execution or torture. In Burns the Court was careful to state that "the Charter ... does not lay down a constitutional prohibition in all cases against extradition unless assurances are given that the death penalty will not be imposed."123 The more chilling passage, perhaps, occurs later in the Court's reasons:

[W]e do not foreclose the possibility that there may be situations where the Minister's objectives are so pressing, and where there is no other way to achieve those objectives other than through extradition without assurances, that a violation might be justified. In this case, we find no such justification.124

Similar language appeared in Suresh, the Court ruling that deportation to torture could on some limited facts be consistent with the principles of fundamental justice in the deportation context per section 7 of the Charter, or justified by the state as a reasonable limitation under section 1.125

In effect, the Court has said there can be circumstances in which rendition of an individual to face the death penalty or torture will be acceptable. While in these two cases rendition would have "shocked the conscience," and it would appear that this would usually be so, there will be situations where packing someone off to be killed or tortured will be acceptable — all of the Court's rather well-placed concern about wrongful convictions, international norms, Canadian constitutional principles and the "death row phenomenon"126 notwithstanding. It is this qualification that gives pause, this drawing of the line somewhere short of absolute protection. The Charter protects individuals, but only so far; at some point beyond our borders, imposition of the death penalty or torture may be "shocking" but nonetheless necessary.

It should be stated that despite the passage of new legislation, all of these concerns will continue to be relevant under the new Extradition Act.127 Notably, section 44 of the new Act reads as follows:

44. (1) The Minister shall refuse to make a surrender order if the Minister is satisfied that

123. Ibid., para. 8.
124. Ibid., para. 133.
125. Supra note 118 and accompanying text.
126. Burns, supra note 6 at paras. 118-123.
127. Supra note 43.
(a) the surrender would be unjust or oppressive having regard to all the relevant circumstances; or

(b) the request for extradition is made for the purpose of prosecuting or punishing the person by reason of their race, religion, nationality, ethnic origin, language, colour, political opinion, sex, sexual orientation, age, mental or physical disability or status or that the person’s position may be prejudiced for any of those reasons

(2) The Minister may refuse to make a surrender order if the Minister is satisfied that the conduct in respect of which the request for extradition is made is punishable by death under the laws that apply to the extradition partner.128

The Minister shall refuse to surrender on the basis of discrimination, but may refuse to surrender on the basis that the fugitive faces the death sentence — there is a certain dissonance to this dichotomy. Similarly, section 46 compels the Minister to refuse surrender, inter alia, if the offence in question is military or political. Admittedly, section 44(1)(a) leaves open the possibility of refusing surrender where it would be "unjust or oppressive" in all the circumstances, to which Burns and the "shocks the conscience" test would appear to apply. It has been suggested that this clause could be applied to situations involving the mental illness of the fugitive, "oppressive" mandatory minimum jail sentences or inhumane conditions in foreign jails; however, even the authors of these suggestions have modest expectations in this regard.129

Expectations should not be modest. The Charter protects individuals from inhumane treatment at the hands of Canada’s governments, and it should do no less for individuals whom Canada is considering extraditing or deporting. The Canadian government should not be a participant of any sort in a gross violation of human rights by another state, in particular to the extent of the rendition of an individual to face this sort of treatment abroad. The language, spirit and letter of the Charter demand this. The fact that it is not the Canadian government itself that will carry out the violation, which (as discussed below) the Supreme Court has found to be significant, is of no moment. By any sensible legal analysis, sending someone off to meet their doom in another country makes the sending state one of the authors of that doom.

128. Ibid., s. 44.
129. See Krivel et al., supra note 44 at 342-49.
It should be made clear that the concern here is not with every possible avenue of treatment that the extraditee/deportee might meet in the requesting state. “Gross human rights violations” as used here refers to the extreme forms of what section 12 of the Charter calls “cruel and unusual treatment or punishment.” The death sentence clearly qualifies, and some others can be identified by their status as, arguably, jus cogens prohibitions at international law: torture and other forms of cruel, inhuman and degrading treatment and punishment; slavery; and racial discrimination. There is some consensus that freedom from retroactive criminal laws qualifies, and imprisonment without trial would also seem so given the result in Pacificador.

The argument here is that, by employing section 7 of the Charter as the analytical focus, the Court has put in place a balancing exercise that gives undue weight to the state’s interest in international criminal co-operation, at the potential expense of fundamental human rights norms. As will be suggested, the Court’s reason for employing section 7 rather than section 12 where gross human rights violations are concerned is difficult to justify. A properly-framed section 12 analysis, applied where it is appropriate to do so, would be an effective adjunct to the current approach and prevent Canadian complicity in gross human rights violations.

6. Revisiting the Application of Section 7
The Supreme Court has recently re-stated its formula for determining the principles of fundamental justice under section 7, and while this re-statement occurred after Burns and Suresh it is still an informative lens for this discussion. In R. v. Malmo-Levine, the Court quoted its holding in Re B.C. Motor Vehicle Act that the principles of fundamental justice:

...lie in “the basic tenets of our legal system. They do not lie in the realm

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132. Brownlie, ibid. On this point, see s. 44 of the Extradition Act, supra note 43.
of general public policy but in the inherent domain of the judiciary as guardian of the justice system".... This Court provided further guidance as to what constitutes a principle of fundamental justice for the purposes of s. 7, in Rodriguez, supra, per Sopinka J. (at pp. 590-91 and 607):

A mere common law rule does not suffice to constitute a principle of fundamental justice, rather, as the term implies, principles upon which there is some consensus that they are vital or fundamental to our societal notion of justice are required. Principles of fundamental justice must not, however, be so broad as to be no more than vague generalizations about what our society considers to be ethical or moral. They must be capable of being identified with some precision and applied to situations in a manner which yields an understandable result. They must also, in my view, be legal principles.

... While the principles of fundamental justice are concerned with more than process, reference must be made to principles which are “fundamental” in the sense that they would have general acceptance among reasonable people.136

It then laid out the three criteria for acceptance as a “principle of fundamental justice,” which it subsequently re-stated in Canadian Foundation for Children, Youth and the Law v. Canada (Attorney General) as follows:

Jurisprudence on s. 7 has established that a “principle of fundamental justice” must fulfill three criteria:... First, it must be a legal principle. This serves two purposes. First, it provides meaningful content for the s. 7 guarantee”; second, it avoids the “adjudication of policy matters”.... Second, there must be sufficient consensus that the alleged principle is “vital or fundamental to our societal notion of justice”.... The principles of fundamental justice are the shared assumptions upon which our system of justice is grounded. They find their meaning in the cases and traditions that have long detailed the basic norms for how the state deals with its citizens. Society views them as essential to the administration of justice. Third, the alleged principle must be capable of being identified with precision and applied to situations in a manner that yields predictable results.138

136. Malmo-Levine, supra note 134 at para. 112 [emphasis in original].
138. Ibid. at para. 8, citations omitted.
To determine the content of the section 7 right in *Burns*, the Court reached into its previous extradition jurisprudence for some of the “basic tenets of the legal system” which constitute the fundamental principles of justice in the extradition setting, including: accused individuals should be brought to trial; justice is best served by a trial in the jurisdiction where the crime was committed; individuals who leave Canada leave behind Canadian law and procedure and are subject to those, including punishment, of the foreign state; “that extradition is based on the principles of comity and fairness to other cooperating states in rendering mutual assistance in bringing fugitives to justice… subject to the principle that the fugitive must … receive a fair trial in the requesting state…” Interestingly, these factors were presented as “Factors that Arguably Favour Extradition Without Assurances.” It then cited “Countervailing Factors that Arguably Favour Extradition Only with Assurances”, among them the abolition of the death penalty in Canada and in most other democracies, international practice regarding extradition with assurances, personal circumstances of the fugitive, and particularly national and international concerns regarding wrongful convictions.

These, said the Court, were the factors to be balanced, and given the high level of discretion which should be accorded the Minister, only a balance which produced a “shock to the conscience” would justify overturning a surrender order. This explicitly upheld the *Kindler* test and the idea that “the rights of the fugitive are to be considered in the context of other applicable principles of fundamental justice, which are normally of sufficient importance to uphold the extradition.” It is perhaps noteworthy how much in the way of very modern developments were found to be fundamental principles; that new developments were held to constitute shared assumptions, to be basic norms that attracted consensus that they are essential for the purposes of the second part of the Malmo-Levine/Canadian Foundation principles. This is remarkable in that it was upon these principles that the Court justified its shift from the way the balancing exercise was done in *Ng* and *Kindler*, which may reflect something of a sea change from the La Forest Court’s extradition jurisprudence.

Again, this is a positive development. However, it was this same balancing test that produced the results in *Ng* and *Kindler* to begin with. It is the “shocks the conscience” test, I submit, which is part of the problem. Recall the passages from *Kindler* set out above, wherein the Court noted

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139. *Burns*, supra note 6 at para. 72, citations omitted.
140. *Ibid.* at paras. 75-123.
that assessing such shock requires a consideration of "the Canadian sense of what is fair, right and just"; a 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." The Court tried to backtrack on this in *Burns*, noting that "the phrase 'shocks the conscience' and equivalent expressions are not to be taken out of context or equated to opinion polls."\(^1\)\(^4\)\(^2\) The suggestion remains, however, that something besides pure constitutional values must play a part in the matrix. This must be so, since punishment which clearly would be "shocking" if carried out domestically\(^1\)\(^4\)\(^3\) is not so shocking when carried out by a foreign country.

It all comes down to this: "[t]he important inquiry is to determine what constitutes the applicable principles of fundamental justice in the extradition context."\(^1\)\(^4\)\(^4\) The "shocks the conscience" standard, then, is tightly linked to the fundamental principles of justice as mandated by section 7 of the *Charter*, but just as clear is that these principles are not immutable (though death, I would note, is).\(^1\)\(^4\)\(^5\) The Court has been explicit that the fundamental principles of justice are distinct in the extradition context because of the competing considerations of international comity and respect for the legal systems of treaty partners. Our concerns about sending an individual off to be killed, or tortured, or indefinitely imprisoned without process, have to be balanced against our relations with other states and similar political considerations (including the very valid and important consideration of combating transnational crime). Similar balancing was at play in *Suresh*.

There is, I submit, too much balancing and too much use of context in section 7. Note that this, the *Kindler/Ng* "balancing approach" which al-

\(^{142}\) *Ibid.* at para. 67. Similarly, in *Suresh*, supra note 7, the Court stated that the phrase should be interpreted "[w]ithout resorting to opinion polls, which may vary with the mood of the moment" (para. 49).

\(^{143}\) Though the Court has never authoritatively pronounced on the constitutionality of the death sentence, and specifically refused to do so in *Burns* (para. 78). However, the balance of opinion suggests that it would violate section 12; see e.g. Hogg, *supra* note 12 at 50-12. See also the dissenting reasons of Cory J. in *Kindler*, supra note 4 at para. 94.

\(^{144}\) *Burns*, supra note 6 at para. 68.

\(^{145}\) For example, the Court justified the differences in result between *Kindler* and *Burns* by suggesting that concern with wrongful convictions was now so prominent that it, in part, dictated a different result in a death penalty case. Yet would not the same thing apply even if the death sentence was not on the table? Is not incarceration of the innocent just as repugnant as execution of the innocent? Would wrongful convictions play a part in a torture case? The topic did not come up in *Pacificador*. 
lowed extradition to face execution only ten years before, takes place within
the context of section 7 itself, rather than occurring as part of a section 1
justification.\footnote{146} Accordingly, if a particular punishment in a particular state
is not too out of step with the principles of fundamental justice (diluted as
they are by comity considerations), then Canada need not justify extradi-
tion as a reasonable limit on the right not to be deprived of life, liberty or
security of person — since there is no violation. More tellingly, as one
commentator has suggested:

Post-	extit{Burns}, the "shocks the conscience" test is turned on its head. It will
be relevant only if an extradition with assurances would shock the public
conscience, say, for example, if Osama bin Laden was discovered in
Canada, and the United States requested his extradition to stand trial for
the recent terrorist attacks in that country on September 11, 2001. The
refusal by the Minister of Justice in those circumstances to decline
extradition unless assurances that the death penalty would not be imposed
by the government of the United States, surely would shock the conscience
of the Canadian public.\footnote{147}

The problem lies in the Supreme Court's approach to section 7, which
has been one of balancing contextual factors. Several commentators over
the years have called for a return to the Court's initial approach to section
7, where the right was defined in terms of the individual interest being
protected rather than being balanced with state interests.\footnote{148} As Professor
Stuart has commented:

On this approach, the state objectives are only to be considered if there is
a violation and the state is attempting to demonstrably justify a reasonable
limit under s. 1. A balancing of interest at the first stage will considerably
dilute the protection of the 	extit{Charter} since the state will not have to bear
the heavy onus of justification under s. 1.\footnote{149}

\footnote{146} Bredt and Dodek refer to this as "the triumph of internal balancing over section 1 external
balancing": Christopher P. Bredt & Adam M. Dodek, "The Increasing Irrelevance of Section 1 of the

\footnote{147} Graeme G. Mitchell, "Developments in Constitutional Law: The 2000-2001 Term—The
McLachlin Era Begins" (2001) 15 Sup. Ct. L. Rev. (2d) 99 at 151-52. While the comment is rel-
evant, it will be clear in the present context that I endorse neither its validity nor its casting of the
"shocks the conscience" test.

\footnote{148} Morris Manning, "Lyons: A One-Stage Approach to the 	extit{Charter} and Undue "Constitutional
Notice"" (1987), 61 C.R. (3d) 72; Thomas J. Singleton, "The Principles of Fundamental Justice,

\footnote{149} Stuart, supra note 2 at 57.
While I would not necessarily argue that the current approach to section 7 should be thrown out in every legal context, the specific linking of the fate of the individual with other state-oriented contextual factors does "dilute the protection of the Charter" in this setting, and moreover deprives the Oakes test for section 1 justification of the violation of most of its content. This is demonstrated most clearly by the fact that in both Burns and Suresh the Court dealt with section 1 in an almost perfunctory manner. In Burns in particular (where the section 1 test was actually applied) it is difficult to distinguish the "balancing factors" the Minister offered under section 7 (most notably "principles of comity and fairness to other cooperating states in rendering mutual assistance") from the justificatory factors it offered under section 1 ("advancing mutual assistance in the fight against crime").

Suresh, too, saw the "fundamental principles of justice" re-balanced, this time against the danger the deportee represents to Canada, and "Canada's interest in combatting terrorism." The malevolent power of the section 7 analysis was demonstrated in Suresh, as it permitted the Court to instruct itself (and the lower courts) that the fundamental human right not to be subjected to torture — a *jus cogens* principle of international law — was to be subjected to a contextual approach and put through a wringer of "balancing factors."

This, then, is the most troubling aspect of the Burns analysis: it allows for contextual balancing at the "alleged violation" stage of Charter litigation, rather than the "justification" stage, where it properly belongs. By treating the possibility of torture as but one contextualized factor of many (most importantly international comity) which are subsumed under "fundamental principles of justice," the state formally has two opportunities to justify the gross violation of human rights which will follow deportation. It may argue that its decision to deport does not violate section 7 (in which case, this individual's right to fundamental justice will not be violated by deporting him/her), or there will be a violation of section 7 and the state will get a second opportunity at the section 1 stage. Moreover, since the significant part of the balancing is done under section 7, then section 1 will be something of an empty vessel.

The distribution of burden is also troubling. The party alleging a violation of section 7 bears the burden of satisfying the court to this effect on a balance of probabilities, a burden which must be made a great deal
more difficult for a potential deportee who is compelled to make a case that persuasively "balances" his/her own circumstances against the current state vision of security and the limits which must be placed on combating terrorism. We are left with the problematic nature of the way the section 7 balancing test is currently applied: "[t]he balancing test becomes both the means of establishing a constitutional standard applicable to all cases, and the means of assessing the circumstances in individual cases."\(^{154}\)

\textit{Suresh} also repeats the same qualification with which it ended its judgment in \textit{Burns}, that deportation to torture would be unconstitutional (i.e., that it would "shock the conscience") in all but "exceptional circumstances" which it confirms could be found in either the section 7 or section 1 analysis.\(^{155}\) At the time of writing there is still a vacuum regarding what such circumstances would look like, though the Court does speak in \textit{Suresh} to how different the "relevant circumstances" (i.e., those circumstances relevant to the Minister's deportation decision) are going to be in torture cases. For example, no state in the world admits that it tortures people, or at least that the torture is officially sanctioned or legal.\(^{156}\) As a result, the Court suggests that the government of Canada must be careful about following assurances that it gets from some states that a deportee will not be tortured, noting that such factors as the state's human rights record and evidence regarding whether and how well the government controls security forces which might commit torture will be relevant.\(^{157}\) This is encouragingly similar to remarks made by the Ontario Court of Appeal in \textit{Pacificador}, though as Professor Carver points out, the difference remains between relevant circumstances that shape the Minister's decision to extradite or deport and exceptional circumstances that might justify extradition or deportation despite the relevant circumstances.\(^{158}\)

7. \textit{A New Approach: Apply Section 12, Re-invigorate Section 1}

There is an alternative route of analysis, one which the Court dealt with in both \textit{Kindler} and \textit{Burns} but has consistently refused to apply: treat the potential circumstances being faced by the fugitive in the requesting state

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\(^{154}\) Carver, \textit{supra} note 113 at 481-82.

\(^{155}\) It seems ironic that this \textit{dictum} should emanate from a Supreme Court purporting to be toughening up the "shocks the conscience" standard as laid down by the La Forest Court in \textit{Kindler} and \textit{Ng}, given that it was rendition to face torture that Justice La Forest himself used as the best example of a situation which would "shock the conscience" (\textit{Schmidt, supra} note 4 at 522).

\(^{156}\) \textit{Suresh, supra} note 7 at para. 63, citing in particular the submissions of Amnesty International, which intervened in the case.

\(^{157}\) \textit{Ibid.} at paras. 124-125.

\(^{158}\) Carver, \textit{supra} note 113 at paras. 482-83.
as engaging the prohibition on cruel and unusual treatment or punishment in section 12 of the Charter. Writing for himself and Lamer C.J. in *Kindler*, Justice Cory emphasized "[t]he commitment of the international community to human dignity and the trend of western nations to abolish the death penalty [which] parallels Canada's own international stance" in arriving at the conclusion that extradition to face execution would violate section 12.\(^{159}\) It was clear that "capital punishment is *per se* cruel and unusual,"\(^{160}\) and would be a violation of section 12 if done in Canada. Justice Cory reviewed European jurisprudence on the subject, particularly the case of *Soering v. United Kingdom*,\(^{161}\) where the European Court of Human Rights found that extraditing a fugitive to face the "death row phenomenon" constituted a violation of state obligations under Article 3 of the *European Convention on Human Rights* (the parallel provision to section 12 of the *Charter*). Liability in the constitutional sense would inure to the extraditing state "by reason of its having taken action which has as a direct consequence the exposure of an individual to proscribed ill-treatment."\(^{162}\)

Ultimately, Justice Cory presented cogent reasons that a state which extradited a fugitive to face the death penalty was complicit in violation of the section 12 right, even though its actual execution (so to speak) would

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159. *Kindler*, para. 58.

160. *ibid.* at para. 94. His Lordship was not specific as to whether extraditing to face the death penalty constituted "treatment" or "punishment" under section 12. He did refer to the European description of it as "treatment" (para. 107), but later appeared to suggest that it was "punishment" (para. 119). In any event, this is not a serious sticking point, since if extradition or deportation are not exactly "punishment" they surely fall under any reasonable definition of "treatment." The Supreme Court held in *Rodriquez v. British Columbia (A.G.)*, [1993] 3 S.C.R. 519 [*Rodriquez*] that "[t]here must be some more active state process in operation, involving an exercise of state control over the individual, in order for the state action in question, whether it be positive action, inaction or prohibition, to constitute 'treatment' under s. 12" (at para. 182), which would appear to settle the issue.

161. *Soering v. United Kingdom*, Series A. No. 161 (1989). Similar findings were made by the U.N. Human Rights Committee in *Ng v. Canada*, UN Doc. CCPR/C/49/D/469/1991, and by the Supreme Court of the Netherlands in *The Netherlands v. Short*, reprinted in (1990) 29 I.L.M. 1375. The *Soering* case gave rise to a provision in the European Union's new *Charter of Fundamental Rights of the European Union* (2000 O.J. (C 364) 1 (Dec. 18, 2000), online: http://www.europarl.eu.int/charter/default_en.htm (date visited: July 28, 2004)) that "no one may be removed, expelled or extradited to a state where there is a serious risk that he or she would be subjected to the death penalty" (Art. 19(2)).

take place outside Canada's jurisdiction:

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

Notwithstanding the fact that it is the United States and not Canada which would impose the death penalty, Canada has the obligation not to extradite a person to face a cruel and unusual treatment or punishment. To surrender a fugitive who may be subject to the death penalty violates s. 12 of the Charter just as surely as would the execution of the fugitive in Canada.163

Justice Cory's perspective hearkens back to that expressed by Justice Wilson in *Schmidt*, where she wrote "[t]he effect is right here in Canada, in the Canadian proceedings, although it will, of course, have repercussions abroad. But there is nothing wrong in this."164 Professor Morgan's explanation of this perspective is illuminating:

The issue for Justice Wilson, in other words, was not so much whether the Canadian constitutional ruling would give the Charter of Rights extraterritorial effect, but rather whether the extradition treaty on which the proceedings were founded could legally trump the constitutional restraints imposed on the very government that entered the treaty in the first place. Of paramount importance was not the cooperation of the Canadian authorities with their American counterparts in bringing the fugitive to justice; instead, the focus was on the cooperation of the Canadian courts with their own governing and supreme constitutional norms.165

The majority in *Kindler*, however, declined to follow both Justice Cory's reasoning and the *Soering* principle. Justice La Forest wrote: "The Minister's actions do not constitute cruel and unusual punishment. The

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163. *Kindler*, supra note 4 at paras. 108-109. In finding that the violation of section 12 was not justified under section 1, Justice Cory remarked, in part: "Canada cannot, on the one hand, give an international commitment to support the abolition of the death penalty and at the same time extradite a fugitive without seeking the very assurances contemplated by the Treaty. To do so would mean that Canada either was not honouring its international commitments or was applying one standard to the United States and another to other nations. Neither alternative is acceptable. Both would contravene Canadian values and commitments" (para. 118).
164. *Schmidt*, supra note 4 at 532.
165. Morgan, supra note 28 at 453.
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.” Justice McLachlin cautioned against extraterritorial application of the Charter, and confirmed Justice La Forest’s view: “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.” The majority did repeat its earlier holding from Schmidt, among other decisions, that the values underlying section 12 are of relevance in determining the content of section 7, which Professor Schabas has called “a reasoning that borders on tautology.” This entire analysis of section 12 was re-affirmed in Burns without much additional comment, except to emphasize once again the “remoteness” of extradition from the execution.

With respect, this point is not convincing. Simply applying a basic tort or criminal law analysis to the act of extradition in Kindler, for example, produces the inescapable conclusion that Canada, as the extraditing state, was an actor in his ultimate execution. As the Court itself concedes in Burns, a decision to extradite would be “a necessary link in the chain of causation.” To torture the tort analogy even further, the response from the Court is that sending the fugitive off to face a potential death sentence is “too remote” from the actual carrying out of the death sentence itself. Yet we know that a tortious action is not too remote for liability purposes if it exposes the victim to foreseeable consequences — even on the more conservative Wagon Mound No. 1 standard, where one would have to be able to foresee the exact harm. So what kind of remoteness is the Court talking about? Certainly in the Judge case, the UN Human Rights Committee was prepared to note that by deporting Judge to death row, “Canada established the crucial link in the causal chain that would make possible [his] execution.” This is hardly a radical approach,
as it is the basis of the ECHR's decision in *Soering*, as well as similar decisions by various domestic and international judicial bodies.\(^{174}\)

If my submission that this idea of "remoteness" is a fundamental error is correct, then the door left open by *Burns* and *Suresh* can be closed. The kinds of gross human rights violations with which I am dealing here obviously fall into the category of prohibited punishments or treatments "that are barbaric in themselves,"\(^{175}\) and which the Court held in its foundational section 12 decision of *R. v. Smith* "will always outrage our standards of decency."\(^{176}\) The Crown may have some section 1 arguments to make,\(^{177}\) but in accordance with existing section 12 case law "such arguments should founder under the minimum intrusion test."\(^{178}\) The problem of extra-territoriality is avoided altogether: Canada could not extradite a fugitive to face the death penalty, torture, indefinite imprisonment without process and the like, because to do so would be "cruel and unusual treatment" on the part of the Canadian government itself. The *Charter* stops long before it reaches the border. This point is implicit and explicit in the current section 7 analysis, but would produce results more compatible with *Charter* values if exercised through section 12.\(^{179}\)

The distinction between Canada delivering the punishment, as opposed to the requesting state, will serve one useful purpose: presenting the Court with a prime opportunity to extract the section 12 analysis from the mire of balancing state interests with individual interests at the violation stage. While the current section 12 case law involves a great deal of this sort of balancing, it stems primarily from the context of minimum sentences for domestic offences.\(^{180}\) The fact that the treatment/punishment is to be consummated abroad is a distinguishing factor: it means that the only relevant state interests are those relating to general crime prevention and

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174 A similar viewpoint seems to be at play in a recent and interesting decision of the British Columbia Court of Appeal; see Robert J. Curnie, "Annotation: Purdy v. Canada (Attorney General)" (2003), 15 C.R. (6th) 211. In this case, the Court of Appeal upheld a *Charter* remedy of disclosure of an RCMP investigative file. The remedy was justified on the basis that Purdy's "right to full answer and defence" under Section 7 of the *Charter* had been denied by the Crown's failure to disclose previously — even though he was actually facing trial in the U.S.

175 Hogg, *supra* note 12, s. 50.3.


177 This was certainly the approach taken by Justice Cory in *Kindler*.

178 Stuart, *supra* note 2 at 398.

179 This approach is a limited expansion of that taken by Arbour J. when she was a lower court Justice in *R v Larahie* (1988), 42 C.C.C. (3d) 385 (Ont. H.C.J.), a pre-*Kindler* case. Justice Arbour was, however, party to the Court's unanimous judgments in both *Burns* and *Suresh*.

international co-operation, which as argued above must be assessed at the section 1 phase to give any coherence to the exercise. I recognize that the evidentiary burden on the Crown, which is already heavy under section 1, will become more so under this analysis. Again, this is what the Charter demands.

The current section 12 analysis might be of use in assessing allegations that less “barbaric” punishments than those being dealt with here were cruel and unusual: for example, onerous minimum prison terms or inhumane prison conditions within an otherwise functioning system. This would, however, force the Court to revisit its section 7-based refusal to interfere with extradition orders even where the prison sentence being faced by the fugitive would likely violate section 12 if imposed in Canada.181 In any event, while some contextual factors (such as the nature of the punishment and the personal circumstances of the offender) would remain to be considered at the section 12 stage, I maintain that comity and other state interests are properly considered under section 1. The change in law may be profound, but is consistent with the Court’s own notional separation of its “jurisprudence on matters involving Canada’s international co-operation in criminal investigations and prosecutions”182 from other kinds of cases.

This, I submit, was exactly the result that the La Forest Court was trying to avoid by locating the extradition Charter analysis within section 7. By ensuring that state interests are taken into account in crafting the content of the right, the Court was able to maintain the deferential approach to the state’s administration of its foreign affairs power183 while still paying lip service to the Constitution by applying diluted Charter standards. The approach outlined here would force us to confront Charter guarantees head-on, force the Crown to bear the burden of justifying violations, and apply the analysis in a manner which seeks to err on the side of rights protection rather than subordinating constitutional values to the interest of the state in co-operating with an array of questionable treaty partners. It may also have the salutary effect of increasing pressure on the treaty partners to discontinue the imposition of barbaric treatment.

Would assessing extradition or deportation on this basis be more

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182. Supra note 4.

183. The sort of approach that the Court rejected in Operation Dismantle, [1985] 1 S.C.R. 441.
complicated logistically than the existing system? I submit that it would not. It would require, as the section 7 analysis currently does, the fugitive or deportee to lead evidence on affairs in the requesting state, in fact subjecting them to a burden of proof, but would spare the fugitive the primary argument and evidence gathering regarding the political and policy factors — which is more appropriately done by the state in any event. It would require our judicial and quasi-judicial decision-makers to assess the evidence regarding the requesting or destination state — no easy task, but as Burns itself and Pacificador demonstrate, it is already a fundamental part of what happens in extradition proceedings. If anything, the Minister's exercise of discretion will be somewhat more tightly confined, and political concerns will have to be discounted that much more. This is not consistent with the level of curial deference traditionally accorded in these contexts, but the rather trite response is that the Court must fulfill its role as guardian of the Constitution if the Minister is not willing to uphold the values contained in it. And protection of fundamental human rights demands no less. To paraphrase what the Court itself has said: while Canada may not be pulling the trigger, surely the values embodied in the Charter forbid us from steadying the gunman's arm.

III. Mutual Legal Assistance
The practice of sharing evidence between states in transnational criminal matters is another area where the need for international co-operation and comity has the potential to come into conflict with domestic human rights

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184. That burden being the balance of probabilities; United States of Mexico v. Hurley (1997), 116 C.C.C. (3d) 414 (Ont. C.A.). This burden is likely to remain the same under s. 44(1)(a) of the new Extradition Act, since the section is "a statutory embodiment of this Charter right" (Krivel et al., supra note 44 at 349).

185. One of Suresh's administrative law issues that is beyond the scope of this paper, but nonetheless relevant and disturbing, is the very deferential standard of review attaching to the Minister's decision, both as regards the determination of a refugee as being "a danger to the security of Canada" and whether he/she faces a "substantial risk of torture" upon deportation. On both decisions, the Minister's determination can only be reversed if it is "patently unreasonable," the most deferential standard of review. While the constitutional standard applied to the ultimate deportation decision is section 7 and the "shocks the conscience" test, the deferential standard attaching to the decision regarding the risk of torture, in particular, must ultimately prevent appropriate cases from even going forward for constitutional testing. This state of affairs, I suggest, presents the strong possibility of scenarios where the political will behind "anti-terrorism" and "security" could push the Minister's decision in a direction that undermines Canada's human rights standards, by providing an "end run" around a determination based either on "the fundamental principles of justice" (section 7) or rights limitations which are "justified in a free and democratic society" (section 1). In this regard, it is perhaps not unjustified to characterize the effect of Suresh as one step forward, two steps back.

186. Suresh, supra note 7 at para. 54.
standards. In Canada, the Court has engaged in a similar sort of "line-drawing" regarding the application of the Charter, and the lower courts have made some tentative forays into balancing comity with constitutional constraint of law enforcement — with mixed results.

Mutual Legal Assistance (hereinafter "MLA") is a relatively new brand of inter-state co-operation in criminal matters that effects what might be called an "international criminal procedure," or perhaps more accurately a means by which the legal system of one state may be "unlocked" for and by the prosecutors of another. accomplishment by treaty, MLA agreements put in place arrangements for domestic prosecutors of one state (the "requesting state") to make a request of the treaty partner (the "requested state") by which the latter will gather evidence germane to an investigation in the requesting state.

In Canada, the inter-state obligations created by the existing MLA treaties are implemented by the Mutual Legal Assistance in Criminal Matters Act, which sets out both the process to be followed by Canadian authorities in making evidence-gathering requests of other states and that to be followed by the Minister of Justice and Crown personnel in responding to incoming requests. While MLA practice has existed internationally since the 1957 enactment of the European Convention on Mutual Assis-

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188. The terms "mutual legal assistance" and "mutual assistance" are often applied to any brand of inter-state cooperation in criminal matters; in Burns, for example, the Court consistently referred to extradition as "mutual assistance." The more recent trend, and the sense in which the phrase is used here, is to equate "mutual legal assistance" with those arrangement specific to evidence-gathering (and other matters such as transfer of prisoners).

189. There are currently bilateral treaties in place with approximately 34 states. For a reasonably up-to-date list, see Krivel et al., supra note 44 at 488-490. Canada is also party to multilateral arrangements under the relevant Organization of American States treaty and the 1988 United Nations Narcotics Convention (ibid.), as well as the Commonwealth Scheme (Currie, "Peace and Public Order," supra note 187 at 97-99).

190. R.S. 1985, c. 30 (4th Supp.) [the "Act"].
The Canadian Act came into effect only in 1988. The expanding network of treaties, however, and in particular Canada’s MLA treaty with the U.S., is seeing more and more use, and this in turn is generating a fair amount of case law as criminal defence lawyers discover the Act and the broad powers it confers on the Crown. As MLA involves the coercive exercise of powers by the state, on behalf of another state, the litigation has mostly involved Charter-testing the Act.

1. Canada as Requesting State
Two discrete issue areas have arisen, which can be simply categorized as “Canada as requesting state” and “Canada as requested state.” In the former category, there is a rather sparse amount of case law arising from Canadian criminal trials where the circumstances of evidence-gathering in the requested jurisdiction were contested, usually as producing trial unfairness in the Charter sense. For the most part, courts appear to have taken Harrer, Terry and Cook as setting out the guiding principles, and employ the same section 7/section 24(2) framework utilized in those cases to determine whether the actions of foreign authorities should result in exclusion of evidence.192

An interesting instance of Charter-testing the Act arose in Schreiber v. Canada (Attorney General).193 As part of the investigation of Schreiber in Canada, the Crown made a mutual legal assistance request194 of the government of Switzerland, asking for seizure of records relating to bank accounts Schreiber held in that country. Schreiber alleged that the letter of request itself violated section 8 of the Charter, because it could be reasonably expected to result in a search and seizure for which the Crown had not obtained a warrant. The Crown argued that the letter itself could not be considered a “search,” since any action undertaken with regard to Schreiber’s privacy would be that of the Swiss government.

In a brief majority judgment, L’Heureux-Dubé J. accepted the Crown’s argument, ruling that since the letter of request was not a “search” or “seizure” for the purposes of section 8, no warrant was required. As in Harrer, Terry and Cook, the dominant theme was the avoidance of extra-

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194. By way of a “letters rogatory” request, the diplomatic precursor to MLA. For background, see Currie, “Peace and Public Order,” supra note 187 at 102-103.
territorial application of the *Charter*. The Court, in effect, analogized the presence of the individual’s property (here bank records) in the foreign jurisdiction with the presence of the individual himself there. The law that applied to the property was that of the territorial state, and having chosen to locate himself beyond the territorial reach of the *Charter* Schreiber was not entitled to the benefit of its protection, even if the exercise of state power against him was formally initiated by the government of Canada.

The majority ruling was subject to a stinging dissent by Iacobucci J., writing for himself and Gonthier J., who felt that by effectively endorsing a warrantless search of the affairs of a *Charter*-protected individual, the majority ruling undermined the prophylactic nature of the section 8 protection. The heart of the disagreement between the majority and dissent was as to where the right to privacy was located. For Justice Iacobucci, the fact that the letter of request was part of engaging the criminal process against Schreiber was sufficient to invoke the effect of section 8, and Schreiber had a legitimate expectation of privacy regarding his property, vis-à-vis the Government of Canada, regardless of the location of the property. For its part, L’Heureux-Dubé J.’s majority was content to “[deposit] the crux of Schreiber’s *Charter* complaint alongside his money in Zurich,” and bulwarked itself against the dissent’s charge of erosion of the section 8 protection by invoking the twin themes of avoidance of extra-territorial application of the *Charter* and the importance of international co-operation in criminal matters.

If the position I have offered on the Supreme Court’s “jurisprudence on matters involving Canada’s international co-operation in criminal investigations and prosecutions” is to be consistent, it is worthwhile to wonder whether in *Schreiber* the Court once again donned the blinders regarding causation and remoteness that it wears in the extradition cases. To state that the search is ultimately an act of the foreign government is somewhat disingenuous, given that it is brought about by the request for assistance made by the Government of Canada. As distinct from the extradition cases, the search by the requesting state could fairly be portrayed as a vicarious action of the government of Canada, and there is some force

195. Lamer, C.J. (as he then was) concurred in the result, but based his analysis on the premise that by banking in Switzerland, Schreiber had no “reasonable expectation of privacy” in his bank records vis-à-vis the government of Canada.
197. *Supra* note 4 and accompanying text.
198. Though the ultimate decision as to whether to fulfill the request is a sovereign act of the requested state and, as the majority intimated in *Schreiber*, there is always the potential that the request will be refused (see Currie, “*Schreiber* Case Comment,” *supra* note 5 at 214).
to the implicit argument in the Schreiber dissent that failing to attach section 8 protection to the request is a triumph of form over substance.

Ultimately, however, it is the same differences from the extradition context that support the majority's finding. At the phase of the mutual legal assistance request by Canada, the Court was not faced with Schreiber having made out a case, as in Burns or Pacificador, that the foreign government would likely trample his human rights in fulfilling the request. Rather, the case was truly a situation where Schreiber was arguing that the Charter should protect him extra-territorially, even though he had chosen to bank abroad. The decision does in some way effectively transform the letter of request into "reasonable and probable grounds" for the foreign search, but avoids the problematic possibility that courts may feel they are called upon to scrutinize foreign criminal process according to Charter standards. One is ultimately comforted by the fact that, again, the search and its results are subjected to scrutiny at a Canadian trial, before a court employing Charter-based standards of fair trial and exclusion of evidence.

2. Canada as Requested State

The second relevant area of MLA practice is where Canada is the requested state, and exercises powers over persons on Canadian territory at the behest of the requesting state. The Act provides for various modes of evidence-gathering by the Crown, including search warrants, "evidence-gathering orders", and the taking of witness statements. As the bulk of case law under the Act concerns search warrants, this is the best lens through which to examine the Charter-testing of MLA practice.

The issuance and execution of search warrants is governed by sections 10-14 of the Act. When the Minister of Justice has determined that a request should be responded to, the Crown authorities are provided with the appropriate materials from the foreign jurisdiction to make an ex parte application for the issuance of a search warrant. The judge may issue the

199. In one way, this is a crude manner of describing the case made out by Burns and Rafay, given that there is still no generally binding principle at international law against execution as a criminal sanction. However, it is a fair description of the manner in which the Court reformulated the relevant human rights standard in the domestic context.

200. An investigative tool, unique to the Act, which allows the Crown to, inter alia, subpoena persons to give evidence or provide documents (see ss. 17-23.1 of the Act).

warrant where satisfied by statements under oath that, *inter alia*, there are reasonable grounds to believe that: an offence has been committed; and evidence of the commission of the offence or information that may reveal the whereabouts of the suspect will be found at the relevant site. The issuing judge must also fix a time and date for a hearing to review the execution of the warrant and determine whether the evidence will be sent to the requesting state.

The latter hearing is governed by Section 15 of the Act, and is somewhat analogous to the extradition hearing, though the process is not bifurcated between judicial and ministerial phases. It is the stage of the process at which the *Charter* has tended to be applied, and the analytical question for present purposes is whether the courts treat the *Charter* concerns any differently because this process involves foreign cooperation. Currently, the answer appears to be yes and no.

The reviewing judge at the section 15 hearing has fairly wide discretion in terms of deciding whether evidence is to be sent or not, and is called upon by paragraphs 15(1)(a) and (b) to assess both whether the warrant was executed according to its terms and conditions, and whether there is any other reason that the evidence should not be sent. This clause has been authoritatively interpreted as giving the judge the power to consider all of the circumstances surrounding the execution of the warrant, including alleged *Charter* violations by Canadian authorities, but also including "the need to ensure that Canada's international obligations are honoured and to foster co-operation between investigative authorities in different jurisdictions." As a result, the constitutional analysis has generally centered on section 8 of the *Charter*, rather than section 7 as in extradition, probably because the actual liberty of the person (and the deprivation thereof in accordance with the "fundamental principles of justice") is seen as too remote from the evidence-gathering exercise.

Domestic search warrants are subject to a fairly rigorous regime of

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203. *Supra* note 190 at ss. 12(1)(a) and (b).
judicial scrutiny, and the Supreme Court of Canada’s decisions on section 8 of the Charter have firmly established that irregularities, either with the warrants themselves or their execution, will generally result in the invalidation of the warrant and can result in exclusion of evidence seized thereunder.\cite{207} A review of the MLA search warrant case law, however, indicates that while courts are applying the domestic search warrant regime to MLA warrants, the international co-operation aspect of these cases is leading to a looser approach than might be tolerated in a purely Canadian case, as privacy rights are balanced against Canada’s international obligations and the need to combat transnational crime. In effect, even if a warrant or its execution would have been constitutionally invalid if purely domestic, Section 15 of the Act provides the reviewing judge with the discretion to send the evidence anyway. This is, of course, analogous to what happens domestically under section 24(2) of the Charter. What is troubling is that, while a refusal to exclude improperly seized evidence at a domestic trial has a constitutional basis, sending judges appear to be empowered to send improperly seized evidence on some vague notion of the importance of international comity.

This balance has been struck in a number of different warrant situations. In some cases, courts were willing to validate warrants despite “facial” irregularities, such as failure to set out the appropriate section under which the individual was charged or failure to provide the name of the executing officer.\cite{208} A number of the more recent cases deal with the Information which is sworn in support of the warrant, and the effect that should be given by the reviewing judge to hearsay content therein.\cite{209} In an Alberta case,\cite{210} the Information contained substantial uncorroborated hearsay obtained both in Canada and in the U.S. Despite finding “serious defects” with the warrant, and noting that it would not have issued in Canada, the reviewing judge ordered the evidence sent. This approach has been followed by at least one other court,\cite{211} though it was expressly

\begin{footnotesize}

208. Gladwin, supra note 204; Germany (Federal Republic) v. Ebke, 2001 NWTSC 52 [Ebke].

209. Often referred to as the issue of “sub-facial validity.”


\end{footnotesize}
rejected by the Quebec Court of Appeal in *R. c. Future Électronique inc.*\(^{212}\)

The most recent and authoritative decision is that of the Ontario Court of Appeal in *Ontario (Commissioner of Competition) v. Falconbridge Ltd.*\(^{213}\) where the affiant Canadian officer, Drapeau, swore his Information entirely on the basis of hearsay information provided by U.S. investigators, much of which had come in turn from confidential informers. However, the Court found that the lack of information about the reliability of the informers was counterbalanced in various ways, including Drapeau’s familiarity with the investigators, the purported and apparent first-hand knowledge of the informer, and confirmation of some of the information by documents which had been provided by the informer.\(^{214}\) Thus, the Court of Appeal was willing to accept Drapeau’s swearing of the Information, containing information relayed by an unknown informer, to American anti-trust investigators, to Drapeau, as providing reasonable and probable grounds for the warrant. Such an Information would be more likely to be struck in a purely domestic case.\(^{215}\)

In other cases, however, reviewing judges have taken a tougher approach, particularly where they have found that the requesting state is in some manner making (or being allowed to make) an “end run” around the domestic MLA procedure. This has arisen especially in cases where the foreign authorities were permitted to participate in the search and even take some of the evidence with them prior to judicial determination as to whether or not it should be sent. One such case is *Germany (Federal Republic) v. Ebke*,\(^ {216}\) where the reviewing judge took note both of procedural lapses in the execution of the warrant by Canadian officers and the participation by a foreign officer in the search (for what the Crown argued was a “consultative” purpose). While not explicitly ruling that the *Charter* should apply to MLA cases in exactly the same manner as it would domestically, Vertes J. rejected the notion that lapses in procedure were to be tolerated in the interests of not defeating the purposes of the Act, i.e., effecting Canadian co-operation with other states.\(^{217}\)


\(^{214}\) Ibid. at paras. 31-35.

\(^{215}\) Though the Court of Appeal did ground its decision in domestic jurisprudence relating to informations; see *ibid.* at paras. 30-35.

\(^{216}\) *Ebke,* supra note 208.

MLA practice is still in its infancy in some respects, and the Supreme Court of Canada has yet to speak to any of the issues that are raised when Canada is the requested state. However, a few observations can be offered on the case law to date. To the extent that the courts have been willing to submerge domestic human rights standards in the interests of inter-state co-operation, the cases are remarkable and somewhat disturbing. It is worth noting that virtually all of Canada’s MLA treaties specify that any evidence-gathering is to be done in accordance with the law of the requested state, and the Act is specifically designed to put in place a mechanism whereby requests can be met in accordance with domestic standards — including the Charter. Yet even in this setting, where every aspect of the process except the request happens on Canadian soil, where Canadian authorities are acting, for the most part, against the interests of individuals who are ostensibly protected by the Charter, our courts have displayed at least a nominal willingness to dilute the rigour of our domestic human rights standards in the interest of inter-state co-operation.

However, this important balancing factor receives virtually no thoughtful analytical attention, the courts being content to simply repeat similar assertions made in extradition cases. Moreover, given that international treaty obligations take on such importance, one is moved to remark on the absence of any consideration by the courts of whether this dilution of domestic human rights standards is compatible with Canada’s obligations under international human rights treaties. That the extent to which our domestic human rights standards are informed by our international human rights obligations is best described as “fuzzy” is certainly relevant, but as a result the MLA cases are another set of decisions that cry out for clarification of the issue. It may be that there is some room for the tailoring of constitutional standards to the exigencies of the battle against transnational crime, but this conclusion must emerge from a far more thoughtful policy conversation than has been had to date.

This point is, I submit, all the more pressing when one considers that a

218. See e.g. Budd, supra note 204; Re Pokidyshev (1999), 27 C.R. (5th) 316 (Ont. C.A.).
219. This also raises a number of important international law issues, among them the question of what states should do in situations where their treaty obligation to provide mutual legal assistance conflicts with applicable human rights treaties; for a detailed discussion, see Robert J. Currie, “International Mutual Legal Assistance and Human Rights,” supra note 37, at 147-67.
Charter Without Borders?

Burns-type case must inevitably arise in the MLA setting. While it is most usual for MLA requests to be made during the investigation and evidence-gathering phase of a criminal prosecution, it is hardly inconceivable that either the request or the Section 15 hearing could occur at a time when the individual being investigated is fully aware of the jeopardy he/she faces in the requesting state. As a result, our courts will have to answer the same question as in Burns: will Canada send evidence to another jurisdiction for use in a capital case? Or perhaps a Suresh- or Pacificador-type case will arise, where an individual requests the Section 15 judge to refuse the sending order because he/she can present a prima facie case that gross violations of human rights will arise from the prosecution.\textsuperscript{221}

Should such a case arise, it is not unlikely that the courts will look to the section 7 test as it has been applied in the extradition and deportation cases for the analytical framework. Yet this setting, too, is ripe for reform and for the recognition that Canada's actions in participating in foreign prosecutions are not too "remote" from any gross violations of human rights which occur in the requesting state. As the Court itself acknowledged in Burns and Suresh, a causal link is just that, and locating the analysis under section 12\textsuperscript{222} may be the most intellectually honest means of recognizing this.

Conclusion

This article has only modest goals in terms of contribution to debate on these issues, and has touched but lightly on many matters that are highly worthy of more substantial attention. Hopefully, it will help to engender recognition of the fact that the debate must be had, and act as a starting

\textsuperscript{221} There is one MLA decision somewhat on point; in United Kingdom v. Wilson-Smith \& Co., [2002] O.J. No. 5342 (Ont. S.C.J.) (QL), procedural misconduct by British authorities acting in their own jurisdiction resulted in a finding of abuse of process and the decline of a sending order.

\textsuperscript{222} Since providing evidence to the requesting state is clearly not "punishment," open for question would be whether it qualifies as "treatment" under section 12. Rodriguez, supra note 160 suggests that there must be an "exercise of state control over the individual" for the action to be caught; does this apply only to the corporeal body of the individual, or can it extend to his/her property or other legal interests which would bear the impact of, for example, a search warrant? I have argued in another context that "[i]t seems somewhat facile to declare that protection under a human rights instrument extends only to a corporeal human being... it is the legal interests of this person that are being protected, rather than just physical well-being" (Currie, "Human Rights and International Mutual Legal Assistance," supra note 37 at 152).

\textsuperscript{223} Morever, as noted above, there is a strong stream in the international case law that assisting another state in a human rights breach will engage the requested state's own international human rights obligations. While this would be simply one of a number of policy considerations in such a case, it seems appropriate for consideration under a section 1 analysis.
point for discussion. While a critical approach has been taken to the Supreme Court of Canada’s jurisprudence on transnational crime and co-operation, the law is in a much more satisfactory condition than it was after Kindler.224 As Professor Roach points out, there is a great deal of good to be spoken of both Burns and Suresh:

In both cases, the Court performed its anti-majoritarian role admirably by examining the fundamental principles of Canadian and international law to reach [its] conclusions. … In both cases, the Court resisted the temptation to minimize Canadian responsibility for what will happen to a fugitive removed from our shores. In both cases also, the Court was not blinded by the serious nature of the charges against the Charter applicant. The Court reminded Canadians in both cases of the values that they were inclined to forget in the understandable urge to expel dangerous persons from our midst.225

Burns and Suresh are clearly significant judgments, but both were simply steps, when they could have been strides. The Court had the opportunity to rule that it is unconstitutional to extradite people to face the death penalty or deport them to face a realistic possibility of torture. Instead, it declined to do so, leaving the door open to either of these possibilities being realized. Recall that Canada has been the subject of declaratory criticism by the UN Human Rights Committee on at least two occasions226 since 1991 for the rendition of fugitives to face the death penalty, which was (or should have been) embarrassing to a state that prides itself on its human rights record and whose human rights jurisprudence has been highly influential throughout the world. In a future case, the fact that the Supreme Court of Canada found a case to be “exceptional” or “compelling” under the sophisticated section 7 analysis would be as unlikely to find favour with the Human Rights Committee as the earlier cases.

These questions do not come up very often, but their infrequency of occurrence is outweighed by their significance, particularly in an era domi-
nated by talk of "security" and the "war on terror." Disturbingly, as Professor Sossin has argued, "[t]he Court appears willing to bend the Charter to accommodate laws and acts justified in the national security." 227 One is left wondering whether the Court has given itself the tools it needs to deal with the tougher brand of case which may present itself. A specific hypothetical example: Khalid Sheikh Mohammed, an alleged lieutenant of Osama bin Laden, was apprehended in Pakistan in March, 2003. He was turned over to American authorities, who took him away to be questioned at "an undisclosed location." It was later reported that Mohammed provided information that led to the capture of other high-ranking 'al Quaida members. 228 It would seem unlikely that Mr. Mohammed spent his post-capture months sitting in a quiet, air-conditioned Washington room answering questions put politely to him by U.S. military intelligence or secret service members. It is hardly beyond the realm of possibility that he was taken to an offshore site, 229 where he would not attract any of the considerable procedural protections in the U.S. Constitution, and quietly tortured either by American personnel or by foreign agents hired for this purpose.

What if Khalid Sheikh Mohammed had turned up in Prince George instead of Pakistan? Would he be extradited to the U.S., where he would surely be subjected to rather intense questioning and then executed after trial? Would this be one of the "exceptional" cases to which the Court referred in Burns? Change the name to Osama bin Laden, and the potential ramifications of these questions are even larger. Such a scenario certainly makes the Court's statement in Burns that there was "little indication that U.S. governments would ever refuse" death sentence assurances 230 seem retrospectively naive, at best. One might suggest that the discretion bestowed upon the Minister of Justice by the new Extradition Act to extradite to face the death penalty 231 could be called the "bin Laden clause." This clause, which confirms the "exceptional circumstances" language employed in Burns and Suresh, leaves the government leeway on particular cases, which will inevitably be shaped by public opinion as much as by legal principle. As Professor Roach has remarked, "the permanent invitation to governments to justify exceptions from the principled rules in [Burns

229. Sources indicated that he was either in Afghanistan or at Guantanamo Bay (ibid.).
231. Supra note 128 and accompanying text.
and Suresh] will present a continued challenge for the courts."\(^{232}\)

It has been argued here that the Supreme Court's persistence in locating the constitutional implications of transnational criminal cooperation in section 7 (along with a gutted section 1 test) pushes the "shocks the conscience" standard inappropriately high — not beyond reach, as Burns, Suresh and Pacificador demonstrate, but high enough to allow Canadian participation in the gross violation of human rights by other states. Extradition, deportation, and mutual legal assistance do not exist in some kind of Westphalian vacuum of "gentlemen's agreements" and inter-state comity, to be kept tidily separated as much as possible from the human costs of inter-state cooperation. The growth and impact of human rights standards in the 20\(^{th}\) century brought with it increased recognition that individuals were not just the objects of the law, but its subjects as well, both on the international and domestic planes. As such, it is time to break down the formative idea behind much of the La Forest Court's extradition jurisprudence, that international relations exists on a higher plane and the courts must avoid sullying the process of inter-state cooperation (a political matter) with the messy human carnage that results from it. Are we to continue with the notion that international criminal cooperation is such a compelling end unto itself; to be satisfied when the Crown submits that "the Minister satisfies himself as to human rights standards in the treaty partner state before entering into the treaty" when Canada has treaties in place with Argentina, China, Russia, the Philippines?

The Court's recent jurisprudence is indeed encouraging.\(^{233}\) However, it is time to fundamentally revisit this idea that the pressing and substantial need for international co-operation on criminal matters, which is not quarreled with here, justifies a looser approach to how the state will be held to the constitutional human rights standards imposed on it, particularly as concerns torture (and other inhumane treatment), the death penalty, slavery, freedom from retroactive criminal laws, and imprisonment without trial. The concern for extra-territorial application of the Charter must ultimately be seen to be misplaced, so long as the courts can truly appreciate the implications of inter-state cooperation for the individual. To accomplish these goals, the Charter's reach need not exceed its grasp.

\(^{232}\) Roach, supra note 225 at 925.

\(^{233}\) Accord, Thomas Rose, "A Delicate Balance: Extradition, Sovereignty, and Individual Rights in the United States and Canada" (2002) 27 Yale J. Int'l L. 193 at 207-208. "Under the La Forest Court, appeals to international law served to support the concept that individual rights were for the sovereign to grant or withhold. With Burns, the court asserted that international law had changed and, with it, the traditional concept of sovereignty. In regard to capital punishment, national interests were now seen as being aligned with the interests of the international community to protect rights that are beginning to be considered universal or transnational in nature."