

CANADA / JUDGMENT

Martin v. Canada (Minister of Justice)

2017 BCCA 220

COURT

British Columbia Court of Appeal

DECIDED

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2017 BCCA 220 Martin v. Canada (Minister of Justice)

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation:

Martin v. Canada (Minister of Justice),

2017 BCCA 220

Date: 20170613

Docket: CA41805

Between:

Colin Hugh Martin

Applicant

And

Canada (Minister of Justice)

Respondent

Before:

The Honourable Chief Justice Bauman

The Honourable Madam Justice Bennett

The Honourable Madam Justice Dickson

On judicial review from: An order of surrender (Extradition Act, S.C. 1999, c. 18) issued by the Minister of Justice on February 15, 2016

Counsel for the Applicant:

S.R. Wright

Counsel for the Respondent:

J.M.L. Gibb-Carsley

Place and Date of Hearing:

Vancouver, British Columbia

October 13, 2016

Place and Date of Judgment:

Vancouver, British Columbia

June 13, 2017

Written Reasons by:

The Honourable Madam Justice Dickson

Concurred in by:

The Honourable Chief Justice Bauman

The Honourable Madam Justice Bennett

Summary:

Mr. Martin applies for judicial review of the decision of the Minister of Justice to surrender him to the United States for prosecution in relation to an alleged drug trafficking conspiracy. He contends the Minister's decision was unreasonable because she erred in finding the requesting state's "outing" of him as a would-be informant was not an abuse of process, because of the evidence relating to the likely nature of his incarceration and its effects on his mental health and because his Métis heritage would not be considered. Held: application dismissed. The Minister's decision is entitled to deference and was not unreasonable. She considered Mr. Martin's submissions relating to abuse of process and reasonably concluded this was not one of the "clearest of cases" in which a stay of proceedings was warranted. The United States provided information regarding solitary confinement, a reality in both countries' prison systems, and programs to address any mental health concerns. It also advised that Mr. Martin's Métis heritage can be considered at sentencing and that there are measures in place at the facility in which he is expected to be housed to accommodate his Aboriginal background.

Reasons for Judgment of the Honourable Madam Justice Dickson:

Introduction

- [1] The United States of America seeks to extradite Colin Martin to stand trial on charges in relation to an alleged drug trafficking conspiracy. On May 9, 2014, Mr. Justice Ehrcke issued an order for Mr. Martin's committal to await surrender and, on February 15, 2016, the Honourable Jody Wilson-Raybould, Minister of Justice, ordered his surrender to the United States.
- [2] Mr. Martin applies for judicial review of the Minister's surrender order on the ground that her decision was unreasonable because, for no valid purpose, United States prosecuting authorities placed his life at risk by identifying him as a would-be informant. This conduct was abusive, he contends, and would shock the conscience of Canadians. He also contends that the Minister erred further in finding the United States could adequately address his Métis heritage in sentencing and imprisoning him. In the result, he seeks an order setting aside the Minister's decision surrendering him to the United States.
- [3] For the reasons that follow, I would dismiss Mr. Martin's application for judicial review.

Facts

Background

- [4] Mr. Martin is a Canadian citizen of Métis heritage. He is a status member of the Métis Nation of British Columbia and the father of six children with whom he and his spouse live in a small, supportive community.
- [5] The United States alleges that, between 2007 and 2009, Mr. Martin participated in a conspiracy with other members of a drug trafficking organization to transport drugs across the Canada-United States border. The record of the case indicates that the drug trafficking organization used helicopters to transport MDMA and marihuana from Canada to remote locations in the United States, where it was exchanged for cocaine to be transported back to Canada. According to the United States, Mr. Martin's role in the conspiracy was to supply the helicopters used to transport the drugs across the border.
- [6] On December 22, 2009, the United States issued a Second Superseding Indictment for Mr. Martin, Sean Doak, James Cameron, Adam Serrano and others in relation to the alleged drug trafficking conspiracy (the "Indictment"). The Indictment included the following paragraphs:
 - 23. In September 2009, COLIN HUGH MARTIN called the Drug Enforcement Administration office in Vancouver, British Columbia, identifying himself by name and offering to provide ongoing information regarding drug trafficking in the United States.
 - 24. In October and November, 2009, COLIN HUGH MARTIN communicated with a person in the United States, claiming to have the "ability to control 70% of the work that comes out of BC and what comes into BC" [referencing marijuana leaving British Columbia and cocaine

being exported into British Columbia], explaining that he "had a long history of credibility" in the drug business which he had been in "for most of my adult life," and offering to assist law enforcement. MARTIN explained that he could identify other coconspirators and direct law enforcement to drug loads so long as he was allowed to continue his drug business for ten years and was assured that law enforcement would arrest only other people.

- [7] Mr. Martin asserts that he did not make the statements attributed to him in paragraphs 23 and 24 of the Indictment (the "Statements").
- [8] Despite his denials, the United States maintains that Mr. Martin made the Statements. According to the Department of Justice, they were included in the Indictment because they were highly probative. In particular, United States authorities assert that they considered Mr. Martin's admission that he had the ability to control 70 per cent of the drug trade in and out of British Columbia to be inculpatory and relevant to the prosecution. This is especially so given that he was not prompted to speak with the United States authorities and did so voluntarily at a time when the offence was still under investigation. They also assert that they did not believe Mr. Martin was interested in becoming a bona fide DEA informant, which, in fact, he certainly was not.
- [9] On December 28, 2009, RCMP officers provided Mr. Martin with a warning pursuant to a duty to warn, advising him that there were credible threats against his life.
- [10] On January 5, 2010, a photograph of Mr. Martin was displayed on the front page of The Province newspaper. The headline read "The Accidental Informant - Court disclosure triggers murder contract on British Columbia man". An RCMP spokesperson is quoted in the accompanying article as stating that publicly identifying informants is "absolute insanity".
- [11] On February 1, 2010, RCMP officers provided Mr. Martin with a second warning, advising him that there were further threats against his life.
- [12] Shortly before and shortly after the Indictment was issued, Mr. Martin spoke publicly about his involvement in drug trafficking. In particular, in a Fifth Estate television documentary that aired on November 13, 2009, he specifically commented on the conduct of one of his alleged co-conspirators in the conspiracy for which his surrender is sought. In addition, in a March 10, 2010 interview with the Eagle Valley News, he is reported as having discussed his past dealings in drug trafficking and stating that he was charged in the United States "because of a series of brief exchanges he had with U.S. Drug Enforcement agents, beginning in September 2009, where he was attempting to demonstrate to CBC reporters the agency's willingness to 'get in bed with the bad guys'".
- [13] On July 9, 2010, Mr. Martin was arrested in relation to other charges in Canada. He remained in prison until his release on December 12, 2011. During his incarceration, Mr. Martin was frequently placed in segregation or protective custody for safety purposes. The resulting isolation contributed to a significant deterioration in his mental health, leading to severe depression and an increased risk for suicide.

Extradition History

- [14] By diplomatic notes dated January 12 and 19, 2012, the United States sought the extradition of Mr. Martin to stand trial for alleged conduct corresponding to the Canadian offence of conspiracy to traffic in controlled substances, contrary to s. 465(1)(c) of the Criminal Code, R.S.C. 1985, c. C-46, and s. 5(1) of the Controlled Drugs and Substances Act, S.C. 1996, c. 19.
- [15] On April 5, 2012, the Minister of Justice issued an Authority to Proceed, pursuant to s. 15 of the Extradition Act, S.C. 1999, c. 18, authorizing the Attorney General of Canada to seek a committal order for Mr. Martin's extradition. On April 17, 2012, he was arrested in relation to this matter.
- [16] The United States issued the Record of the Case on April 19, 2012. It includes prima facie evidence that Mr. Martin participated in the conspiracy to transport drugs across the Canada-United States border. It does not include any reference to the Statements attributed to Mr. Martin in paragraphs 23 and 24 of the Indictment.
- [17] The committal hearing took place on May 7, 8 and 9, 2014 before Mr. Justice Ehrcke. On the last day of the hearing, he issued an order for Mr. Martin's committal to await surrender to the United States: *United States of America v. Martin*, 2014 BCSC 1112.
- [18] In a series of written submissions following committal, Mr. Martin opposed his surrender on the basis that it would be unjust and oppressive. He advanced three primary arguments: i) his personal circumstances and the safety risks created by inclusion of the Statements in the Indictment led to a situation where he would be subject to segregated imprisonment of a kind that would shock the conscience of Canadians and breach his s. 7 Charter rights; ii) surrender would be contrary to principles of fundamental justice when his Métis heritage and the disproportionate sentence he would face in the United States are considered; and iii) surrender would constitute an unjustified breach of his s. 6(1) Charter rights.
- [19] In reasons dated February 15, 2016, the Minister rejected Mr. Martin's submissions and ordered his surrender to the United States (the "Surrender Decision").

The Surrender Decision

- [20] The Minister began by summarizing the procedural history and committal proceedings. She acknowledged receipt of his submissions opposing surrender and outlined the issues she considered were raised:
- The alleged abusive conduct of the United States in including, in their charging document, an allegation that Mr. Martin offered to become an informant for the DEA;
 - Concerns for Mr. Martin's health and safety while in custody in the United States;
 - Mr. Martin's personal circumstances, including his Aboriginal status; and

· Mr. Martin's right to remain in Canada under s. 6(1) of the Canadian Charter of Rights and Freedoms (the Charter).

[21] After noting the limits of her discretion to refuse surrender, the Minister stated that she had fully considered the facts and law and decided to order Mr. Martin's surrender. In explaining her reasons, she outlined Mr. Martin's position, the relevant facts and legal principles, and her decision on the various issues. She responded to Mr. Martin's submissions at each step of her analysis.

Alleged Abuse by the United States

[22] The first issue the Minister considered was the allegedly abusive conduct of United States prosecuting authorities in publicly identifying Mr. Martin as a would-be DEA informant. She began by acknowledging Mr. Martin's assertion that he did not make the Statements and his submission that, even if he did, "outing" him needlessly and unacceptably put his and his family's safety at risk. She also recognized his submission that: he would be subjected to solitary confinement in the United States due to the "outing"; the Statements lacked any probative value; and the United States authorities included the Statements in the Indictment in an effort to bully him.

[23] The Minister reviewed the evidence regarding the "outing" and its purported consequences for Mr. Martin, including death threats and periods of segregated incarceration. She also reviewed the response of the United States authorities to the abuse allegation, including their assertion that Mr. Martin was never a DEA informant and their explanation that the Statements were included in the Indictment because they constituted a highly probative inculpatory admission. After considering several cases on abuse of process, she stated that she was entitled to assume the United States authorities acted properly and that there was no evidence to suggest the Statements were included in the Indictment for an illegitimate purpose. She declined to resolve the question of whether Mr. Martin made the Statements, noting this was a matter for the United States trial court. On the question of informer privilege, she did not accept that a reasonable person in Mr. Martin's position would have believed his identity would be protected.

[24] The Minister decided that it could not be said the United States authorities acted in an abusive manner in their dealings with Mr. Martin. She found the Statements were not subject to informer privilege and there was no evidence to suggest they were included in the Indictment for an illegitimate purpose. She also found that Mr. Martin jeopardized his safety by his own actions, including engaging in drug-related crime, purportedly offering to provide information to the RCMP as well as the DEA and incurring drug debts to a high-profile criminal organization. She noted further that he had commented publicly to the press regarding his knowledge and involvement with drug trafficking. In consequence, she found, even if the Statements added to the security risk he faced, it was only one of many contributing factors.

[25] The Minister was also not persuaded that there was a clear link between the Statements and the alleged threats to Mr. Martin's family. Based on the totality of the record, she stated:

I am satisfied that the conduct of the U.S. authorities in disclosing Mr. Martin's alleged, unsolicited offer to become an informant for the DEA, does not qualify as abusive. In the result, I have concluded that neither Mr. Martin's extradition proceedings, nor the Canadian extradition process more generally, has been compromised as a result of the actions of the U.S. authorities.

Safety and Related Health Concerns

[26] Despite her view that there was no evidence of an abuse of process, the Minister went on to consider whether the safety and related health concerns Mr. Martin identified warranted refusal of his surrender. In doing so, she referred to the evidence regarding the harmful effects of solitary confinement on Mr. Martin and, more generally, on incarcerated persons. Noting that there was no evidence Mr. Martin's safety and health risks would be greater if he was detained in the United States than if he were to remain in Canada, she characterized the issue as whether the United States is able to provide him with adequate protection and care and a proper custodial placement.

[27] Again, the Minister fully reviewed the evidence and the information presented to her. She outlined in detail the procedures and programs available in the United States to address Mr. Martin's situation. Based on the record, she was satisfied there are sufficient procedures and programs in place in the United States correctional system short of solitary confinement to protect him. While acknowledging the relationship between his mental health issues and segregated custody, she also accepted that, in appropriate situations, segregation and solitary confinement are a necessary reality in both Canadian and United States correctional institutions.

[28] The Minister went on to accept that the United States correctional system will be able to treat Mr. Martin's mental health adequately. She noted further that those who commit offences involving criminal associations necessarily expose themselves to safety risks through their criminal activities. All things considered, she concluded that Mr. Martin's surrender would not "shock the conscience" of Canadians or be contrary to the principles of fundamental justice based on threats to his safety and health while incarcerated in the United States.

Personal Circumstances

[29] The Minister turned next to Mr. Martin's personal circumstances, including his family situation, his mental health and his Métis heritage. She recognized that the detrimental effects of extradition on his family and mental health were relevant to her s. 7 Charter analysis, as was his Métis heritage and the prospect that he could receive a higher sentence in the United States than he would in Canada. In order to address these matters, she reviewed the salient evidence and the applicable law, including *R. v. Gladue*, [1999] 1 S.C.R.

688, *United States of America v. Leonard*, 2012 ONCA 622 and *R. v. Ipeelee*, 2012 SCC 13. She also reviewed the information provided to her by the United States Department of Justice.

- [30] In conducting her analysis, the Minister accepted that Mr. Martin's circumstances correspond, to some extent, to the systemic and background factors identified in *Gladue* and subsequent jurisprudence. However, she noted that the record suggests other motivations for his criminality, including pro-criminal attitudes and negative associations outside the family. Based on the available evidence and information provided by the United States, she found that, if surrendered, Mr. Martin would likely be incarcerated as near as possible to his family. She also found that his Métis heritage would be considered at the time of sentencing and that his spiritual practices would be adequately accommodated.
- [31] Taking into account all of the circumstances, the Minister was satisfied it would not be shocking to the conscience of Canadians, unjust, oppressive or contrary to the Charter to order his surrender, despite the sentence he faces and his personal circumstances, including the *Gladue* factors:

I conclude that it would not be shocking to the conscience of Canadians to order his surrender, based, largely, on the following:

- Mr. Martin is alleged to have been one of the lead members of a sophisticated drug trafficking conspiracy, which spanned the course of at least two years.
- He was approximately 35 years of age at the commencement of the alleged conspiracy and has a serious criminal record dating back to 1992. His record shows that he was committing offences both before and after he established a connection to his Aboriginal roots.
- Mr. Martin has no substance abuse problems but is alleged to have trafficked in a number of controlled substances solely for profit.
- Mr. Martin's Aboriginal background and related needs will be considered by the courts in the United States, and accommodated by the Bureau during any period of detention to which he may be subject.
- The *Gladue* Report prepared in Mr. Martin's case suggests that his past criminal actions were motivated by greed and he views his criminality as harmful to himself and his family, but otherwise considers drug offences to be victimless crimes.

Section 6(1) Charter Rights

- [32] The final issue the Minister considered was whether Mr. Martin's surrender would unjustifiably violate his s. 6(1) Charter right to remain in Canada. She concluded that it would not, which conclusion is not challenged on this judicial review.

Conclusion

[33] In sum, the Minister decided that Mr. Martin's surrender would not be unjust or oppressive, or contrary to the Extradition Act or the Charter. She also decided that no other considerations would justify refusing his surrender in the face of Canada's obligations under the Treaty on Extradition between the Government of Canada and the Government of the United States of America. In consequence, she ordered Mr. Martin's surrender to the United States.

Issues on Judicial Review

[34] Mr. Martin contends the Minister made five errors in the Surrender Decision:

- i. finding that there was a valid purpose in placing his alleged attempts to become an informant in the Indictment;
- ii. finding that his public outing as a would-be informant was only one of many factors that put his safety in jeopardy;
- iii. finding that publicly identifying him as a would-be informant did not amount to abusive conduct that would shock the conscience of right-minded Canadians;
- iv. failing to properly consider the type of custody Mr. Martin would face if surrendered to the United States; and
- v. finding that the United States could adequately address the considerations of his Métis heritage.

[35] Taking into account the alleged errors and the applicable standard of review, the issue for determination is whether the Surrender Decision was reasonable given:

- a) the fact that the United States included the Statements in the Indictment and the implications of that conduct;
- b) the evidence and information provided regarding Mr. Martin's personal circumstances, including his mental illness and the nature of his proposed incarceration; and
- c) the evidence and information provided regarding the extent to which Mr. Martin's Métis heritage would be addressed within the United States legal and prison systems.

Discussion

The Minister's Decision to Surrender

[36] Extradition is the three-phase process by which Canada meets its international obligations to surrender persons found in this country to face prosecution, or serve sentences imposed, in another country. Based on principles of reciprocity, comity and respect for differences in other legal systems, its objectives are to protect the public from crime, bring fugitives to justice and ensure, through international cooperation, that national boundaries do not

enable escape from the rule of law. Ministerial surrender or refusal to surrender for extradition is the final phase in the process. It is intended to balance these objectives with protection of the rights and interests of persons sought: *M.M. v. United States of America*, 2015 SCC 62 at paras. 14-16.

- [37] When a person sought has been committed by an extradition judge, the extradition request reverts to the Minister to decide whether and, if so, on what basis, to order surrender to the extradition partner. In reaching a decision, the Minister must determine whether it is politically appropriate and not fundamentally unjust to surrender the person sought. This requires the Minister to consider all relevant circumstances, individually and cumulatively, weighing those that favour surrender against those that do not to ascertain whether surrender would be unjust, oppressive or otherwise unacceptable: *Canada (Justice) v. Fischbacher*, 2009 SCC 46 at paras. 36-38. Amongst others, Canada's international obligations and its relationships with foreign governments are important factors for the Minister's consideration: *Lake v. Canada (Minister of Justice)*, 2008 SCC 23 at para. 27.
- [38] The Minister's authority to order or refuse surrender is subject to the provisions of the Extradition Act and the Treaty. It must be exercised in conformity with the Charter, although the Charter does not govern the actions of the extradition partner: *United States v. Cavan*, 2015 ONCA 664 at paras. 42, 43, 50. In fulfilling her role, the Minister provides an additional safeguard to the rights of the person sought and addresses matters that may not be considered at the earlier phases of the extradition process: *M.M.* at paras. 113-114. The nature of her decision-making task is primarily political and thus well-suited to the Minister's specialized expertise: *Lake* at paras. 34, 37, 41.
- [39] Pursuant to s. 44(1)(a) of the Extradition Act, the Minister must refuse to surrender the person sought if she is satisfied that surrender would be "unjust or oppressive having regard to all the relevant circumstances". The burden of demonstrating that surrender would be "unjust or oppressive" falls upon the person sought. Whether the Minister is satisfied that surrender would be unjust or oppressive in a given case is a matter of discretion and, as to qualifying circumstances, she has a wide measure of appreciation: *Fischbacher* at para. 37; *Cavan* at para. 49.
- [40] In making her decision, the Minister must also often assess whether surrender would violate principles of fundamental justice and the s. 7 Charter right of the person sought to "life, liberty and security of the person": *Lake* at para. 31; *M.M.* at para. 26. In *Lake*, the Supreme Court of Canada confirmed that similar considerations often apply to the analysis under s. 44(1)(a) and under s. 7 of the Charter. In particular, where surrender would be contrary to the principles of fundamental justice, it would also be unjust or oppressive: *Lake* at para. 24. In both cases, the question is whether the act of surrender "sufficiently shocks the Canadian conscience" or is "simply unacceptable" in all of the circumstances: *Scarpitti v. United States of America*, 2007 BCCA 498 at para. 63, citing *United States v. Burns*, 2001 SCC 7; *United States of America v. Reumayr*, 2003 BCCA 375 at para. 19.

- [41] The doctrine of abuse of process is captured by s. 7 of the Charter and the principles of fundamental justice: Cavan at para. 51. As summarized in Cavan and *R. v. Babos*, 2014 SCC 16, there are two categories of abuse of process recognized in domestic proceedings, each rooted in state conduct. The first encompasses state conduct that affects trial fairness; the second, state conduct that offends societal notions of fair play and decency and thus undermines the integrity of the judicial process. Conduct that falls short of bad faith or an improper motive but still risks tarnishing the integrity of the judicial system falls within the abuse of process doctrine. In the extradition context, while exceptional and extremely rare, in the "clearest of cases" a finding of abusive conduct on the part of a requesting state may warrant Ministerial refusal to surrender the person sought: Cavan at paras. 51-57; *United States of America v. Cobb*, 2001 SCC 19 at para. 38.
- [42] When a person sought has been committed for extradition, he or she may make submissions to the Minister opposing surrender: Extradition Act, s. 43(1). The Minister must consider the submissions and respond to them when giving reasons for the surrender decision: Lake at para. 25. In reaching a decision, the Minister must consider all of the material presented, including any representations provided by the extradition partner. Unless there is good reason not to do so, the Minister may rely on the extradition partner's representations without further inquiry because their accuracy is a matter of national honour and rejecting them would impugn its good faith and integrity: Scarpitti at para. 67.
- [43] The complex balancing process undertaken by the Minister is primarily fact-based and may encompass a wide range of possible considerations. For example, a significant discrepancy in jeopardy between Canada and the requesting state may be relevant to whether surrender would be unjust, oppressive, or contrary to the principles of fundamental justice. The same is true of matters such as the Aboriginal heritage of the person sought, the nature of his proposed incarceration and humanitarian issues relating to his personal circumstances: Fischbacher at paras. 38, 54; Leonard; *United States v. Kerfoot*, 2016 BCCA 306 at para. 89. However, the threshold is high and the test must account for all relevant factors, including the seriousness of the offence and the principles of comity and reciprocity that underlie extradition: M.M. at paras. 113-119; Lake at para. 39.

Standard of Review

- [44] Pursuant to s. 57(7) of the Extradition Act, this Court has jurisdiction to grant relief from the Minister's decision to surrender on any of the grounds set out in s. 18.1(4) of the Federal Courts Act, R.S.C. 1985, c. F-7. Before granting such relief, this Court must be satisfied that the Minister:
- a) acted without jurisdiction, acted beyond his or her jurisdiction or refused to exercise his or her jurisdiction;
 - b) failed to observe a principle of natural justice, procedural fairness or other procedure that he or she was required by law to observe;

- c) erred in law in making a decision or an order, whether or not the error appears on the face of the record;
- d) based his or her decision or order on an erroneous finding of fact that he or she made in a perverse or capricious manner or without regard for the material before him or her;
- e) acted, or failed to act, by reason of fraud or perjured evidence; or
- f) acted in any other way that was contrary to law.

[45] The standard of review of the Minister's surrender decision is reasonableness. In *M.M., Mr. Justice Cromwell* explained how the reasonableness standard is applied:

[106] There is no dispute that the standard of review that the Court of Appeal had to apply to the Minister's decision was reasonableness. This standard was authoritatively described in *Lake v. Canada (Minister of Justice)*, 2008 SCC 23, [2008] 1 S.C.R. 761, at para. 41:

To apply this standard in the extradition context, a court must ask whether the Minister considered the relevant facts and reached a defensible conclusion based on those facts. If the Minister has identified the proper test, the conclusion he has reached in applying that test should be upheld by a reviewing court unless it is unreasonable. Given the Minister's expertise and his obligation to ensure that Canada complies with its international commitments, he is in the best position to determine whether the factors weigh in favour of or against extradition. [Emphasis deleted.]

The ultimate question on appeal, therefore, is whether the Minister's decision was unreasonable.

[46] The Minister's decision to surrender, including her assessment of the Charter rights of the person sought, is accorded significant deference on review and interference is limited to exceptional cases of "real substance": *Lake* at paras. 34, 41; *Cavan* at para. 58. Although the reasonableness standard does not require blind submission to the Minister's assessment, this Court's role is not to reassess the relevant factors and substitute its own view. Rather, it is to determine whether, having applied the correct legal test, the Minister's decision falls within a range of reasonable outcomes: *Lake* at para. 41.

[47] However, while this Court may not reweigh the relevant factors considered by the Minister, it may intervene if her decision is unsupported by the evidence or fails to consider the appropriate factors: *Suresh v. Canada (Minister of Citizenship and Immigration)*, 2002 SCC 1 at para. 39. Further, where assurances are given by the requesting state, they must address the risks intended to be mitigated. Therefore, in some circumstances, this Court may also intervene if the Minister accepts assurances without assessing their responsiveness to the relevant risks because their uncritical acceptance may not be reasonable: *India v. Badesha*, 2016 BCCA 88 at paras. 37-40, leave to appeal granted [2016] S.C.C.A. No. 180.

Is the Surrender Decision reasonable given the fact that the United States included the Statements in the Indictment and the implications of that conduct?

- [48] Mr. Martin contends that the United States authorities intentionally or recklessly placed his life in peril by "outing" him as a would-be informant. Even if the Statements were made they lacked probative value, he says, and their disclosure predictably devastated his safety and mental health, dooming him to segregation if, when and wherever he may be imprisoned. This is true regardless of whether informer privilege formally applied. In his submission, such state conduct would shock the conscience of Canadians and, as in Cobb, surrendering him to those who created this "ominous climate" contravenes principles of fundamental justice and undermines the integrity of the extradition process. Given the nature and impact of its conduct, he submits, it was unreasonable for the Minister to surrender him to the United States.
- [49] In support of his submission, Mr. Martin argues there was no valid purpose for the United States authorities to include the Statements in the Indictment as they were not probative, given their generality and the passage of time since the alleged conspiracy. In addition, he notes, the Indictment does not identify a law enforcement source for the Statements, the evidence tying Mr. Martin to the Statements is unclear and they are not included in the Record of the Case. Further, the evidence revealed that publicly identifying informants was "absolute insanity". All things considered, he says, the United States' explanation that the Statements were included in the Indictment because they were highly probative is simply untenable.
- [50] However, according to Mr. Martin, the Minister uncritically accepted the United States' explanation rather than analyzing the real purpose and motivation behind the impugned conduct, which was to bully him. This was, he says, an error which led her to reach an unreasonable surrender decision. In his submission, contrary to the Minister's finding, the only reasonable conclusion available was that the United States acted recklessly or for a nefarious purpose in "outing" him as a would-be informant. This was, he says, a serious abuse of process.
- [51] Mr. Martin also submits that the Minister minimized the effects of the dangerous, unnecessary "outing". In support of this submission, he emphasizes the evidence linking the risks to his safety and mental health to the public disclosure that he was an attempted informant. He notes that the RCMP warnings were provided shortly after the Indictment was issued and correctional records regarding his segregated imprisonment reflect the close connection. In addition, he says, the harmful effects of segregation and solitary confinement were indisputably established. Nevertheless, the Minister failed adequately to consider that the United States' conduct turned a Canadian citizen into a "psychological wreck".
- [52] While maintaining that the United States acted in bad faith, Mr. Martin goes on to submit that, in any event, such a finding was not necessary to demonstrate an abuse of process. Citing Cavan, he notes that the abuse of process doctrine does not require evidence of bad faith or an improper motive on the part of the impugned state actor. Given the extreme, predictable risks of "outing" a would-be informant, regardless of whether informer privilege

applied and whatever the purpose, he argues that the United States' conduct in including the Statements in the Indictment undermined the integrity of the extradition process. However, the Minister failed to consider whether this conduct disentitled the United States to his surrender even in the absence of bad faith, he submits, which error further rendered the Surrender Decision unreasonable.

- [53] I would not accede to these submissions. In my view, they amount to an invitation to reweigh the factors considered by the Minister and to replace her defensible conclusions based on the facts she found with different conclusions based on different facts. Given the limits of judicial review, it is not an invitation that this Court should accept.
- [54] The Minister's reasons indicate that she reviewed the evidence thoroughly, considered all of the relevant factors and applied the correct test in deciding whether to surrender Mr. Martin. She recognized Mr. Martin's abuse of process claim as an important matter to assess in connection with his s. 7 Charter rights and the principles of fundamental justice. Contrary to his submission, she did not uncritically accept the United States' explanation for including the Statements in the Indictment, nor did she minimize the effects of its conduct or ignore its implications even if bad faith was not established. Rather, she made supportable findings of fact that underpin the Surrender Decision and bring it within the range of reasonable outcomes.
- [55] The Minister accepted the United States' representation that the Statements were included in the Indictment because they were considered a probative inculpatory admission. In the absence of evidence to the contrary, the representation, made by a trusted extradition partner, satisfied her that the Statements were not disclosed for an illegitimate purpose. In my view, this was not an unreasonable finding. It was grounded in the evidence and logical in light of the material presented. This is so regardless of whether the Statements were privileged, which was not, as Mr. Martin rightly points out, the determinative issue.
- [56] Probative value concerns the capacity of evidence to establish a fact in issue: *R. v. M.T.*, 2012 ONCA 511 at para. 43. The prosecution case is that Mr. Martin participated in a conspiracy to transport drugs between British Columbia and the United States between 2007 and 2009. In October and November 2009, Mr. Martin allegedly approached United States authorities, unsolicited, and claimed to be a long-time drug dealer who controlled 70 per cent of the drugs coming in and out British Columbia. As a matter of logic and common sense, the Statements are capable of helping, by inference, to prove that he participated in the alleged drug trafficking conspiracy.
- [57] As the Minister noted, whether the Statements were made and, if so, whether they ultimately assist in proving Mr. Martin's culpability is a matter for the foreign court to determine. The purported deficits in their probative value are points for argument in that forum alone. These purported deficits do not necessarily undermine the United States' explanation for including the Statements in the Indictment, nor do they render its acceptance by the Minister unreasonable. The same is true of the absence of the Statements

in the Record of the Case, which is a summary of expected prosecution evidence, not a complete and comprehensive statement: Extradition Act, s. 33; United States of America v. Martin, 2014 BCSC 1112 at para. 41.

- [58] The extent to which disclosure of the Statements impacted Mr. Martin's safety and mental health were also factual matters for the Minister to determine. Her conclusion that Mr. Martin jeopardized his safety, and thus his mental health, by his own actions is supportable on the evidence, particularly given his pre-Indictment media statements and claimed indebtedness to a criminal organization. It follows that her finding that the United States' inclusion of the Statements in the Indictment was, at most, one of many factors contributing to his current circumstances is not unreasonable. This was another significant factual finding underpinning the Surrender Decision.
- [59] The Minister considered whether, despite the absence of bad faith but given its impact, the United States' conduct warranted refusing Mr. Martin's surrender because condoning it would undermine the integrity of the extradition process. Taking into account the total record and balancing the relevant factors, she concluded it would not. Following a discussion of the safety risks allegedly created for Mr. Martin and his family, she stated:
- even if a connection to the public release of the U.S. charges were to be established, that, alone, would not warrant a refusal of [his] surrender to face prosecution on serious drug charges, particularly in circumstances where no state abuse had been found to exist.
- [60] In my view, the Minister was entitled to reach this conclusion in the exercise of her discretion. Despite the United States' contribution to the safety and mental health risks Mr. Martin faces, unlike Cobb, this was not the clearest of cases of abusive state conduct mandating a refusal to surrender.
- [61] In Cobb, the American prosecutor stated publicly that each of the persons sought would be "the boyfriend of a very bad man if you wait out your extradition" and the extradition judge found "no right-thinking Canadian would endorse the use of a threat of homosexual rape as a means of persuading Canadian residents to abandon their rights to a full extradition hearing". The Supreme Court of Canada upheld the stay he imposed on the basis that the prosecutor's "sinister" attempt to interfere with the due process of the Canadian court amounted to a clear abuse of process. Based on the facts as found by the Minister, the impugned conduct in this case is of a significantly lower order of magnitude. Given that the United States did not disclose the Statements for an illegitimate purpose, its conduct does not necessarily amount to an affront to fair play and decency that is disproportionate to society's interest in the discharge of Canada's international obligations to our extradition partner.
- [62] In sum, the requisite balancing of societal interests and the "clearest of cases" threshold meant Mr. Martin had an onerous burden to meet to establish an abuse of process warranting a refusal of his surrender. Considering all of the relevant facts, applying the correct test and drawing on her specialized expertise, the Minister concluded that he had

not met this burden. Bearing in mind the limited scope of judicial review, I would not interfere with her decision based on the abuse of process alleged by Mr. Martin. In my view, it falls within a range of reasonable outcomes and, therefore, is not unreasonable.

Is the Surrender Decision reasonable given the evidence and information provided regarding Mr. Martin's personal circumstances, including his mental illness and the nature of his proposed incarceration?

- [63] Mr. Martin submits further that the Minister erred in her assessment of whether the conditions of incarceration he faces in the United States justify a refusal to surrender. In particular, he contends, she failed to recognize that, as in Canada, he would inevitably be held in segregated or solitary confinement, which severely compromises his mental health. He submits that the issue is not the good faith of the United States in providing assurances that his physical and mental well-being would be adequately addressed within its correctional system. Rather, as in Badesha, the issue is whether it has the capacity to fulfill those assurances. In his submission, as to his mental well-being, it does not have that capacity.
- [64] In support of his submission, Mr. Martin points to his experience within the Canadian correctional system since he was "outed" as a would-be informer. Although his physical safety was protected by segregation and solitary confinement, the effect on his mental health was, he says, profoundly damaging. There was no evidence to suggest the United States is better equipped than Canada to protect him and treat his mental health issues in an inevitably segregated context. In these circumstances, he submits it was unreasonable for the Minister to accept the general assurances of the United States that it could do so adequately and, on that basis, order his surrender.
- [65] I would not give effect to these submissions.
- [66] The Minister's decision on this issue is entitled to substantial deference. She was required to balance Mr. Martin's mental health needs and the nature of his proposed incarceration with the duty to honour Canada's extradition partner. In doing so, she carefully considered the detailed information provided by the United States on the procedures and programs available to deal with Mr. Martin's situation and accepted its assurances that they adequately mitigate the risks in question. Recognizing that some form of solitary confinement may be required, she also accepted that, in appropriate situations, segregation and solitary confinement are a necessary reality in both countries' correctional institutions.
- [67] In my view, the Minister was entitled to accept the United States' assurances, which she realistically assessed and contextualized. I see no reason to disturb her conclusion that it would not shock the conscience of Canadians to surrender Mr. Martin to face custodial conditions that present no greater risk to his physical and mental health than those of our own correctional system. This conclusion was not unreasonable.

Is the Surrender Decision reasonable given the evidence and information provided regarding the extent to which Mr. Martin's Métis heritage would be addressed within the United States legal and prison systems?

[68] Finally, Mr. Martin submits that the Minister erred in finding there were adequate measures in the United States to take account of his Aboriginal heritage at sentencing and during any period of incarceration. In support of this submission, he emphasizes that in the United States, unlike Canada, there is no codified recognition of the need to sentence Aboriginal offenders differently. In addition, he says, there is no indication that his Métis heritage would shape the sentencing analysis or ensure him access to programs for Aboriginal prisoners because the Métis are not a federally recognized Indian tribe in the United States. Given this lack of formal recognition of Métis people, he submits, it was unreasonable for the Minister to accept that his Métis heritage would be considered at sentencing and accommodated while he was incarcerated.

[69] In my view, there is no merit to these submissions.

[70] The United States Department of Justice informed the Minister that Aboriginal origin is considered in its legal system at sentencing and during any period of incarceration imposed on an Aboriginal person. It also informed her that Mr. Martin may raise his Métis heritage as a mitigating factor in a presentence report, which would be considered by the Court and could result in a sentence reduction. It informed her further of various measures in place within the prison system in which he would be incarcerated to accommodate his Aboriginal background and practices.

[71] In the face of these specific representations and the absence of evidence to the contrary, it is speculative to suggest the United States would not take adequate account of Mr. Martin's Aboriginal heritage at sentencing and during his incarceration because he is Métis. This is not a case like Leonard, in which there was evidence that the prisons to which Mr. Leonard would likely be assigned lacked culturally appropriate programs, and where the Court was satisfied that the American justice system would not take Mr. Leonard's Aboriginality into account at sentencing. The fact that Métis are not a federally recognized Indian tribe in the United States and there is no codified recognition of the need to sentence Aboriginal offenders differently is of no moment. These matters do not undermine the extradition partner's unambiguous representations, which responded to concerns regarding the extent to which Mr. Martin's Métis heritage would be addressed if he is surrendered. In my view, it was not unreasonable for the Minister to accept those representations and, taking them into account, conclude that Mr. Martin's surrender would not be unjust, oppressive or shocking to the conscience of Canadians despite his Métis heritage.

Conclusion

[72] In the result, I would dismiss the judicial review application.

"The Honourable Madam Justice Dickson"

I AGREE:

"The Honourable Chief Justice Bauman"

I AGREE:

"The Honourable Madam Justice Bennett"

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