COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: *Graham v. Canada (Minister of Justice),* 2022 BCCA 47

Date: 20220208
Docket: CA46408

Between:

John Graham

Applicant

And

Canada (Minister of Justice)

Respondent

FILE SEALED IN PART

Before: The Honourable Mr. Justice Frankel
The Honourable Madam Justice DeWitt-Van Oosten
The Honourable Mr. Justice Voith

On judicial review from: A decision consenting to waiver of specialty (*Extradition Act*, S.C. 1999, c. 18) issued by Canada (Minister of Justice) on February 2, 2010.

Counsel for the Applicant (via videoconference):	M.E. Sandford, Q.C. A. Tolliday
Counsel for the Respondent (via videoconference):	D.J. Strachan, Q.C. K.L. Swift
Place and Date of Hearing:	Vancouver, British Columbia January 10–11, 2022
Place and Date of Judgment:	Vancouver, British Columbia February 8, 2022

Written Reasons by:
The Honourable Mr. Justice Frankel

Concurred in by:
The Honourable Madam Justice DeWitt-Van Oosten
The Honourable Mr. Justice Voith

Summary:

The applicant, a Canadian citizen, was surrendered to the United States to stand trial on a federal charge of first degree murder. Years later, American prosecutors decided to proceed on state charges. To do so, the United States sought a waiver of the rule of specialty from Canada. Without notice to the applicant, the Minister of Justice signed a waiver consenting to the applicant's prosecution on two state charges: felony murder (kidnapping) and premeditated murder. The applicant was convicted of felony murder (kidnapping). The applicant now applies for judicial review of the Minister's decision on the grounds that it was unreasonable, violated principles of procedural fairness, and breached his rights under several provisions of the Charter as well as his Aboriginal rights. He further asserts the extradition process was abused. The Minister offered to reconsider the waiver request and to receive submissions, which the applicant declined. The Minister submits the application is moot.

Held: (1) The application is not moot. Reconsideration is not the principal relief sought and, in any event, the application raises an important matter that should be heard, namely, whether the principles of procedural fairness require that persons in respect of whom a waiver is sought have participatory rights in that decision-making process similar to those they have in regard to the decision to surrender. (2) Application allowed. The waiver of specialty is set aside and the request for a waiver is remitted to the Minister for reconsideration. At the hearing, the Minister conceded that procedural fairness requires that a person in respect of whom a waiver is sought is entitled to, among other things, notice of the request, an opportunity to make submissions, and disclosure. The request should be remitted because the applicant has not established an abuse of process. Declaratory relief is inappropriate in the circumstances of this case.

Reasons for Judgment of the Honourable Mr. Justice Frankel:

Introduction

[1] The rule of specialty is at the heart of this application for judicial review. That rule, which is a principle of international extradition law, provides that without the consent of the surrendering jurisdiction, the requesting jurisdiction will not try a person surrendered for any previously committed offence other than the offence for which that person was surrendered. It is included in the *Treaty on Extradition Between the Government of Canada and the Government of the United States of America*, Can. T.S. 1976, No. 3, art. 12.

[2] The applicant, John Graham, a Canadian citizen and member of the Champagne and Aishihik First Nations, was surrendered to the United States of America to stand trial on a federal charge of first degree murder. The warrant of surrender was signed by then Minister of Justice, the Honourable Vic Toews.

[3] Some years later, because of difficulties encountered in proceeding against Mr. Graham on federal charges, American prosecutors decided to proceed on state charges. To that end, the United States sought a waiver of the rule of specialty. Without notice to Mr. Graham, then Minister of Justice, the Honourable Rob Nicholson, signed a waiver consenting to Mr. Graham being prosecuted on two state charges: felony murder (kidnapping) and premeditated murder. Minister Nicholson did not provide reasons for his decision.

[4] A jury convicted Mr. Graham of felony murder (kidnapping); he was sentenced to life imprisonment without the possibility of parole. It was not until after Mr. Graham had been sentenced that he was able to obtain a copy of the waiver. He was unsuccessful in raising the waiver as an issue in challenging his conviction in both state and federal courts in the United States. Mr. Graham now seeks to have Minister Nicholson's consent to the waiver reviewed by this Court. The current Minister of Justice, the Honourable David Lametti—who is the respondent before us—accepts this Court has jurisdiction to do so.

[5] Mr. Graham asserts that the decision to waive the rule of specialty was unreasonable and breached his Aboriginal right and rights guaranteed under the *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11. He further asserts the extradition process was abused. He seeks an order setting aside the waiver and declaratory relief. His objective is to be in a position to seek post-conviction relief based on the absence of a waiver. On this application Mr. Graham has filed the affidavit of an American attorney who deposes that, in the absence of a waiver, there is a "reasonable likelihood" Mr. Graham will be entitled to pursue *habeas corpus* in American courts.

[6] After Mr. Graham filed his judicial review application, Minister Lametti advised Mr. Graham that he was prepared to reconsider the waiver request and to receive Mr. Graham's submissions in that regard. Mr. Graham declined that offer.

[7] Because the Minister had offered to reconsider the waiver request, the Court asked the parties to address whether this application had become moot. Mr. Graham filed a written submission in which he took the position the application was not moot. At the outset of the hearing, the Minister applied to have the application dismissed as moot. After hearing from the Minister, we dismissed the mootness application and proceeded with the judicial review.

[8] During the course of the hearing, the Minister conceded that Mr. Graham was denied procedural fairness when the rule of specialty was waived. The Minister further accepted that this Court should set aside the waiver on that basis. He submitted, however, that if the waiver was set aside, the matter should be remitted to him for reconsideration. He also opposed other of the relief sought by Mr. Graham.

[9] What follows are our reasons for dismissing the mootness application and our reasons for setting aside the waiver and remitting the matter for reconsideration.

Background

[10] On December 12, 1975, Anna Mae Aquash, a Canadian citizen and member of the Mi'kmaq First Nation, was killed on the Pine Ridge Indian Reservation in South Dakota, a reservation under federal jurisdiction. She died of a single bullet wound to the back of the head. Her body was not discovered until February 24, 1976.

[11] On March 20, 2003, a federal grand jury indicted Mr. Graham and Fritz Arlo Looking Cloud for the first degree murder of Ms. Aquash. On April 24, 2003, a federal grand jury indicted Mr. Graham and Mr. Looking Cloud on a "superseding indictment"

with the first degree murder of Ms. Aquash. That indictment, which was filed in the United States District Court for the District of South Dakota (the "U.S. Dist. Ct.") read:

> The Grand Jury charges:
>
> On or about the 12th day of December, 1975, near Wanblee, in Indian country, in the District of South Dakota, the defendants, Fritz Arlo Looking Cloud, an Indian, and John Graham, a/k/a John Boy Patton, wilfully, deliberately, maliciously, and with premeditation and malice aforethought, did unlawfully kill and aid and abet the unlawful killing of Annie [*sic*] Mae Aquash a/k/a Annie [*sic*] Mae Pictou, by shooting her with a firearm, in violation of 18 U.S.C. §§ 1111, 1153 and 2.

The sections of Title 18, *United States Code*, mentioned in the indictment relate to the following: § 1111 (murder), § 1153 (murder and other major crimes committed by an "Indian" within "Indian country"), and § 2 (aiding and abetting). "Indian country" includes all lands within a federal reservation: 18 U.S.C. § 1151.

[12] On April 30, 2003, a judge of the Supreme Court of British Columbia issued a provisional warrant for Mr. Graham's arrest. He was arrested on December 1, 2003. On January 15, 2004, he was granted bail.

[13] On January 29, 2004, the United States, by diplomatic note, requested Mr. Graham's extradition on the single count of first degree murder set out in the April 24, 2003 superseding indictment.

[14] Mr. Looking Cloud's trial proceeded in the U.S. Dist. Ct. He was convicted of first degree murder and sentenced to life imprisonment. His conviction appeal was later dismissed: 419 F. 3d 781 (8th Cir. 2005).

[15] With respect to Mr. Graham's extradition, a member of the International Assistance Group (the "IAG") of the Canadian Department of Justice, signed an authority to proceed on behalf of the Minister of Justice: see *Extradition Act*, S.C. 1999, c. 18, s. 15. The offence set out in the authority to proceed was murder, contrary to s. 229 of the *Criminal Code*, R.S.C. 1985, c. C-46.

[16] An extradition (i.e., committal) hearing was conducted by a judge of the Supreme Court of British Columbia. On February 21, 2005, Mr. Graham was committed for extradition: 2005 BCSC 559.

[17] After receiving submissions from Mr. Graham, Minister Toews ordered Mr. Graham surrendered. The Minister provided Mr. Graham with written reasons for that decision. By virtue of s. 58(b) of the *Extradition Act*, a surrender order can describe the basis on which surrender is ordered in one of three ways: "the offence in respect of which the extradition is requested, the offence for which committal was ordered or the conduct for which the person is to be surrendered". In this case, the Minister signed an order stating that Mr. Graham was being surrendered for the offence of:

> first degree murder in violation of Title 18, United States Code, Sections 2, 1111 and 1153, as shown in superseding indictment number 03-50020 filed on April 24, 2003, in the U.S. District Court for the District of South Dakota.

[18] Mr. Graham appealed the committal order to this Court under s. 49 of the *Extradition Act*. He did not seek judicial review of the surrender order under s. 57 of that *Act*.

[19] This Court dismissed Mr. Graham's committal appeal: 2007 BCCA 345, 222 C.C.C. (3d) 1. Justice Donald, at para. 6 of his reasons, stated that the following excerpt from the decision of the Eight Circuit Court of Appeals dismissing Mr. Looking Cloud's conviction appeal aptly summarized the case presented against Mr. Graham at the committal hearing:

> Aquash's badly decomposed body was discovered in 1976, and police began to suspect foul play after identifying her as having been involved with the American Indian Movement. Due to lack of cooperation, the investigation made little headway until agents began talking to Looking Cloud in the mid-90s. Looking Cloud and almost every other witness in the case were members of, and were actively involved in, the American Indian Movement at the time of Aquash's death. The government's theory at trial was that Looking Cloud and other American Indian Movement members killed Aquash, who was also a member, because they suspected she was a federal informant, working with the government.
>
> When the rumor began to spread around the American Indian Movement that Aquash was an informant, she fled Pierre to Denver. A few weeks later, Looking Cloud, Theda Clark and John Graham (also called John Boy Patton) received orders from the American Indian Movement to bring Aquash back to South Dakota. They tied her up and drove her to Rapid City to question her about being an informant. Aquash was constantly guarded and her requests to be let free were refused. At some point, Aquash realized that she was about to be killed. Looking Cloud, Clark, and Graham met with other American Indian Movement members in Rapid City and eventually the three drove Aquash to an

> area near Wanblee. Aquash begged to go free, prayed, and cried. Looking Cloud and Graham marched Aquash up a hill and Graham shot her at the top of a cliff. Her body was either thrown or it tumbled to the bottom of that cliff.

The Supreme Court of Canada refused Mr. Graham's application for leave to appeal this Court's judgment: [2007] 3 S.C.R. xi.

[20] Mr. Graham was surrendered to the United States the day his leave application was refused. He was arraigned in U.S. Dist. Ct. and ordered detained.

[21] Mr. Graham filed a motion to dismiss the April 24, 2003 superseding indictment on the basis that the U.S. Dist. Ct. lacked jurisdiction. On October 3, 2008, a judge of that Court granted the motion and dismissed the indictment because it failed to allege Mr. Graham was an "Indian": 585 F. Supp. 2d 1144 (D.S.D. 2008).

[22] On October 7, 2008, a federal grand jury indicted Mr. Graham and Vine Richard Marshall on a three-count indictment relating to the death of Ms. Aquash. Mr. Marshall had earlier been indicted alone on a charge of premeditated murder. The new indictment contained the following charges:

> Count 1 alleged Mr. Graham and Mr. Marshall—both said to be "an Indian"—"did unlawfully kill and aid and abet the unlawful killing of [Ms. Aquash], an Indian or other person, by shooting her with a firearm, in violation of 18 U.S.C. §§ 1111, 1153, and 2."
>
> Count 2 alleged Mr. Graham alone "did unlawfully kill and aid and abet in the unlawful killing of [Ms. Aquash], an Indian, by shooting her with a firearm, in violation of 18 U.S.C. §§ 1111, 1152, and 2."
>
> Count 3 alleged Mr. Graham alone "did unlawfully kill and aid and abet an Indian, to-wit: [Mr. Looking Cloud, Theda Clarke, and Mr. Marshall], in the unlawful killing of Ms. [Aquash], an Indian or other person, by shooting her with a firearm, in violation of 18 U.S.C. §§ 1111, 1153 and 2."

[23] On October 31, 2008, the United States appealed the dismissal of the April 24, 2003 superseding indictment.

[24] Mr. Graham challenged the October 7, 2008 indictment. On April 29, 2009, a judge of the U.S. Dist. Ct. dismissed Count 3 of that indictment, again because it failed to allege Mr. Graham was an "Indian". The United States appealed that decision.

[25] The Eight Circuit Court of Appeals dismissed both of the United States' appeals: 572 F. 3d 954 (8th Cir. 2009). The United States then applied for a rehearing of those appeals.

[26] Federal and state prosecutors in South Dakota decided Mr. Graham should be prosecuted on state charges. On September 9, 2009, a South Dakota grand jury indicted Mr. Graham and Thelma Rios in the South Dakota Circuit Court ("state court") on a three-count indictment containing the following charges:

> Count 1 alleged Mr. Graham and Ms. Rios committed "Felony Murder" by causing the death of Ms. Aquash while committing a kidnapping.
>
> Count 2 alleged Mr. Graham alone committed "Felony Murder" by causing the death of Ms. Aquash while committing a rape.
>
> Count 3 alleged Mr. Graham and Ms. Rios committed "Premeditated Murder" of Ms. Aquash.

[27] The United States' applications for a rehearing of its appeals was dismissed: 598 F. 3d 930 (8th Cir. 2009).

[28] On December 18, 2009, the United States, by diplomatic note, asked Canada to waive the rule of specialty to permit Mr. Graham's prosecution on state charges. An expedited decision was requested because Mr. Graham's trial on the two counts remaining on the October 7, 2008 federal indictment was imminent and the United States wished to have those charges dismissed. Mr. Graham was not advised a waiver was being sought.

[29] The IAG provided Minister Nicholson with a memorandum in regard to the waiver request together with background material, including a record of the case setting out the

evidence against Mr. Graham which was similar to the record of the case filed at the 2005 committal hearing.

[30] On February 2, 2010, Minister Nicholson signed a waiver consenting to Mr. Graham being prosecuted on Count 1 (felony murder (kidnapping)) and Count 3 (premeditated murder) of the South Dakota indictment. No reasons for that decision exist. Mr. Graham was not advised of the waiver.

[31] On February 3, 2010, the U.S. Dist. Ct. dismissed the two remaining charges on the October 7, 2008 federal indictment.

[32] State prosecutors indicated to Mr. Graham that Canada had authorized his prosecution on state charges.

[33] Mr. Graham filed a disclosure application in state court seeking, among other things, documents from Canada authorizing his prosecution on state charges and what was known as the "Aquash Box", being information gathered by the Denver Police Department during its investigation into Ms. Aquash's death.

[34] At the hearing of the disclosure application state prosecutors acknowledged the existence of the waiver but opposed its disclosure. A judge directed them to find out whether the waiver was a public document that could be made available to or obtained by Mr. Graham's counsel, or was a document that could be viewed by the Court *in camera*.

[35] The Aquash Box was ordered disclosed. It included copies of the following:

(1) A letter dated August 6, 1998, from a South Dakota Assistant United States Attorney to the Denver Chief Deputy District Attorney indicating that federal charges in connection with Ms. Aquash's murder could not be brought because neither she nor Mr. Graham were American Indians; and

(2) A letter dated November 16, 1998, from South Dakota's Chief Deputy Attorney General to the Denver Police Department indicating that federal jurisdiction to prosecute charges relating to Ms. Aquash's kidnapping and murder

was “put into question” because both she and Mr. Graham were Canadian Indians.

[36] State prosecutors advised the judge hearing the disclosure application that Canada considered the waiver to be a “non-public” document but had agreed to a “limited viewing” in connection with an *in camera* review. A copy of the waiver was provided to the judge with a request that it be sealed. After an *in camera* hearing, the judge ordered the waiver sealed.

[37] Mr. Graham’s trial in state court commenced in November 2010.

[38] On December 6, 2010, counsel who had acted for Mr. Graham on the Canadian extradition proceedings, emailed Minister Nicholson c/o the Acting Director General of the IAG, asking the Minister to take steps to prohibit the South Dakota prosecution on the basis that it violated the rule of specialty.

[39] On December 10, 2010, a jury convicted Mr. Graham of felony murder (kidnapping) and acquitted him of premeditated murder.

[40] On December 17, 2010, the Acting Director General of the IAG emailed Mr. Graham’s Canadian counsel. She referenced the rule of specialty and stated “Any communications relating to such a request [for waiver of the rule], and any considerations stemming from that request, however, are confidential matters between states.”

[41] On December 20, 2010, Canadian counsel emailed the Acting Director General of the IAG, noting that Mr. Graham had been convicted but not yet sentenced. Counsel asked her to “confirm whether Canada did in fact waive specialty in Mr. Graham’s case.” The Associate Director of the IAG replied on December 22, 2010, stating that “the issue of specialty is a confidential matter between states” and “[a]ccordingly, Canada cannot confirm whether specialty was waived in Mr. Graham’s case.”

[42] On January 28, 2011, Mr. Graham was sentenced to life imprisonment without possibility of parole.

[43] On August 23, 2011, Mr. Graham, without objection from state prosecutors, successfully applied in state court for access to the waiver for the purpose of his conviction appeal.

[44] On May 30, 2012, the South Dakota Supreme Court dismissed Mr. Graham's conviction appeal, holding that the rule of specialty had been waived: 2012 S.D. 42, 815 N.W. 2d 293.

[45] Mr. Graham filed an application for a writ of *habeas corpus* in state court. One of his grounds related to the fact that felony murder is not a crime in Canada. That application was dismissed on July 1, 2013. Mr. Graham's efforts to appeal that decision failed because of improper service in the South Dakota Supreme Court.

[46] Mr. Graham then filed an application for a writ of *habeas corpus* in the U.S. Dist. Ct. One of his grounds was that the Minister of Justice could not consent to his being prosecuted for felony murder. That application was dismissed on October 26, 2016: CIV 13-4100 (D.S.D 2016). An appeal from that decision was dismissed on March 30, 2018: 886 F. 3d 700 (8th Cir. 2018).

[47] On September 30, 2019, Mr. Graham filed a petition in this Court seeking judicial review of Minister Nicholson's decision to consent to the waiver, an order of *certiorari* setting aside or quashing the waiver, declarations, and an order for disclosure. An amended disclosure application was later filed.

[48] Substantial disclosure voluntarily provided to Mr. Graham reduced the scope of his disclosure application. What remained in issue were redacted portions of the memorandum the IAG had prepared for Minister Nicholson, over which solicitor-client privilege was claimed.

[49] On November 19, 2020, this Court adjourned the disclosure application with directions and appointed *amicus curiae* to make submissions *in camera* with respect to the privilege claims being asserted: 2020 BCCA 347.

[50] On March 24, 2021, this Court ordered several redacted portions of the IAG memorandum disclosed: 2021 BCCA 118.

Analysis

Jurisdiction to Review a Waiver of Specialty

[51] This appears to be the first time an application for judicial review has been brought with respect to a waiver of specialty. Although such reviews are not expressly dealt with in the *Extradition Act*, Mr. Graham and the Minister agree this Court has jurisdiction to hear them by virtue of s. 57(1) of that *Act*, which provides:

> Despite the Federal Courts Act, the court of appeal of the province in which the committal of the person was ordered has exclusive original jurisdiction to hear and determine applications for judicial review under this Act, made in respect of the decision of the Minister under section 40.

Section 40 deals with the Minister's powers of surrender.

[52] In simple terms, the parties agree that a decision to waive specialty is connected to, and therefore, made "in respect of" the decision to surrender.

Mootness

[53] The Minister submitted this judicial review application should be dismissed as moot because he had offered to reconsider the waiver. In addition, the Minister stated it is now his policy to give notice to persons in respect of whom a waiver is sought and to permit them to make submissions.

[54] To begin, we did not consider Mr. Graham's application to have been rendered moot in light of the fact that reconsideration was not the principal relief he was seeking. The principal relief sought was an order setting aside the waiver without more; reconsideration was sought only in the alternative. As well, various declarations were sought.

[55] In addition, had we been persuaded that the application was moot, we would have exercised our discretion to hear it, as doing so would be in the interests of justice: see *Tran v. Abbott*, 2018 BCCA 365 at paras. 13–15, 16 B.C.L.R. (6th) 222. This

matter raises an important legal question, namely, whether the principles of procedural fairness require that persons in respect of whom a waiver of specialty is sought have participatory rights in that decision-making process similar to those they have in regard to the decision to surrender.

Was Mr. Graham Denied Procedural Fairness?

[56] Section 57(7) of the *Extradition Act* provides that on an application for judicial review, this Court may grant relief on any of the grounds set out in s. 18.1(4) of the *Federal Courts Act*, R.S.C. 1985, c. F-7. Mr. Graham relies on subsection (b): "failed to observe a principle of natural justice, procedural fairness or other procedure that [the Minister] was required by law to observe". Citing *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817 and *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65, 441 D.L.R. (4th) 1, he says that a person in respect of whom a waiver of specialty is sought has a "right to be heard". In effect, he says the duty owed by a Minister to such a person is the same as that owed by the Minister in connection with the surrender decision, which includes the obligation to provide a person whose extradition is sought with adequate disclosure and an opportunity to state their case: *Idziak v. Canada (Minister of Justice)*, [1992] 3 S.C.R. 631 at 656–657; *United States of America v. Whitley* (1994), 94 C.C.C. (3d) 99 at 112–113 (Ont. C.A.), aff'd [1996] 1 S.C.R. 467; *Németh v. Canada (Justice)*, 2010 SCC 56 at para. 70, [2010] 3 S.C.R. 281.

[57] Mr. Graham says there are a number of significant matters he could have put before the Minister in opposing a waiver had he been afforded an opportunity to do so, including: (a) the propriety of allowing him to be prosecuted for felony murder when felony (i.e., constructive) murder has been held unconstitutional in Canada; (b) the delay by the United States in making the request; (c) his Indigenous status and the honour of the Crown in dealing with Indigenous peoples; (d) the fact that the state murder charges carry a mandatory sentence of life imprisonment without possibility of parole; and (e) his rights under several provisions of the *Charter*.

[58] In his factum the Minister took the position that in the circumstances of this case it was reasonable for his predecessor to have waived specialty without notice to Mr. Graham. However, after Mr. Graham completed his oral submissions the Minister changed his position and accepted that procedural fairness requires that a person in respect of whom a waiver is sought is entitled to: (a) notice of the request; (b) an opportunity to make submissions to the Minister; (c) disclosure of the material provided to the Minister except those portions protected by solicitor-client privilege; (d) reasons from the Minister; and (e) a copy of those reasons. Put otherwise, the Minister accepted that the duty of fairness owed with respect to a waiver decision is equivalent to that owed with respect to a surrender decision.

[59] In my view, the Minister's ultimate position is the legally correct one; it is in accord with the law set out in *Baker* and *Vavilov*: see also *May v. Ferndale Institution*, 2005 SCC 82 at paras. 92, 94, [2005] 3 S.C.R. 809. A waiver of specialty significantly affects the rights of the person in respect of whom it is sought. If a waiver is consented to, then that person can be prosecuted for offences other than those for which they were surrendered and, in some cases, will be liable to punishment greater than that which can be imposed for the offences for which they were surrendered.

Should the Waiver be Set Aside and the Request Remitted for Reconsideration?

[60] On the facts of this case, the Minister accepts that Mr. Graham was denied procedural fairness when the rule of specialty was waived. Initially, the Minister attempted to argue that the denial did not result in prejudice because the submissions Mr. Graham says he could have made would have been unlikely to change the result. However, the Minister later resiled from that position and accepted that the absence of procedural fairness provided a proper basis on which to set aside the waiver. It is the Minister's position that the appropriate remedy is to remit the matter to him for reconsideration. Mr. Graham's principal position is that the waiver should be set aside and not remitted for reconsideration.

[61] In the normal course, a denial of procedural fairness will result in the impugned decision being set aside and the matter remitted to the decision-maker for

reconsideration. However, a court can decline to set aside, or set aside without remitting, where a particular outcome is inevitable and, therefore, no useful purpose would be served by remitting: *Vavilov* at para. 142; *Beaumann v. Canada (Minister of Justice)*, 2020 BCCA 124 at para. 77, 462 C.R.R. (2d) 214.

[62] Mr. Graham does not argue that the waiver request should not be remitted because it is inevitable that the submissions he intends to make to the Minister will result in the waiver being refused. Rather, he submits that reconsideration should be denied because the United States abused the extradition process. He says that abuse lies principally in the fact that the United States should have known that because he is not an American Indian, he could not be prosecuted on a federal murder charge and, as a result, it should never have sought his extradition on that charge. Mr. Graham describes the request to permit his prosecution on state charges as a "bait and switch". In addition, he says that the extradition process was abused because he was not returned to Canada after the April 24, 2003 superseding indictment was dismissed on October 3, 2008, and before he was re-indicted four days later. In effect, Mr. Graham says that the United States, by its conduct, has disentitled itself from seeking Canada's consent to prosecute him on state charges. However, he does not suggest the American authorities acted unlawfully.

[63] On the limited record before us, I am not satisfied Mr. Graham has established that the United States abused the extradition process. Nothing in that record supports an inference that the request to extradite him was made in bad faith or for an ulterior purpose. At their highest, the 1998 letters raising the possibility of a jurisdictional issue and the rulings by the American courts with respect to the federal indictments show no more than that the decision to prosecute Mr. Graham on federal murder charges was ultimately determined to be ill-advised. Once it became clear that Mr. Graham could not be prosecuted for Ms. Aquash's murder on federal charges it is understandable that the focus of the prosecution turned to state charges.

[64] I am, accordingly, of the view that the waiver request should be remitted for reconsideration.

Is Another Extradition Hearing Required?

[65] In addition to his procedural fairness arguments, Mr. Graham submits that a *prima facie* case for conviction on proposed new or different charges must be established through a meaningful judicial process before a waiver of specialty can be granted. He says there must be a form of committal hearing with respect to the offence(s) for which a waiver is requested. However, Mr. Graham did not develop that argument beyond citing two passages from M. Cherif Bassiouni, *International Extradition: United States Law and Practice*, 5th ed. (New York: Oxford University Press, 2007) at 556, 602. Those passages state that the United States Secretary of State cannot grant a waiver without the approval of the court that issued the extradition order. Of note is that one of the passages indicates that United States legislation does not expressly provide for such a hearing, but nothing is said in regard to why a hearing is required.

[66] Whether a judicial hearing must be held before a waiver can be consented to is a significant issue. Given the limited arguments that were made, I do not consider it appropriate to address this issue. It is best left to be decided when the Court has the benefit of well-developed submissions. In fairness, I should add that Mr. Graham did not vigorously pursue this point.

Should Declarations be Granted?

[67] As set out in his factum, the orders sought by Mr. Graham include the following:

> Declarations as follows:
>
> i. In making the Decision, the Minister:
>
> a. failed to observe principles of natural justice and procedural fairness,
>
> b. breached the Petitioner's rights under Sections 6, 7 and 35 of the Charter;
>
> ii. *Charter* protections and principles of natural justice and procedural fairness attach to an executive decision to consent to waiver of specialty;
>
> iii. The extradition process was abused;
>
> iv. Article 12 of the *Treaty on Extradition Between the Government of Canada and the Government of the United States of America E101323 – CTS 1976 No. 3* was violated.

> v. The expectation of this Court is that the Requesting State will fashion an appropriate remedy in response to the relief ordered herein, in accordance with principles of comity.

[68] To begin, although the process by which the waiver was consented to denied Mr. Graham procedural fairness and was, therefore, not in accord with the principles of fundamental justice in s. 7 of the *Charter* (see *Idziak* at 656; *Whitley* at 112; *Németh* at para. 70), he has not established that consenting to the waiver unjustifiably violated his mobility rights under s. 6 of the *Charter* or his Aboriginal rights under s. 35 of the *Constitution Act, 1982* (s. 35 is not part of the *Charter*). These are allegations that must be proved on a balance of probabilities and require an evidentiary foundation specific to the purported breach. As well, he has not established that the extradition process was abused or that the *Treaty* was violated.

[69] What remains to be considered is whether we should grant declarations that: (1) the principles of natural justice and procedural fairness apply on a request for a waiver of specialty; (2) those principles were breached in this case; and (3) this Court expects the United States to fashion an appropriate remedy in response to the setting aside of the waiver.

[70] Declaratory relief is discretionary: *Strickland v. Canada (Attorney General)*, 2015 SCC 37 at para. 37, [2015] 2 S.C.R. 713. One of the elements the party seeking a declaration must establish is that the declaration "will have practical utility, that is, if it will settle a 'live controversy' between the parties": *Daniels v. Canada (Indian Affairs and Northern Development)*, 2016 SCC 12 at para. 11, [2016] 1 S.C.R. 99.

[71] Mr. Graham relies on *Canada (Prime Minister) v. Khadr*, 2010 SCC 3, [2010] 1 S.C.R. 44. That case involved an application by Mr. Khadr to the Federal Court for judicial review of a decision by the Canadian government not to seek his repatriation from the American military installation at Guantanamo Bay, Cuba. A judge of the Federal Court allowed the application and made an order requiring Canada to request Mr. Khadr's repatriation. That order was upheld by the Federal Court of Appeal. On a further appeal by Canada, the Supreme Court held that, while Mr. Khadr's rights had been infringed, it was not appropriate to order the government to request his

repatriation. Rather, what the Court considered appropriate was a declaration that Canadian officials had actively participated in a process that deprived Mr. Khadr of his rights, to "provide the legal framework for the executive to exercise its functions and to consider what actions to take in respect of Mr. Khadr, in conformity with the *Charter*": at para. 47. In other words, a declaration was the only relief granted.

[72] Mr. Graham also relies on *R. (Miller) v. The Prime Minister*, [2019] UKSC 41, [2020] A.C. 373, in which the Court held that the prorogation of the United Kingdom Parliament had been unlawful and was null and void. It issued a declaration to that effect, leaving it to Parliament to decide what would happen next. Once again, a declaration was the only relief granted.

[73] In the present case, no purpose would be served by declaring that Mr. Graham was entitled to and had been denied procedural fairness. Such a declaration is unnecessary, as it would amount to no more than a repetition, in summary form, of the reasons given for granting the principal relief he seeks, namely the setting aside of the waiver.

[74] The last declaration sought is highly inappropriate. It is not for this Court to express a view with respect to what, if any, remedy should be granted by the United States as a result of the decision to set aside the waiver. That is a matter for the United States and possibly its courts. Further, and in any event, as the waiver request is being remitted for reconsideration there has yet to be a final determination of that issue.

A Final Comment

[75] Section 40 of the *Extradition Act* contains provisions in regard to the time the Minister has to consider submissions from a person committed for extradition and to decide whether to order surrender. There are no similar provisions in regard to a request for a waiver of specialty. Nevertheless, I am confident the Minister will act expeditiously, both in regard to providing Mr. Graham with disclosure and, after receiving Mr. Graham's submissions, deciding whether to consent to a waiver.

Disposition

[76] I would allow this application for judicial review, set aside the waiver of specialty dated February 2, 2010, and remit the United States' request for a waiver to the Minister of Justice for reconsideration.

"The Honourable Mr. Justice Frankel"

I AGREE:

"The Honourable Madam Justice DeWitt-Van Oosten"

I AGREE:

"The Honourable Mr. Justice Voith"