CITATION: SMITH *v.* CANADA (ATTORNEY GENERAL), 2009 FC 228, [2010] 1 F.C.R. 3 T-2067-07

Ronald Allen Smith (*Applicant*)

v.

Attorney General of Canada, Minister of Foreign Affairs and International Trade and **Minister of Public Safety** (*Respondents*)

INDEXED AS: SMITH V. CANADA (ATTORNEY GENERAL) (F.C.)

Federal Court, Barnes J.—Toronto, September 29 and 30, 2008; Ottawa, March 4, 2009.

Crown — Prerogatives — Application seeking order compelling respondents to assist applicant in pursuing commutation of death penalty — Respondents claiming decision not to support applicant within Crown prerogative, issue not justiciable — Decisions of administrative character affecting rights, privileges, interests of individual subject to review, principles of procedural fairness — Respondents' justiciability argument dependent on existence of new clemency policy — No evidence of new policy, consensus or decision taken — Government policy cannot be sum total of contradictory public statements by ministers, spokespersons — Applicant entitled to know what new clemency policy was before it was applied to his situation — Reversal of Government position giving rise to reasonable expectation of full consultation with applicant — Fairness also requiring clear articulation of any new clemency policy —Absent such clarity, resulting decision arbitrary, unlawful — Application allowed.

This was an application seeking an order compelling the respondents, on behalf of the Government of Canada, to assist the applicant in pursuing commutation of the death penalty by way of an anticipated clemency petition to the Governor of Montana. The applicant, a Canadian citizen incarcerated in the Montana State Penitentiary, claimed relief under the *Canadian Charter of Rights and Freedoms* and on the basis that the respondents breached fundamental principles of fairness by arbitrarily withdrawing diplomatic assistance without consultation or reasons.

In 1983, the applicant was sentenced to death in Montana after pleading guilty to charges of aggravated kidnapping and homicide. The applicant sought, unsuccessfully, to reverse the death penalty sentence. In 1999, the Canadian Consul General wrote to the Governor of Montana requesting that he consider granting clemency to the applicant. The Consul General stated that the practice of the Department of Foreign Affairs and International Trade (DFAIT) to seek clemency for Canadian citizens sentenced to death in foreign countries is based on humanitarian considerations. Nothing resulted from this request, but DFAIT continued to take interest in the applicant's case. In 2007, the applicant's lawyers described to consular officials the importance of the Canadian government's assistance in obtaining the Governor's clemency. Shortly thereafter, however, the Canadian government withdrew its longstanding support for the applicant, stating that there were no ongoing efforts to seek a commutation of the applicant's death penalty. Except for various Parliamentary or press statements, the respondents provided no evidence of a new Canadian government policy on clemency or with respect to the decision to deny support to the applicant's bid for clemency.

The respondents claimed that no justiciable legal duties were owed to the applicant because the decision not to support him fell within the Crown prerogative to conduct Canada's foreign affairs, and that no duty of procedural fairness arose because government interventions would not be determinative of the applicant's fate.

At issue was whether the issues raised in this proceeding were justiciable, and if they were, whether the respondents breached a duty of fairness in the manner of their withdrawal of diplomatic assistance for the applicant's pending petition for clemency.

Held, the application should be allowed.

It is open to the Government of Canada in its assessment of the public interest to freely change its policies from time to time. Similarly, the exercise of the prerogative to develop and implement diplomatic and foreign policy initiatives is generally beyond the scope of judicial scrutiny. However, decisions of an administrative character which affect the rights, privileges or interests of an individual are reviewable and they are subject to the principles of procedural fairness. In the case at bar, any new clemency policy had to be applied to the applicant to determine whether he fit within it. The respondents' justiciability argument was dependent on the existence of a new clemency policy. However, there was no such policy, nor was there evidence of a consensus or a policy decision being taken. Government policy cannot be the sum total of contradictory public statements of its ministers and spokespersons made inside or outside of Parliament. The applicant was entitled to know precisely what the new clemency policy was before it was applied to his situation. It is the Court's obligation to ensure that the Government's decisions are made fairly and with appropriate regard to the applicant's legal interests. The reversal of the Government's position gave rise to a reasonable expectation that it would be made in full consultation with the applicant, followed by a fair and objective consideration of the appropriateness of applying any new policy to the facts of his case. Fairness also required that there be a clear articulation of any new clemency policy such that the applicant could understand it and a decision maker could apply it. Absent such clarity, any resulting decision will be arbitrary and unlawful. The Government's failure to recognize any of these rights represented a fundamental breach of the duty of fairness. Finally, evidence showed that government intervention for clemency would influence the Governor's decision. In conclusion, because the Government's decision to withdraw support for the applicant was made in breach of the duty of fairness, it was set aside. In the absence of any other policy, the Government must continue to support clemency for Canadians, including the applicant, facing execution in a foreign state.

STATUTES AND REGULATIONS CITED

Canadian Charter of Rights and Freedoms, being Part I of the *Constitution Act, 1982*, Schedule B, *Canada Act 1982*, 1982, c. 11 (U.K.) [R.S.C., 1985, Appendix II, No. 44], s. 7.

Department of Foreign Affairs and International Trade Act, R.S.C., 1985, c. E-22, s. 10 (as am. by S.C. 1995, c. 5, s. 7).

CASES CITED

APPLIED:

Operation Dismantle Inc. et al. v. The Queen et al., [1985] 1 S.C.R. 441, (1985), 18 D.L.R. (4th) 481, 12 Admin. L.R. 16.

DISTINGUISHED:

United States v. Burns, 2001 SCC 7, [2001] 1 S.C.R. 283, 195 D.L.R. (4th) 1, [2001] 3 W.W.R. 193; *Suresh v. Canada (Minister of Citizenship and Immigration)*, 2002 SCC 1, [2002] 1 S.C.R. 3, 208 D.L.R. (4th) 1, 37 Admin. L.R. (3d) 159; *Roger Judge v. Canada*, Communication No. 829/1998, U.N. Doc. CCPR/C/78/D/829/1998 (2003).

CONSIDERED:

Abbasi & Anor, R (on the application of) v. Secretary of State for Foreign and Commonwealth Affairs & Secretary of State for the Home Department, [2002] EWCA Civ 1598; *Black v. Canada (Prime Minister)* (2001), 54 O.R. (3d) 215, 199 D.L.R. (4th) 228, 147 O.A.C. 141 (C.A.); *Council of Civil Service Unions v. Minister for Civil Service*, [1984] 3 All E.R. 935 (H.L.); *Canadian Shipowners Assn. v. Canada* (1995), 103 F.T.R. 170 (F.C.T.D.); *Reg. v. Secretary of State for the Home Department, Ex parte Bugdaycay*, [1987] A.C. 514 (H.L.); *Mount Sinai Hospital Center v. Quebec (Minister of Health and Social Services)*, 2001 SCC 41, [2001] 2 S.C.R. 281, 200 D.L.R. (4th) 193, 36 Admin. L.R. (3d) 71.

REFERRED TO:

Cardinal et al. v. Director of Kent Institution, [1985] 3 S.C.R. 643, (1985), 24 D.L.R. (4th) 44, [1986] 1 W.W.R. 577; *Attorney General of Canada v. Inuit Tapirisat of Canada et al.*, [1980] 2 S.C.R. 735, (1980), 115 D.L.R. (3d) 1, 33 N.R. 304; *Knight v. Indian Head School Division No. 19*, [1990] 1 S.C.R. 653, (1990), 69 D.L.R. (4th) 489, [1990] W.W.R. 289; *Gosselin v. Quebec (Attorney General)*, 2002 SCC 84, [2002] 4 S.C.R. 429, 221 D.L.R. (4th) 257, 100 C.R.R. (2d) 1.

AUTHORS CITED

House of Commons Debates, No. 013 (1 November 2007), at page 693 (Hon. Stockwell Day).

House of Commons Debates, No. 014 (2 November 2007), at page 744 (Hon. Peter Van Loan).

House of Commons Debates, No. 020 (20 November 2007), at page 1115 (Hon. Rob Nicholson).

House of Commons Debates, No. 022 (22 November 2007), at page 1236 (Hon. Rob Nicholson).

House of Commons Debates, No. 026 (28 November 2007), at page 1493 (Rob Moore).

House of Commons Debates, No. 041 (31 January 2008), at page 2457 (Deepak Obhrai).

House of Commons Debates, No. 068 (31 March 2008), at page 4252 (Hon. Maxime Bernier).

APPLICATION seeking an order compelling the respondents, on behalf of the Government of Canada, to assist the applicant in pursuing commutation of the death penalty by way of an anticipated clemency petition to the Governor of Montana. Application allowed.

APPEARANCES

Lorne Waldman, *Marlys A. Edwardh*, *Adriel Weaver*, *Ikiko Maria Sophia Erdei* and *Craig S. Forcese* for applicant.

Eric P. Groody, *David H. de Vlieger* and *Katherine Reiffenstein* for respondents.

SOLICITORS OF RECORD

Waldman & Associates, Toronto, *Ruby & Edwardh*, Toronto and *University of Ottawa*, Ottawa, for applicant.

Code Hunter LLP, Calgary, for respondents.

The following are the reasons for judgment and judgment rendered in English by

[1] BARNES J.: Ronald Allen Smith, a Canadian citizen, is a death-row inmate presently incarcerated in the Montana State Penitentiary at Deer Lodge, Montana. He was first sentenced to death on March 21, 1983 for the murder of Harvey Madman Jr. and Thomas Running Rabbit Jr. on August 4, 1982 near Glacier National Park in Montana.

[2] Mr. Smith's application to this Court seeks an order compelling the respondent Ministers, on behalf of the Government of Canada, to assist him in pursuing commutation of the death penalty by way of an anticipated clemency petition to the Governor of Montana. He claims relief under the *Canadian Charter of Rights and Freedoms* [being Part I of the *Constitution Act, 1982*, Schedule B, *Canada Act 1982*, 1982, c. 11 (U.K.) [R.S.C., 1985, Appendix II, No. 44]] (Charter) and also on the basis of allegations that the respondents have breached fundamental principles of fairness by arbitrarily withdrawing diplomatic assistance from him without consultation or reasons.

[3] There is no dispute that the respondents have recently declined to assist Mr. Smith with his bid for clemency. Indeed, notwithstanding more than 20 years of prior support for Mr. Smith, various ministers and representatives of the present government have publicly declared that the Government of Canada will no longer assist Mr. Smith in his efforts to avoid the death penalty in the United States.

[4] The respondents say that the Government's decision is one of high policy falling within the royal prerogative and that this Court has no authority to intervene on Mr. Smith's behalf. They deny that they have breached Mr. Smith's Charter rights or that any duty of fairness arises in this context. In short, they say that the Government of Canada owes no legal duties of any kind to Mr. Smith and it is fully entitled to ignore his plea for assistance.

I. Background

[5] Mr. Smith's legal history in the United States is extensive. It began with his arrest in Wyoming on August 27, 1982. On September 20, 1982, he was charged with two counts of aggravated kidnapping and two counts of homicide. Not long after being charged, Mr. Smith was offered a plea arrangement. In return for guilty pleas to murder, the State would not seek the death penalty. Mr. Smith declined the offer and initially pleaded not guilty, but within three weeks he withdrew his not-guilty pleas, pleaded guilty and asked to be put to death. On March 21, 1983, Mr. Smith attended a sentencing hearing and reiterated his request to be put to death. The Court obliged. Later that year Mr. Smith asked the sentencing Court to reconsider and to allow him to present psychiatric evidence. Although the Court did commission psychiatric evidence and re-examined the facts of the case, the death sentence was affirmed. In 1985, the death sentence was reaffirmed by the Supreme Court of Montana. In 1990, the United States Court of Appeals for the Ninth Circuit reversed the death penalty sentence but, following a further hearing, the death penalty was reinstated in 1992. That sentence was also set aside in State Court but reinstated yet again following a re-sentencing hearing in 1995. The record discloses a history of legal errors made by the State courts in the 1983 and 1992 sentencing hearings which have so far been corrected on appeal. Mr. Smith's appeal from the 1995 sentencing decision is presently pending in the United States Court of Appeals for the Ninth Circuit. Throughout this entire period of more than 25 years Mr. Smith has been confined on death row at the Montana State Penitentiary.

[6] The record discloses a long history of interaction between Canadian consular officials and Mr. Smith and his legal counsel. Indeed, the Government of Canada has maintained an interest in Mr. Smith's case since the time of his initial incarceration in 1983. Over the succeeding years, consular officials communicated with some regularity with Mr. Smith, with his lawyers, with prison officials, with the Office of the Governor of Montana, with other State officials and with the United States Department of State. In early 1998, Mr. Smith's lawyer, Don Vernay, wrote to the Canadian Consulate General in Minneapolis seeking the assistance of the Canadian government in the presentation of "an early clemency petition" to the Montana Governor. In reply, the Consul General, Robert Déry, advised:

> As rules apply differently according to state and each death row case is different, we do not have a standard procedure to support a clemency request. Once Mr. Smith is ready to make his petition for clemency, we will work closely with you to ensure that our representation on his behalf complements your approach and the legal aspects of the case.

[7] Mr. Déry followed up by writing to the Governor on May 25, 1999, seeking commutation of Mr. Smith's death sentence. His letter to the Governor (written in collaboration with Mr. Smith's attorney) concluded as follows:

> I have reviewed Mr. Smith's file and have personally visited him in prison. I believe he is a good candidate for clemency in that, over time, he has accepted that his actions were wrong and has expressed remorse. He has a consistent record for good behaviour in prison and is taking university level courses towards a degree.
>
> I am aware that there are still a number of avenues which Mr. Smith can appeal; however, it is my understanding that all judicial or administrative remedies need not be exhausted before an appeal for clemency is made. I further understand that, under the statutes of Montana, the granting of clemency is the sole responsibility of the Governor.

The Government of Canada does not sympathize with violent crime and this letter should not be construed as reflecting a judgement on Mr. Smith's guilt or innocence. The practice of the Department of Foreign Affairs and International Trade to seek clemency for Canadian citizens sentenced to death in foreign countries is based on humanitarian considerations.

In view of Mr. Smith's efforts towards rehabilitation, and the significant mitigating circumstances presented in his petition for post conviction relief, I believe there are compelling reasons for commuting his sentence to life in prison. I therefore respectfully request that you give serious consideration to granting executive clemency to Mr. Smith.

Nothing of significance seems to have come from this initial request for clemency apparently because Mr. Smith's legal appeals had not then been exhausted. The record does indicate, though, that the Department of Foreign Affairs and International Trade (DFAIT) continued to be interested in Mr. Smith's case and communicated with him and with his attorneys on a fairly regular basis.

[8] In 2007, Mr. Smith's attorneys and Canadian consular officials focused their attention once again on the issue of clemency. On February 13, 2007, Canadian Consul General, Michael Fine, met with legal counsel for the Montana Governor to discuss Mr. Smith's case. In a DFAIT case note dated February 21, 2007, the outcome of that meeting was described as follows:

Consul General Michael Fine met with Ann Brodsky, Legal Counsel for Montana Governor Brian Schweitzer, on February 13, 2007. Mr. Fine also met with Governor Schweitzer on that date but subject's case was not discussed as members of the media were present. Ms. Brodsky indicated that they are still willing to consider options, however, they are waiting for the conclusion of the current Legislative Session in mid-April. She also indicated that they would want some type of guarantee that subject would spend at least five years in prison in Canada should a transfer occur.

[9] On July 19, 2007, Mr. Smith's attorneys met with the Governor's staff to discuss clemency. In an e-mail the next day to Consular Officer Kimberley Lewis, they described the Governor's views and the need for the assistance of the Canadian government in the following terms:

Further, it was obvious from the meeting that the Governor is weighing the political considerations/ramifications of a decision to commute. In that regard, it was equally obvious that the lynch pin to a decision to commute is going to be the Canadian government and their desire for Ron Smith's commutation and return to Canada.

Finally, as you know, Ron has been incarcerated in the US for 24 years. He is tired and losing hope of winning in the courts and returning to Canada. He has in recent years witnessed most of the other death row inmates' executions. Thus, if we are unsuccessful in the commutation effort, we anticipate that he will demand that his appeals be dismissed and that he will "volunteer" to be executed – as did David Dawson last year.

Thus, in our opinion time is of the essence for this to move forward. While Don and I can handle the mechanics of the application for commutation and hearing on that application, realistically it will only happen if Canada actively pushes for and negotiates the decision to commute with Governor Schweitzer. In the absence of a prior agreement of the Governor to commute Ron's sentence, it would be unrealistic for us to proceed with a commutation application at this time.

We appreciate all of your help and would be happy to discuss this more with you. If you have any questions, please feel free to give us a call.

On September 10, 2007, Mr. Smith's attorney, Gregory Jackson, wrote to Ms. Lewis to again emphasize the importance of Canadian government assistance:

Consequently, it appears to us that unless the Canadian Consulate can "carry the ball" and secure a commitment from Governor Schweitzer on the commutation issue, that we are placed in the position of pursuing the appeals, risking a loss of that appeal and risking Ron's execution or volunteering to be executed. As we are nearing the end of the appeal process, these are all very real possibilities.

Please let us know your thoughts on the situation. Thank you again for your assistance.

[10] The Canadian government's decision to withdraw its long-standing support for Mr. Smith seems to have been made very quickly and without any widespread or considered consultation. On October 26, 2007, Randy Boswell, a reporter with CanWest News Service, asked for a response from DFAIT in connection with a United States news report referring to earlier clemency deliberations between the Montana Governor and Canadian officials. The initial response given by DFAIT was that the government's clemency policy had not changed and that support for Mr. Smith's case would continue on humanitarian grounds. But on October 30, 2007, Mr. Boswell made further enquiries of the Department of Public Safety and was told that "there are no ongoing efforts by our Government to seek a commutation of the death penalty for Mr. Smith". This response was quickly followed by a number of exchanges in the House of Commons where the Government was asked to explain its position.

[11] On November 1, 2007, the Minister of Public Safety, the Honourable Stockwell Day, told Parliament that "[w]e will not actively pursue bringing back to Canada murderers who have been tried in a democratic country that supports the rule of law" [*House of Common Debates*, No. 013, at page 693]. This was followed by a similar statement in the House by the Government Leader, the Honourable Peter Van Loan, on November 2, 2007 [*House of Common Debates*, No. 014, at page 744].

[12] On November 20, 2007, the Minister of Justice and Attorney General of Canada, the Honourable Rob Nicholson, told Parliament that each case for clemency assistance would be examined "on its merits" but "in the case of the individual [Mr. Smith] who was the multiple murderer" no further help would be forthcoming [*House of Common Debates*, No. 020, at page 1115].

[13] On November 22, 2007, Minister Nicholson advised Parliament that the Government's new clemency policy was as follows [*House of Commons Debates*, No. 022, at page 1236]:

> What we have indicated, though, and I will repeat this for the hon. member, is that multiple murderers and mass murderers who are convicted in a democracy that adheres to the rule of law cannot necessarily count on a plea for clemency from the Canadian government and patriation back to this country. That message should be very clear. [Emphasis added.]

[14] Minister Nicholson's statement was followed on November 28, 2007, by a statement in Parliament from his Parliamentary Secretary, Rob Moore [*House of Commons Debates*, No. 026, at page 1493]:

> With respect to clemency, as the Minister of Justice has said, our government will deal with the issue on a case by case basis. Potentially, if another country will only grant clemency on the basis of the offender being repatriated to Canada, we may have difficulty inasmuch as an offender who has committed murder abroad could potentially be eligible for parole in Canada and subsequently be free to live in our communities.
>
> As is evident from our ambitious justice agenda, our government's first priority is to protect Canadians. We would be abdicating that responsibility by the potential release of a murderer, particularly one who has committed not one but multiple murders.
>
> I am confident that Canadians do not want murderers free to roam our streets, especially if they have not served a sentence proportionate to the seriousness of their crime.

[15] On January 31, 2008, the Parliamentary Secretary to the Minister of Foreign Affairs, Deepak Obhrai, told Parliament that "[i]n cases where Canadians face the death penalty abroad, the Government of Canada, on a case by case basis, based on what is in the best interest of Canada, will continue to consider whether to seek clemency" [*House of Common Debates*, No. 041, at page 2457].

[16] On March 31, 2008, the Minister of Foreign Affairs, the Honourable Maxime Bernier, in a Parliamentary exchange with the Honourable Irwin Cotler presented what appears to be the most detailed version of the Government's policy [*House of Commons Debates*, No. 068, at page 4252]:

Question No. 194—**Hon. Irwin Cotler**:

> With regards to Canadians sentenced to death abroad, does the government have a clemency policy and, if so: (*a*) when was this new policy adopted; (*b*) which Ministers, departments, agencies, and officials were responsible for the creation of this policy; (*c*) what factors are considered in a clemency determination; (*d*) what specific information is collected by Foreign Affairs and consular officials when evaluating clemency requests; (*e*) what criteria must one meet to be granted clemency; (*f*) what process exists for review of clemency determinations by the government; (*g*) what oversight process exists for clemency determinations by the government; (*h*) how does a person apply for clemency protection under this process; (*i*) is there an appeal process for clemency determinations under this policy; and (*j*) which Minister, Ministry, Department, Agency, or officials will make clemency determinations for the government?

Hon. Maxime Bernier (Minister of Foreign Affairs, CPC): Mr. Speaker, in response to (a), as of October 31, 2007, the Government has clearly stated that it will address requests for clemency on a case by case basis.

In response to (b) and (j), the Minister of Foreign Affairs has the responsibility under the Department of Foreign Affairs Act to conduct all diplomatic and consular relations on behalf of the Government of Canada, which includes any representations to a foreign government requesting clemency.

In response to (c), (d) and (e), relevant factors would include all the details of the individual case and reference to applicable international standards on the death penalty.

In response to (f), (g), (h) and (i), the Government of Canada's position has been very clear with respect to this matter. Canadian citizens detained abroad will continue to receive consular assistance. In cases where Canadians face the death penalty abroad, the Government of Canada will continue to consider whether to seek clemency on a case by case basis. [Emphasis added.]

[17] Except for the various Parliamentary statements noted above and a variety of similar press statements attributed to Government ministers and representatives, the respondents have provided no evidence of a new Canadian government policy on clemency or with respect to the decision to deny further support to Mr. Smith's bid for clemency. The record before me also establishes that the Government did not seek any input from Mr. Smith or from his legal advisors before it decided to withdraw its support.

II. Issues

[18] (a) Are the issues raised in this proceeding justiciable and, if the issues are justiciable, did the respondents breach a duty of fairness in the manner of their withdrawal of diplomatic assistance for the applicant's pending petition for clemency?

(b) Does the government's asserted policy concerning the provision of diplomatic assistance for clemency for Canadians facing the death penalty abroad violate the Charter or contravene paragraphs 10(2)(*a*), 10(2)(*i*) and 10(2)(*j*) of the *Department of Foreign Affairs and International Trade Act*, R.S.C., 1985, c. E-22?

III. Analysis

[19] The issues presented by this case are unique and, in some measure, the relief that Mr. Smith seeks would extend the previously recognized boundaries of Canadian law.

[20] The issue of the extradition of an accused to face potential execution has been thoroughly addressed by the Supreme Court of Canada in *United States v. Burns*, 2001 SCC 7, [2001] 1 S.C.R. 283. The *Burns* decision was followed by *Suresh v. Canada (Minister of Citizenship and*

Immigration), 2002 SCC 1, [2002] 1 S.C.R. 3, which involved the issue of deportation to potential torture or death. In both cases, the Court examined the balance that must be struck between the need to protect the safety of the public and the importance of maintaining respect for liberty, the rule of law and the principles of fundamental justice. Neither of these decisions concerned a situation like that of Mr. Smith who is outside of Canada and, therefore, beyond the effective control of Canadian authorities.

[21] In *Burns* and *Suresh* there was found to be a sufficient connection between the conduct of the Canadian government and the risk of execution or torture because the government was not "merely a passive participant" in the processes giving rise to those risks. In both cases the Court prevented the Government from taking a step which was causally linked to the foreign risks they each faced. Here the situation is different because the Canadian government has no control over Mr. Smith and no control of the legal process which has put him at risk of execution in Montana. The most that Mr. Smith can expect from his Government is that it exert its influence on the Montana Governor in support of his bid for clemency. But, as noted above, the Government wishes to remain passive to his plight.

[22] The respondents say that the Canadian government owes no justiciable legal duties to Mr. Smith because the decision not to support him falls squarely within the Crown prerogative to conduct Canada's foreign affairs, including the right to speak freely with a foreign state on all such matters. They also contend that no duty of procedural fairness arises where the interventions being sought will not be determinative of Mr. Smith's fate and where their potential efficacy is a matter of supposed speculation.

[23] The respondents do acknowledge that the general principle of non-justiciability is subject to constitutional obligations and to situations where individual rights or private law interests are engaged. But they assert that this case is only about the Government's decision to adopt a new foreign policy on clemency for Canadians facing the death penalty in other countries. This, they say, is fundamentally a matter involving political and morality-based choices lacking a sufficient legal component to allow for judicial review. In making this argument the respondents rely heavily upon the decision of the England and Wales Court of Appeal in *Abbasi & Anor, R (on the application of) v. Secretary of State for Foreign and Commonwealth Affairs & Secretary of State for the Home Department*, [2002] EWCA Civ 1598, and on the Ontario Court of Appeal decision in *Black v. Canada (Prime Minister)* (2001), 54 O.R. (3d) 215.

[24] *Abbasi* was a case involving a British citizen who was detained by the United States Government in Guantanamo Bay, Cuba. The British Foreign Office had intervened, in some measure, with the American authorities on behalf of Mr. Abbasi but he sought an order to compel British officials to do more. Ultimately the Court declined to grant relief to Mr. Abbasi and there is no question that this unwillingness to intervene was based on a recognition of the non-justiciability of executive decisions involving finely nuanced and multi-faceted political judgments. The decision also applied a line of "formidable" authorities which had declared matters involving the content of high-foreign policy and the exercise of "delicate diplomacy" to be immune from judicial review.

[25] The *Abbasi* decision makes it quite clear, though, that where the application of foreign policy requires certain criteria to be satisfied, the process of decision making—as distinct from its content—may be subject to judicial review. Thus in cases where the application of policy involves a fair consideration of relevant factors, the refusal of the decision maker to even consider an individual claim to relief may attract judicial review. The Court in *Abbasi* also observed that judicial review may be available where the exercise of executive discretion to refuse support to a citizen was "irrational or contrary to legitimate expectation". These qualifications to the non-justiciability principle were described in the following passages [at paragraphs 99–100, 104 and 106]:

What then is the nature of the expectation that a British subject in the position of Mr Abbasi can legitimately hold in relation to the response of the government to a request for assistance? The policy statements that we have cited underline the very limited nature of the expectation. They indicate that where certain criteria are satisfied, the government will "consider" making representations. Whether to make any representations in a particular case, and if so in what form, is left entirely to the discretion of the Secretary of State. That gives free play to the "balance" to which Lord Diplock referred in *GCHQ*. The Secretary of State must be free to give full weight to foreign policy considerations, which are not justiciable. However, that does not mean the whole process is immune from judicial scrutiny. The citizen's legitimate expectation is that his request will be "considered" and that in that consideration all relevant factors will be thrown into the balance.

One vital factor, as the policy recognises, is the nature and extent of the injustice, which he claims to have suffered. Even where there has been a gross miscarriage of justice, there may perhaps be overriding reasons of foreign policy which may lead the Secretary of State to decline to intervene. However, unless and until he has formed some judgment as to the gravity of the miscarriage, it is impossible for that balance to be properly conducted.

…

The extreme case where judicial review would lie in relation to diplomatic protection would be if the Foreign and Commonwealth Office were, contrary to its stated practice, to refuse even to consider whether to make diplomatic representations on behalf of a subject whose fundamental rights were being violated. In such, unlikely, circumstances we consider that it would be appropriate for the court to make a mandatory order to the Foreign Secretary to give due consideration to the applicant's case.

…

We would summarise our views as to what the authorities establish as follows:

…

iv. It is highly likely that any decision of the Foreign and Commonwealth Office, as to whether to make representations on a diplomatic level, will be intimately connected with decisions relating to this country's foreign policy, but an obligation to consider the position of a particular British citizen and consider the extent to which some action might be taken on his behalf, would seem unlikely itself to impinge on any forbidden area.

[26] The Ontario Court of Appeal decision in *Black* contains a thorough and considered review of the principles of justiciability in the Canadian foreign policy context. The Court held that it is the subject-matter of the power being exercised and not its source (statutory, prerogative, etc.) that dictates whether a decision is justiciable. This was said to involve a consideration of the appropriateness of a court deciding a particular issue instead of deferring to other decision-making institutions. Decisions involving pure policy or political choices in the nature of Crown prerogatives are generally not amenable to judicial review because their subject-matter is not suitable to judicial assessment. But where the subject-matter of a decision directly affects the rights or legitimate expectations of an individual, a court is both competent and qualified to review it. In making this distinction Justice Laskin cited with approval the House of Lords decision in *Council of Civil Service Unions v. Minister for Civil Service*, [1985] A.C. 374 where at page 408 Lord Diplock held that even the exercise of a Crown prerogative was judicially reviewable where an individual is deprived of some benefit or advantage which had been enjoyed in the past. According to Lord Diplock an expectation of continuing advantage is only removable by the Crown on rational grounds and where the affected person has had the opportunity to comment.

[27] The interest at stake in the *Black* case was the potential conferral by the Queen of a Royal Peerage. Mr. Black made no assertion that he had been denied procedural fairness but only that the Prime Minister's negative intervention with the Queen had been based on wrong legal advice and a mistaken interpretation of Canadian honours policy. Perhaps in keeping with Canadian sensibilities, Justice Laskin held that the potential grant of a British honour did not engage an important individual interest or give rise to real adverse consequences for Mr. Black. Justice Laskin also discussed the

Crown prerogative of mercy (pardon) which has traditionally been viewed as beyond the scope of judicial review. Nevertheless, Justice Laskin said that the discretion to grant a pardon could raise important liberty or personal interests which would attract procedural rights: see *Black*, above, at paragraph 55.

[28] From these and other authorities it is clear that, subject to Parliament and to the Constitution, it is open to the Government of Canada in its assessment of the public interest to freely change its policies from time to time. The development of broad public policy is, after all, an exercise of the executive function which is generally not amenable to judicial review. Similarly, I accept that the exercise of the prerogative to develop and implement diplomatic and foreign policy initiatives is generally beyond the scope of judicial scrutiny.

[29] At the other end of the spectrum of government decision making are decisions of an administrative character which affect the rights, privileges or interests of an individual: see *Cardinal et al. v. Director of Kent Institution*, [1985] 2 S.C.R. 643, at page 653 and *Black*, above, at paragraph 51. Such decisions are reviewable and they are subject to the principles of procedural fairness.

Where does this decision fit on the justiciability continuum?

[30] In order to resolve the issue of justiciability in this case it is necessary to properly characterize the decision under review. The respondents argue that the withdrawal of clemency support for Mr. Smith was merely the incidental consequence of applying a new policy on clemency. Mr. Smith contends that the Government's characterization of the decision as a policy choice is mere camouflage for a decision which very deliberately and singularly targeted him.

[31] In my view the respondents' argument misses the point. Even if there was a discernible change in the Government's clemency policy it is fallacious to say that that alone constitutes the decision under review in this case. At some point someone with the authority to do so had to apply any new clemency policy to Mr. Smith to determine whether he fit within it. That is where Mr. Smith's specific and considerable interests were at stake and where the Government owed him a clear duty of fairness.

[32] The respondents' justiciability argument is also entirely dependent on the existence of a new government clemency policy and, on the evidence before me, it is quite obvious there was no such policy. Various government representatives had advanced views on what a new policy ought to be but there is no evidence of a consensus or of a policy decision being taken by anyone. I also have no idea who made the *de facto* decision to withdraw government support for Mr. Smith or which of the contradictory statements of policy were applied to his case.

[33] If the new Government policy was represented by the views of Minister Bernier as stated in Parliament on March 31, 2008, Mr. Smith was entitled to have his case individually reviewed on the basis of all relevant mitigating and aggravating factors including applicable international standards on the death penalty. The respondents have produced no evidence of any such review and it is reasonable to conclude that none was done.

[34] If the new Government clemency policy was represented by the views of Parliamentary Secretary to the Minister of Justice and Attorney General Rob Moore, as stated in Parliament on November 28, 2007, clemency support was to be determined on a case-by-case basis including consideration of the possible obligation to accept repatriation of the offender to Canada and whether the sentence already served was appropriate to the seriousness of the crime. This version of the supposed policy would have required the decision maker to determine if repatriation of Mr. Smith was a pre-condition to the grant of clemency. The evidence on this point is only that the Governor of Montana had raised repatriation of Mr. Smith and the length of his Canadian incarceration as issues but that they had not been presented by the Governor as absolute pre-conditions to clemency.[1] In any

event the Government of Canada did not have the unilateral authority to agree to those conditions and, accordingly, the Governor of Montana could not reasonably insist upon their fulfillment as conditions to the grant of clemency. If repatriation of Mr. Smith was the determinative issue for assisting his clemency request in accordance with a new Government clemency policy, it was clearly premature for the Government to withdraw its support when it did. I also have no evidence here that anyone in authority considered the sufficiency of the 25 years that Mr. Smith has spent on death row under threat of execution. While he may not yet have served a sentence proportionate to the seriousness of his crimes, there still would have to be some consideration of those facts if the Government's clemency policy included such an assessment.

[35] Even though the respondents were unable to produce an official statement of the Government's supposed new clemency policy, the Court was invited to divine or to construct such a policy from the various public statements made by ministers of the Crown and by other government representatives. When asked, counsel for the respondents indicated that such an analysis would lead the Court to the following version of the new policy:

> The Government will not intervene in clemency applications by a Canadian facing a capital sentence in a democratic country that honours the rule of law.

When counsel for the respondents was then asked if the above version constituted the Government's official clemency policy, the surprising answer was "no". He asserted only that this version represented his best attempt to construct the policy from available public sources and that he was authorized by the respondents to put it forward on that basis only.

[36] It is perhaps not altogether surprising that the Court was invited to accept that the Government's new clemency policy was as stated above. That version would presumably apply to Mr. Smith because he was sentenced—indeed repeatedly sentenced—in a democratic jurisdiction which follows the rule of law. That version of a clemency policy essentially removes any element of discretion in its application. However, when counsel for the respondents was asked if that statement of the policy allowed for any exceptions including situations involving young offenders or persons with intellectual challenges, his response was that the policy might be changed if the circumstances required it. In other words, even that version of the policy was variable if it was found to be wanting in a particular case.

[37] In the end, of course, the respondents' arguments about the supposed clemency policy are wholly without merit. Government policy cannot be created by a process as amorphous and unaccountable as the one followed here. Government policy is not and cannot be the sum total of contradictory public statements of its ministers and spokespersons made inside or outside of Parliament. While the government is generally free to change its policies there must still be a tangible and intelligible articulation of any policy before it can be applied to a case like Mr. Smith's. Mr. Smith was entitled to know precisely what the new clemency policy was before it was applied to his situation. He could not be expected to discern the policy by sorting through the inconsistent versions offered by various government representatives.

[38] The decision to withdraw clemency support from Mr. Smith did not involve the exercise of a legislative function nor can it be properly characterized as a decision made on broad grounds of public policy. Even with a new clemency policy, the decision to apply it would involve a subject-matter of grave and specific concern to Mr. Smith: see *Attorney General of Canada v. Inuit Tapirisat of Canada et al.*, [1980] 2 S.C.R. 735, at pages 752–754. As was observed by Justice Marc Noël in *Canadian Shipowners Assn. v. Canada* (1995), 103 F.T.R. 170 (F.C.T.D.), at paragraph 24, the more personal the nature of the issue, the more likely that a government decision will lose its legislative character and the more the principle of fairness becomes applicable.

[39] In *Reg. v. Secretary of State for the Home Department, Ex parte Bugdaycay*, [1987] A.C. 514 (H.L.) the significance of the matter in issue was also said to inform the scope of judicial review or as Lord Bridge stated, at page 531:

> The most fundamental of all human rights is the individual's right to life and when an administrative decision under challenge is said to be one which may put the applicant's life at risk, the basis of the decision must surely call for the most anxious scrutiny.

In the realm of diplomatic assistance to citizens in legal trouble in foreign jurisdictions everything pales in significance to the cause of one's imminent execution and the corresponding interest in avoiding it. One would expect, therefore, that any decision by the Canadian government to withdraw clemency support for a person in such a predicament would also attract the most rigorous and anxious scrutiny by the decision maker and, where that is not evident, by the supervising court.

[40] My concern, then, is not with the authority of this Court to tell the Canadian government how to formulate foreign policy or how to conduct its business with the Governor of Montana but, rather, with the Court's obligation to ensure that the Government's decisions in that regard are made fairly and with appropriate regard to Mr. Smith's legal interests. This is a matter which is indisputably justiciable and which attracts a duty of fairness.

Estoppel, reasonable expectations and the duty of fairness

[41] I do not agree with counsel for Mr. Smith that the Government's prior support for clemency creates an estoppel in law. There is no evidence that Mr. Smith has suffered any detriment caused by the Government's earlier conduct. I accept that some time and effort has been expended over the years with a view to engaging the support of the Canadian government and Mr. Smith may have sustained some sort of a psychological set back by the decision to withdraw that support, but those are not matters which satisfy the requirement for detrimental reliance.

[42] Mr. Smith's interests were, however, particularly affected in this instance because he was caught in the middle of a transition from a position of full clemency support to a position of no support. The legal significance of such a reversal of position for the procedural rights of an interested party was considered by the Supreme Court of Canada in *Mount Sinai Hospital Center v. Quebec (Minister of Health and Social Services)*, 2001 SCC 41, [2001] 2 S.C.R. 281, at paragraph 16 where Justice Binnie observed:

> It is true, as the appellant points out, that the Minister's power under s. 138 is framed as a broad policy discretion to be exercised "in the public interest". Yet the discretion, however broadly framed, is not unfettered. At the very least the Minister must exercise the power for the purposes for which it was granted: *Roncarelli v. Duplessis*, [1959] S.C.R. 121, at p. 140; *Padfield v. Minister of Agriculture, Fisheries and Food*, [1968] A.C. 997 (H.L.), at p. 1030. The Minister must observe procedural fairness in dealing with the respondents' interests in their application for a permit: *Cardinal v. Director of Kent Institution*, [1985] 2 S.C.R. 643; *Nicholson v. Haldimand-Norfolk Regional Board of Commissioners of Police*, [1979] 1 S.C.R. 311. Other limitations are more controversial. Where, as here, the Minister makes representations by word or conduct that someone will receive or retain a benefit, or that some procedural right will be afforded before a decision is taken, the availability and/or content of procedural fairness may be enlarged under the doctrine of legitimate expectation. [Authorities omitted; emphasis added.]

I have no hesitation whatsoever in finding that the reversal of the Government's position after more than 20 years of unqualified assistance to Mr. Smith gave rise to a reasonable expectation that any decision to withdraw support would not be applied without a full consultation with him and with his legal advisors followed by a fair and objective consideration of the appropriateness of applying any new policy to the facts of his case. That determination would be required to consider the implications arising from the Government's midstream and very late reversal of the earlier decision to afford him full support. Fairness also requires that there be a clear articulation of any new clemency policy such that Mr. Smith could understand it and an appropriate decision maker could fairly apply it. Absent

such clarity, any resulting decision will always be arbitrary and unlawful. Finally, Mr. Smith is also entitled to a clear and consistent articulation of the reasons for the Government's reversal of its position.

[43] The failure by the Government to recognize any of these procedural rights represents a fundamental breach of the duty of fairness and the decision to withdraw support from Mr. Smith for clemency must on that basis be set aside.

Does it matter that the Canadian government is not the ultimate decision maker?

[44] I do not agree with the respondents that the duty of fairness is not engaged in this case because the actions of the Government will not be determinative of the clemency outcome. The right to fair treatment is engaged whenever a decision is "a significant one and has an important impact on the individual": see *Knight v. Indian Head School Division No. 19*, [1990] 1 S.C.R. 653, at page 677. It is not correct to say that the decision to withdraw support from Mr. Smith was akin to a preliminary investigation where the result may or may not be considered by the ultimate decision maker. From Mr. Smith's perspective the result of the Government's decision to withdraw support is final and he has no other Canadian recourse.

Is the evidence concerning the value of Government intervention in the clemency process speculative?

[45] I also do not agree with the respondents' characterization of the potential value of the Government's assistance as speculative. They contend that the impact of Government support for Mr. Smith's clemency petition is a matter of conjecture because there is "no empirical evidence to back up the claim that foreign governments have a significant influence in executive clemency proceedings". While it is true that much of the evidence bearing on this issue is anecdotal, opinion-based or experiential, it is, in my view, sufficient to support an inference that Canadian government support for clemency will, in all probability, have a significant influence on the Governor's decision. I also do not agree that the expression of expert opinion on this issue is of no weight or value in drawing an inference with respect to an intangible fact—that is, with respect to a prospective factual determination. For this I rely upon the following observations by Justice Bertha Wilson in *Operation Dismantle Inc. et al. v. The Queen et al.*, [1985] 1 S.C.R. 441, at pages 478–479:

> It has been suggested, however, that the plaintiffs' claim should be struck out because some of the allegations contained in it are not matters of fact but matters of opinion and that matters of opinion, being to some extent speculative, do not fall within the principle that the allegations of fact in the statement of claim must be taken as proved. I cannot accept this proposition since it appears to me to imply that a matter of opinion is not subject to proof. What we are concerned with for purposes of the application of the principle is, it seems to me, "evidentiary" facts. These may be either real or intangible. Real facts are susceptible of proof by direct evidence. Intangible facts, on the other hand, may be proved by inference from real facts or through the testimony of experts. Intangible facts are frequently the subject of opinion. The question of the probable cause of a certain result is a good illustration and germane to the issues at hand. An allegation that the lack of shower facilities at a defendant's brickworks probably resulted in a plaintiff employee's skin disease may in lay language appear to be merely an expression of medical opinion, but it is also in law a determination which the courts can properly infer from the surrounding facts and expert opinion evidence: see *McGhee v. National Coal Board*, [1972] 3 All E.R. 1008 (H.L.) Indeed, even a finding that an event "would cause" a certain result in the future is a finding of intangible fact. For example, in *Fleming v. Hislop* (1886), 11 A.C. 686, it was necessary to determine whether or not the finding "that the ignition of any other heap or bing of blaes on said farm or in the vicinity of the pursuers' land would cause material discomfort and annoyance to the pursuers," was a finding of fact or a finding of law. It was argued that it could not be a finding of fact because it related to something that was "prospective, future, not actually in existence". The Earl of Selborne agreed that, since the thing had not actually happened, a finding of fact as a thing past was impossible. But it was nevertheless a finding of fact and "there is a fallacy in saying that, because the word 'would' is a word of futurity, the words 'would cause' do not mean something which is properly a fact" (p. 690). See also on causation as an issue of fact: *Alphacell Ltd v. Woodward*, [1972] 2 All E.R. 475, *per* Lord Salmon, at pp. 489-90.

The nature of causation has been discussed by many eminent philosophers and also by a number of learned judges in the past. I consider, however, that what or who has caused a certain event to occur is essentially a practical question of fact which can best be answered by ordinary common sense rather than abstract metaphysical theory.

The Canadian government's past interventions on Mr. Smith's behalf provide the best available evidence on the likely effect of any future intervention. According to a briefing note signed by Assistant Deputy Minister (Justice) Carolyn Kobernick, those early informal representations had elicited some qualified sympathy for clemency from the Governor of Montana:

DFAIT consular officials have requested clemency for Mr. Smith on humanitarian grounds since 1997. In February 2007, the Governor of Montana indicated to our Consul General that they were willing to consider commuting Mr. Smith's sentence so he could be transferred back to Canada, but that they would want some type of guarantee that he would spend at least five years in prison in Canada should a transfer occur.

[46] Even the affidavit of the prosecuting attorney in Montana, Thomas J. Esch, did not suggest that Canada's intervention would be of no influence to a clemency decision.[2]

[47] The evidence from other deponents in this case overwhelmingly establishes the value of government intervention on behalf of their nationals facing execution in the United States.[3] This is particularly true in a state like Montana "which does not have a strong history of executing".[4]

[48] I am satisfied that the good faith assistance of the Government of Canada would be influential in the exercise of the Governor's discretion. It is not possible, of course, to say that such assistance would be determinative of the clemency outcome but, in my view, it is not necessary to go that far just as it was not a requirement in either *Burns* or *Suresh*, above, to establish that execution or torture were factual certainties.

What is the Government policy on clemency?

[49] The evidence is clear that until various representatives of the Government of Canada began to publicly discuss Mr. Smith's case in 2007, Canada's official clemency policy was to support clemency for Canadians facing execution in a foreign state.[5] According to Mr. Graham, a former Minister of Foreign Affairs, this policy allowed for no exceptions and was founded on Canada's principled objection to the death penalty—a view which evolved since the practice of execution was ended here in 1962. This is also a position that is consistent with Canada's long-standing international policy to support the universal abolition of the death penalty. In the absence of any other policy, this is the policy that the Government must continue to apply in good faith to Mr. Smith's case.

Charter and international law issues

[50] I was invited by counsel for Mr. Smith to consider the lawfulness of the respondents' decision on Charter grounds. While I agree with counsel for Mr. Smith that the Government's decision to withdraw clemency support could raise important Charter concerns of the sort discussed in *Burns*, above, and in *Suresh*, above, I am mindful of the admonition that Charter questions should not be determined hypothetically and here I can identify no new government clemency policy which could be the appropriate subject of a Charter analysis. Suffice it to say that if there is to be a case where a person's section 7 Charter interests will attract a "positive dimension"[6] requiring the Government to take affirmative action where it has declined to do so, it will be a case like this one involving the pending execution of a Canadian citizen.

[51] It was argued on behalf of Mr. Smith that the Government's conduct has caused actual harm to his bid for clemency and to his section 7 Charter rights both because the withdrawal of support after more than 20 years of assistance sent an implied negative signal to the Governor of Montana and

because various ministers spoke disparagingly about him in public. This history of active negative interference with the process unfolding in the United States was said to constitute a violation of Mr. Smith's security interests sufficient to distinguish his case from that of simple government inaction.

[52] There is no merit to the argument that a change in the Government's position concerning Mr. Smith should alone advance his claim to Charter relief in this proceeding. Such a decision, if made fairly and lawfully, may carry adverse consequences but that is not a sufficient basis to support a claim to Charter relief.

[53] The conduct of some Government representatives in this case is, however, more problematic. The public statements of some representatives of the Government implied that Mr. Smith was personally undeserving of further support. It may be open to the Government to change its policy on clemency for Canadians facing foreign execution and it would always be appropriate to explain such a new policy to Canadians. It is another thing altogether to make specific unfavourable comments about an individual's case for relief which might jeopardize his legal status. In the face of Mr. Smith's tenuous situation and the highly politicized nature of the clemency process in the United States, such political comments from representatives of the Government were regrettable. I do not, however, have enough evidence from which I could draw an inference that those unofficial remarks have caused or are likely to cause actual harm to Mr. Smith's pending application for clemency such that a Charter remedy on that basis alone would be warranted, particularly where I am ordering the respondents to implement on behalf of Mr. Smith the previous policy of universal support for all Canadians facing execution in foreign jurisdictions.

[54] Mr. Smith also contends that Canada is obliged by the principles of international law and paragraphs 10(2)(*a*), 10(2)(*i*), and 10(2)(*j*) of the *Department of Foreign Affairs and International Trade Act* to take positive steps to protect him. While I do agree that the Government's decision to deny clemency assistance to Mr. Smith is hard to reconcile with Canada's international commitment to promote respect for international human rights norms including the universal abolition of the death penalty, I do not agree that this inconsistency creates a positive legal obligation to act. The imposition of the death penalty in the United States is not of itself a violation of international law principles and I do not find the words of section 10 [as am. by S.C. 1995, c. 5, s. 7] of the Act to be sufficiently explicit to create the kind of positive duties of diplomatic protection that Mr. Smith asserts. While the evolution of international law may be in that direction, I am of the view that the Charter will provide a sufficient basis for protection such that resort to international law principles will not be required in an appropriate case.

[55] I also do not read the decision of the United Nations Human Rights Committee (UNHRC) in *Roger Judge v. Canada*, Communication No. 829/1998, U.N. Doc. CCPR/C/78/D/829/1998 (2003), as expansively as counsel for Mr. Smith urged. That was a decision dealing with deportation to a death penalty state. It did not recognize an international obligation any larger than what has already been recognized by the Supreme Court of Canada in *Burns* and *Suresh*, above: that is to say that Canada must not "expose a person to the real risk" of the death penalty in another state such as by agreeing to extradition or deportation without conditions.

[56] Whether international law creates positive obligations of diplomatic protection is essentially no different a question than whether such an obligation will be recognized within section 7 of the Charter. It would be unwise to make such a finding in this case for the same reason that I have declined to resolve the Charter issues raised by Mr. Smith.

[57] Although it was argued on behalf of Mr. Smith that this Court should order the respondents to take steps to facilitate Mr. Smith's return to Canada, such an order would, in my view, be inappropriate. The process of repatriation is separate from the clemency process and it involves

entirely different considerations. Furthermore, repatriation is dependant upon the success of Mr. Smith's petition for clemency making that part of Mr. Smith's claim to relief premature.

IV. Conclusion

[58] In the circumstances described above, the decision by the Government of Canada to withdraw support for Mr. Smith was made in breach of the duty of fairness, is unlawful and is set aside. In the absence of any new clemency policy I am ordering the Government to continue to apply the former policy of supporting clemency on behalf of Canadians facing the death penalty in any foreign state to Mr. Smith. Because no new clemency policy has been established, any claim to relief on Charter grounds is, at best speculative, and I decline to consider such grounds on that basis. For the same reason, I decline to consider the application of international law to this case.

Costs

[59] It would be appropriate in this case to hear the parties with respect to the issue of costs. I will therefore allow the applicant two weeks to prepare a submission on costs not to exceed ten pages in length. The respondents shall have a further ten days to respond with a submission not to exceed ten pages in length. The applicant shall then have three days to reply not to exceed five pages in length.

JUDGMENT

THIS COURT DECLARES that the respondents' decision to withdraw diplomatic support for the applicant's claim to clemency in the State of Montana was made in breach of the duty of procedural fairness and is therefore unlawful and invalid.

THIS COURT ADJUDGES that the decision by the respondents to withdraw diplomatic support for the applicant's claim to clemency in the State of Montana is set aside.

THIS COURT FURTHER ADJUDGES that the respondents shall, on behalf of the Government of Canada and in consultation with the applicant and his legal advisors, take all reasonable steps to support the applicant's case for clemency before the Governor of Montana and his advisors in accordance with the current government policy.

THIS COURT FURTHER ADJUDGES that the matter of costs be reserved pending the receipt of further submissions from the parties.

[1] Affidavit of Kimberley Pittman, at para. 21.

[2] Affidavit of Thomas J. Esch, at para. 26: "In this particular case I doubt that any expression by a government at the clemency hearing would carry any more weight than the statements of the victims' families in both Montana and Alberta."

[3] Affidavit of Gregory A. Jackson, at para. 42: "Mr. Smith's interests have been seriously jeopardized"; affidavit of Daniel T. Kobil, at para. 13: "a crucial opportunity to influence the decision"; affidavit of Henry Garfield Pardy, at para. 21: "[withdrawal of support will be] seen as a direct contributing factor in his execution"; affidavit of Alan W. Clarke, at para. 36: "Canada's consular efforts were having a positive effect"; affidavit of Mark Warren, at para. 11: "clemency interventions by foreign governments have been singularly effective in averting the execution of their citizens in the United States"; affidavit of Sandra L. Babcock, at para. 7: "foreign governments have an astounding success rate in preventing the imposition of the death penalty on their nationals".

[4] Affidavit of Alan W. Clarke, at paras. 33–35.

[5] Affidavit of William C. Graham, at para. 22 and affidavit of Henry Garfield Pardy, at para. 8.

[6] See the decision of Justice Louise Arbour in *Gosselin v. Quebec (Attorney General)*, 2002 SCC 84, [2002] 4 S.C.R. 429, at para. 319.