NO. CA 46408
VANCOUVER REGISTRY

IN THE COURT OF APPEAL OF BRITISH COLUMBIA

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

BETWEEN

John Graham

PETITIONER

AND

Canada (Minister of Justice)

RESPONDENT

PETITION TO THE COURT

THIS IS THE PETITION OF:

John Graham

ON NOTICE TO:

The Honorable David Lametti
Minister of Justice and Attorney General of Canada
284 Wellington Street
Ottawa, Ontario K1A 0H8

AND TO:

The Attorney General of Canada
Department of Justice Canada
British Columbia Regional Office
900 – 840 Howe Street
Vancouver, BC V6Z 2S9

This proceeding has been started by the petitioner for the relief set out in Part 1 below.

If you intend to respond to this petition, you or your lawyer must

(a) file a response to petition in Form 67 in the above-named registry of this court within the time for response to petition described below, and

(b) serve on the petitioner

(i) 2 copies of the filed response to petition, and
(ii) 2 copies of each filed affidavit on which you intend to rely at the hearing.

Orders, including orders granting the relief claimed, may be made against you, without any further notice to you, if you fail to file the response to petition within the time for response.

Time for response to petition

A response to petition must be filed and served on the petitioner,

(a) if you were served with the petition anywhere in Canada, within 21 days after that service,
(b) if you were served with the petition anywhere in the United States of America, within 35 days after that service,
(c) if you were served with the petition anywhere else, within 49 days after that service, or
(d) if the time for response has been set by order of the court, within that time.

(1) The address of the Registry is:

British Columbia Court of Appeal
The Law Courts
400 - 800 Hornby Street
Vancouver, BC V6Z 2E1

(2) The address for Service of the Petitioner is:

c/o Ritchie Sandford McGowan
1200 – 1111 Melville Street
Vancouver, BC V6E 3V6

Fax number address for service of the petitioner:
604-684-0799

Email address for service of the petitioner:

msandford@ritchiesandford.ca

Part 1: ORDERS SOUGHT

1. A writ of *certiorari* setting aside or quashing the decision of Minister of Justice Rob Nicholson ("Minister") made on 2 February 2010 (the "Decision") consenting to waiver of specialty, and prosecution of the Petitioner in the United States (the "Requesting State") on felony murder, a charge he had not been extradited on. The Minister did not communicate the Decision to the Petitioner. The Petitioner obtained access to a copy of the Decision in August 2011, after his criminal trial in the Requesting State had concluded.

2. Further, or in the alternative, declarations as follows:

   i. In making the Decision, the Minister:

      (a) breached the Petitioner's *Charter* rights;

      (b) breached the Petitioner's Aboriginal rights;

      (c) failed to observe principles of natural justice, procedural fairness, and/or other procedures he was required by law to observe;

      (e) abused the extradition process;

      (f) acted beyond his jurisdiction;

      (g) erred in law.

   ii. The acts and omissions of the Requesting State associated with the extradition process:

      (a) breached the Petitioner's *Charter* rights;
      (b) breached the Petitioner's Aboriginal rights;
      (c) offended principles of comity;
      (d) abused the extradition process.

   iii. The Minister and/or the Requesting State violated the terms of the *Treaty on Extradition Between the Government of Canada and the Government of the United States of America* E101323 - CTS 1976 No. 3.

iv. It would be in accordance with principles of comity and/or the Petitioner's *Charter* rights and/or his Aboriginal rights, if the Requesting State took steps to discharge the Petitioner from custody and returned him to Canada;

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

3. Further, or in the alternative, an order that the issue of consent to waiver of specialty be referred back to the Minister for redetermination in accordance with directions of this Court, including directions relating to such procedural protections as may be required by the *Charter.*

4. Orders that disclosure be made of information in the possession of the Minister and/or the International Assistance Group of the Department of Justice related to the extradition process and/or the Decision, as follows:

i. the Record before the Minister regarding consent to waiver of specialty based upon which the Decision was made;
ii. written Reasons, if same exist, for the Minister's Decision;
iii. details of communications between the Requesting State and the Minister and/or the International Assistance Group, at the time that extradition of the Petitioner was sought, of particulars of the elements of the offences(s) that the Requesting State intended to prosecute;
iv. communications between the Requesting State and the Minister and/or the International Assistance Group relating to any known potential impediments to successful prosecution of the Petitioner in the United States;
v. communications between the Requesting State and the Minister and/or the International Assistance Group related to felony murder and the prosecution of the Petitioner;

vi. communications between the Requesting State and the Minister and/or the International Assistance Group related to the dismissals of the U.S. charges against the Petitioner, and the appeals from those dismissals;

vii. communications between the Requesting State and the Minister and/or the International Assistance Group related to the delays in the prosecution of the Petitioner post-Surrender;

viii. communications between the Requesting State and the Minister and/or International Assistance Group regarding the Petitioner's Aboriginal heritage;

ix. communications between the Requesting State and the Minister and/or the International Assistance Group regarding the penalties associated with the offences that the Petitioner was charged with in the Requesting State;

x. communications between the Requesting State and the Minister and/or the International Assistance Group regarding the procedural rights of the Petitioner related to the Minister's consent to waiver of specialty;

xi. communications between the Minister and/or the International Assistance Group and the Petitioner or counsel for the Petitioner regarding waiver of specialty;

xii. records of steps taken, if any, by the Minister to communicate the Decision to the Petitioner;

xiii. communications between the Minister and/or the International Assistance Group and U.S. prosecuting attorneys, U.S. Department of Justice officials, and/or U.S. correctional authorities, regarding the applications made by the Petitioner to the U.S. Courts for disclosure of the Decision;

xiv. communications between the Minister's spokespersons and members of the media in 2010 related to the Decision;

xv. directions given to media spokespersons by the Minister and/or the International Assistance Group related to the Decision;

xvi. communications between the Requesting State and the Minister and/or the International Assistance Group based upon which assertions were

made by the U.S. prosecutor in submissions to the Eighth Circuit Court of Appeals on October 19, 2017 related to the purported powers of the Canadian Minister with respect to extradition, and the availability of process in Canada for the Petitioner to bring legal challenge to the Decision.

5. Such other disclosure orders as may be necessary.

6. If this Court finds that the Minister communicated the Decision to the Petitioner within the meaning of s. 57(3) of the *Extradition Act,* and that the time period within which it was necessary to bring this application has expired, an order pursuant to s. 57(3) of the *Extradition Act* extending the time to bring this application.

7. Such further or alternative relief as this Honorable Court may deem just.

Part 2: FACTUAL BASIS

A. Overview

1. In late 2007, at the conclusion of extradition proceedings and appeals therefrom, the Petitioner, a Canadian citizen, was extradited from Canada to the United States to face a charge that he committed premeditated murder of Anna Mae Aquash in South Dakota in 1975.

2. The U.S. authorities then proceeded with prosecution of the Petitioner in U.S. federal Court. The charges in federal Court required, however, that the Petitioner be an "Indian" within the meaning of U.S. law. He was found by the U.S. Courts not to meet that definition as he was of Canadian Aboriginal background, a fact known to the U.S. authorities long prior to his extradition.

3. It was not disclosed to the Canadian Extradition Judge or the Petitioner during the Canadian extradition process that he would be prosecuted in the U.S. for an offence that required proof he was an "Indian," nor was it disclosed that the United States prosecutors

were aware that he may well not meet that legal definition. These were matters, the Petitioner says, that could have provided grounds for the Canadian court to decline committal. Further, this would have provided a compelling basis for submissions to the Minister that Surrender should not occur.

4. Two years after the extradition, following a Court-ordered dismissal of the U.S. indictment and then a partial dismissal of a new Indictment, and in the face of imminent final dismissal of the criminal charges at trial, the United States requested that the Minister consent to the Petitioner being prosecuted on a new charge he had not be extradited on, felony murder. Felony murder is akin to the former Canadian offence of constructive murder, which had been struck down in Canada as unconstitutional. This new charge did not require proof of the mental element of the offence of murder. This charge, when tried in South Dakota State Court, did not require American Indian status be proven as an element of the offence. The penalty upon conviction for felony murder when prosecuted by the State of South Dakota State was life imprisonment without parole: the Petitioner had been extradited on the expectation he would face a maximum sentence on conviction of life imprisonment *with* the possibility of parole.

5. On February 2, 2010 the Minister of Justice consented to waiver of specialty (the "Decision,") which allowed for the Petitioner's prosecution on a new charge of felony murder, a charge that had not been before the Extradition Judge at the committal phase or the Minister at the Surrender phase. The Petitioner was not provided with an opportunity to make submissions related to the Decision. The Canadian Court was not involved in assessment of whether the new charge met the test for committal under the *Extradition Act*.

6. The Decision was not communicated to the Petitioner by the Minister. When be brought application to the U.S. Court to obtain its disclosure, Canada advised the U.S. prosecutor that its position was that the Decision should not be made public and should not be disclosed to the Petitioner unless the U.S. trial judge was satisfied that it was

necessary for full answer and defence. The Decision was accordingly not provided to the Petitioner by the U.S. authorities.

7. The Petitioner was subsequently tried in State Court. In December 2010 the jury acquitted him of premeditated murder, and convicted him of felony murder. He was sentenced to life without parole.

8. The Petitioner claims that the Decision violated principles of procedural fairness, his Aboriginal rights, and/or his rights under the *Charter.* The Petitioner further claims that the Requesting State breached his *Charter* rights, his Aboriginal rights, and principles of comity. He claims that the extradition process was abused by the Requesting State and/or by the Minister. He seeks an appropriate remedy.

9. If this Court finds that an extension of time to bring this application is necessary, then the Petitioner seeks leave of the Court to grant that relief. He also seeks disclosure, including of the Record before the Minister related to the Decision.

B. Procedural Chronology: United States. 1976-2003

10. The Petitioner was born in 1955 in Whitehorse, Yukon. He is a Canadian citizen and is a member of the Champagne and Aishihik First Nations. He has been involved in activism related to a variety of causes, including with the American Indian Movement.

11. In 1975 Anna Mae Aquash was the victim of a homicide on the Pine Ridge Indian Reservation in South Dakota. In February 1976 Anna Mae Aquash's body was found in a remote area within the exterior boundaries of the Pine Ridge Indian Reservation. Investigators formed the view that her death was a homicide and that it arose out of her involvement in the American Indian Movement ("AIM.")

12. AIM had been involved in the occupation of Wounded Knee in South Dakota 1973. A Canadian member of AIM, Leonard Peltier, had faced charges of two counts of first-degree murder arising from the shooting of two FBI agents in 1975 on the Pine Ridge

Indian Reservation. Following a highly controversial extradition from Canada and trial, Peltier was convicted in 1977.

13. Investigators formed a view that Anna Mae Aquash was kidnapped and murdered in 1975 because leaders and members of AIM, including Peltier, believed she was a federal government informant. It was alleged in the course of the prosecution of the Applicant many years later that AIM leaders ordered Aquash to be taken from Colorado to South Dakota to face an allegation that she was an informant, that she was forcibly taken from Denver to Rapid City, South Dakota by AIM members - the Petitioner, Arlo Looking Cloud, and Theda Clarke - and that she was then taken to a remote area where the Petitioner shot her.

14. For many years the case was under investigation by FBI agents, but no charges were laid. In the mid-1990s several federal grand jury sessions of the United States District Court of the District of South Dakota were held related to the Aquash homicide. Robert Mandel was one of the federal prosecutors working on the case at the time. It was the decision of the United States Attorney of the District of South Dakota that there was an insufficient basis to seek that the grand jury return an Indictment. There were a number of deficiencies that led the U.S. Attorney to this conclusion. These various likely impediments to successful prosecution were memorialized in a letter dated 6 August 1998 written by Assistant U.S. Attorney Holmes, signing under the name U.S. Attorney Schreier, and addressed to the Chief Deputy District Attorney of the Second Judicial District (the "Holmes/Schreier Letter.")

15. The first impediment was that, due to limitations problems arising from the passage of time, the only offence that could be prosecuted federally was first degree murder. However, federal jurisdiction over the offence would only arise if it could be established that the victim, the accused, or both, met the legal definition of "Indian" within the meaning of the U.S. federal statute. The victim was of Canadian Indigenous status, as was one of the suspects, the Petitioner.

16. The U.S. Attorney was of the view that Canadians of Indigenous heritage likely did not meet the legal definition of "Indian" within the meaning of the federal criminal statutes. Jurisdiction to prosecute thus was questionable with respect to the Petitioner, though there was jurisdiction with respect to two other suspects. The view of the U.S. Attorney as expressed in the Holmes/Schreier letter was that because of the potential that the suspects would point fingers at each other, it would be difficult to successfully prosecute unless all three were charged together.

17. A second impediment to successful prosecution known to the U.S. Attorney in the 1990s and recorded in the letter was the potential that a prosecution would be viewed as a "cover-up" of alleged FBI involvement in Aquash' death.

18. The third impediment to successful prosecution was that the U.S. Attorney held the view that the evidence could not in any event establish proof beyond a reasonable doubt of guilt.

19. In a second letter authored in 1998 the Deputy Attorney General for the State of South Dakota indicated that the fact Graham and Aquash were of Canadian Aboriginal background "puts United States jurisdiction into question."

20. Notwithstanding these known legal impediments to federal prosecution, some years later, in an Indictment returned by a federal grand jury in the District of South Dakota on March 20, 2003, Arlo Looking Cloud and the Petitioner were jointly charged with the first-degree murder of Aquash. Federal prosecutor Robert Mandel was assigned conduct of the case.

21. On April 3, 3003 a warrant for the Petitioner's arrest on a federal charge of premeditated murder was issued by U.S. District Judge Battey, District of South Dakota. In a superseding indictment filed 24 April 2003 the Petitioner and Looking Cloud were charged jointly with the federal charge of premeditated murder of Aquash. The Indictment

stated that Looking Cloud was an "Indian," but was silent regarding the Petitioner's ethnicity.

22. U.S. District Judge Schreier, the former federal prosecutor above whose signature the 1998 Holmes/Schreier Letter had spelled out the legal impediments to federal prosecution of the Petitioner, recused herself from hearing the murder case, and Judge Piersol was assigned.

C. Procedural Chronology: Canada 2003-2007

23. U.S. authorities sought the extradition of the Petitioner to the U.S. from Canada. Article 9-1 of the *Treaty on Extradition Between the Government of Canada and the Government of the United States of America*, 3 December 1971, Can. T.S. 1976 No. 3 (entered into force 2 March 1976) ("*Treaty*") requires that the diplomatic request for extradition must be accompanied by "the text of the laws of the Requesting State describing the offense and prescribing the punishment for the offense, and a statement of the law relating to the limitation of the legal proceedings."

24. On 29 April 2003 Minister of Justice ("Minister") Toews issued an Authorization to the Attorney General of Canada pursuant to the *Extradition Act* to apply for a Provisional Arrest Warrant seeking the Petitioner's arrest for the purpose of extradition. In the affidavit of R.C.M.P Staff Sgt. Darbyshire relied on by Mr. Justice Oppal, the U.S. offence for which extradition was sought was indicated to be first degree murder, and the associated penalty life imprisonment.

25. The 24 April 2003 Indictment, which had been sealed, did not form part of the material before Justice Oppal. Nothing in the materials placed before Justice Oppal indicated that the criminal charge in the United States required proof of "Indian" status as an element of the offence.

26. On December 1, 2003 the Petitioner was arrested in Vancouver on the Provisional Arrest Warrant. On January 15, 2004, Associate Chief Justice Dohm of the British

Columbia Supreme Court released the Petitioner from custody on his own recognizance, subject to strict terms and conditions. An appeal on behalf of the U.S. from the bail decision was unsuccessful.

U.S.A. v. Graham, 2004 BCSC 1603 (CanLII), paras. 4,5
USA v. Graham, 2004 BCCA 162, para. 1

27. Assistant U.S. Attorney Robert Mandel subsequently certified that the evidence summarized or contained in the Record of the Case dated January 26, 2004 was available for trial and was sufficient under the laws of the United States to justify prosecution of the Petitioner. The Record of the Case formed the central basis of the evidentiary assessment at the Extradition Hearing that later followed.

28. The Record of the Case made no mention that the intention of the U.S. authorities was to try the Petitioner in federal Court on a charge that required in law that the prosecution prove that the Petitioner was an "Indian" as an element of the offence. The "text of the laws of the Requesting State describing the offence" under which the Petitioner was to be prosecuted in the United States, as described in Article 9-1 of the *Treaty*, was not included in the Record of the Case. The Record of the Case furthermore did not disclose that the U.S. authorities were aware that there existed a serious legal issue whether the Petitioner met the definition of "Indian" as he was of Canadian Indigenous heritage.

29. An Authority to Proceed ("ATP") was issued by the Minister of Justice on 12 February 2004, authorizing extradition proceedings against the Petitioner and listing the Canadian offence of murder contrary to s. 229 of the *Criminal Code* as corresponding to the conduct alleged in the United States. There was no mention in the ATP of "Indian" status as an element required to be proven.

30. The Petitioner was represented on the extradition proceedings by Greg Del Bigio QC and Terrence LaLiberte QC. Mr. LaLiberte sought additional disclosure related to the U.S. prosecution from the Canadian Department of Justice, and from the U.S. prosecutor

Mr. Mandel. The latter responded that his office had provided everything required by the *Treaty*.

31. The hearing of preliminary applications related to the extradition proceedings commenced on November 15, 2004 before Madam Justice Bennett of the British Columbia Supreme Court ("the "Extradition Judge.") The Petitioner brought applications seeking disclosure, challenging the constitutionality of provisions in the *Extradition Act*, and seeking a stay of proceedings. Those matters were ruled on by the Extradition Judge. The extradition hearing then followed.

A.G. of Canada on behalf of the U.S.A. v. Graham, 2004 BCSC 1603 (CanLII)
A.G. of Canada on behalf of The U.S.A. v. Graham, 2004 BCSC 1768 (CanLII)
AG of Canada on behalf of the U.S.A. v. Graham, 2005 BCSC 54 (CanLII)
AG of Canada on behalf of the U.S.A. v. Graham, 2005 BCSC 279 (CanLII)

32. Following the extradition hearing, on 2 Mach 2005 the Extradition Judge ordered that the Petitioner be committed for extradition. In her decision on committal dated 21 February 2005 the Extradition Judge held that the evidence presented to her by the Requesting State "has been presented in a most unsatisfactory manner" and that "she had concerns regarding the wording of the Record of the Case" (paras. 22, 35, 35). She nonetheless found that there was sufficient evidence to commit the Petitioner for extradition to the United States to face an American charge equivalent to the Canadian charge of murder. On April 20, 2005 she provided a report to Minister of Justice Cotler as required by s. 38 of the *Extradition Act*.

USA v. Graham, 2005 BCSC 559 (CanLII)

33. The extradition proceedings then moved to the second phase, related to Surrender. The Petitioner was ordered released on bail pending the Minister's decision on Surrender.

34. On November 04, 2005 counsel for the Petitioner provided submissions to the Minister of Justice pursuant to section 40 of the *Extradition Act* seeking that he refuse Surrender under section 44(1)(a) of the *Extradition Act*. Counsel for the Petitioner did not seek any assurances regarding penalty, which the extradition documentation stipulated was life imprisonment.

35. On April 18, 2006 the International Assistance Group provided counsel for the Petitioner with its summary of the submissions made by the Petitioner's counsel, and a history of the case, which were in turn forwarded to the Minister. In those submissions the IAG noted that the first degree murder charge against the Petitioner in the U.S. "is not statute barred against Mr. Graham."

36. The Petitioner provided additional submissions to the Minister, in the nature of some further documents, on May 5, 2006. In addition, some two hundred persons wrote to the Minister opposing the Petitioner's Surrender. A handful of people wrote to the Minister supporting Surrender.

37. On June 13, 2006 Minister of Justice Toews ordered the Petitioner's Surrender on the charge of first degree murder. He attached no conditions to Surrender, and noted that if the Petitioner were convicted the maximum sentence was life imprisonment.

38. The Petitioner appealed the decision of the Extradition Judge committing the Petitioner for extradition. He did not apply for judicial review of the decision of the Minister ordering his Surrender. Madam Justice Saunders of the British Columbia Court of Appeal ordered that the Petitioner be released on bail pending his appeal of committal.

A.G. Canada on behalf of USA v. Graham 2005 BCCA 131

39. On 26 June 2007 the British Columbia Court of Appeal dismissed the appeal from the order of committal.

USA v. Graham, 2007 BCCA 345 (CanLII)

40. The Petitioner applied for leave to appeal to the Supreme Court of Canada from the decision of the British Columbia Court of Appeal denying the appeal from committal. On December 6, 2007 the Supreme Court of Canada dismissed the leave application. The Petitioner was in cells in the Vancouver Courthouse that day, having surrendered himself to await the decision. Guards attended and advised him he was leaving. He was not provided an opportunity to speak to his counsel or his family. He was immediately

removed from the Courthouse and was transported to the U.S. border to be turned over to U.S. authorities.

D. Procedural Chronology: U.S. 2008 -2018

41. The Petitioner was arraigned on the criminal charges in federal court (the U.S. District Court) in South Dakota on December 7, 2007 and ordered detained in custody pending trial. Robert Mandell and Marty Jackley were the assigned federal prosecutors.

42. The Petitioner initially faced charges in an Indictment that charged him and Arlo Looking Cloud jointly with the murder. Prior to the Petitioner's extradition his co-accused Looking Cloud had been tried separately and convicted of the murder charge in 2004. He was sentenced to life imprisonment. Looking Cloud's appeal to the U.S. Court of Appeals for the Eighth Circuit was dismissed in August 2005.

43. On December 13, 2007 the Petitioner's trial was scheduled to commence on February 12, 2008. On December 19 that trial date was adjourned at the prosecution's request and rescheduled for June 17, 2008. The defence sought a further adjournment due to the volume of disclosure materials that were required to be reviewed, and the trial was rescheduled to commence September 23, 2008. On June 9, 2008, at the joint request of the prosecution and defence, the trial was again adjourned and rescheduled to commence on October 6, 2008.

44. On August 20, 2008 separate murder charges were laid against Richard Marshall related to Anna Mae Aquash's death. On September 23, 2008 a new, superseding federal Indictment was filed charging the Petitioner and Marshall jointly with premeditated murder of Anna Mae Aquash and with aiding and abetting her murder.

45. The Petitioner brought an application to dismiss the charges in the Superseding Indictment. He argued that the Indictment was fatally defective as it did not plead that he was of Indian status, a required element for the federal charge. That application was argued on October 2, 2008. In a decision delivered on October 3, 2008, just prior to the

scheduled October 6, 2008 start date of the Petitioner's murder trial, U.S. District Court Judge Piersol held that Graham's Indian status was an essential element of the federal charge of murder, and the charge of aiding and abetting, and as the two counts in the superseding Indictment failed to allege Graham was "Indian," he dismissed the Indictment.

46. The Petitioner was not released from custody. Hours after the dismissal of the Indictment prosecutors filed a new criminal complaint, and a few days later a new federal Indictment. The Indictment contained three counts against Graham, each pursuant to a different theory of liability. Count I of the new Indictment charged the Petitioner and his co-accused Marshall with murder of Aquash and with and with aiding and abetting her murder, and alleged that the Petitioner was "Indian." Count II charged the Petitioner with murder of Aquash but did not allege he was "Indian." Count III alleged that the Petitioner murdered Aquash and aided and abetted others who were "Indian" in her murder, but did not allege the Petitioner was "Indian."

47. The Petitioner was arraigned on the new federal Indictment on October 10, 2008 and was ordered detained. The trial was scheduled to commence 24 February 2009. The trial was later adjourned and rescheduled to commence May 17, 2009.

48. In January 2009 the Petitioner filed an application to dismiss all three counts, making the same arguments as on the earlier application to dismiss. Judge Piersol ruled on April 29, 2009 that Count III was substantially the same as a count that had previously been dismissed, and ordered Count III dismissed. With respect to the remining two Counts, he held that the matter could not be resolved pre-trial as on its face the Indictment was not defective, but also noted that if the proof at trial regarding Indian status were as anticipated - that the Petitioner was of Canadian Indigenous heritage and not an American Indian - Counts I and II would then be dismissed due to the absence of any evidence of an element of the offence. He reasoned "the only governmental entity that could try the Petitioner would be the State of South Dakota," as Indian status was not an element of State murder charges.

United States v. John Graham 2009 W L 1173039 (D.S.D. 2009)

49. The federal prosecutors appealed both the dismissal of the entire September 23, 2008 Indictment, and the second dismissal of Count III of the new Indictment.

50. The filing of the prosecution's appeals led on May 6, 2009 to the adjournment of the May 12, 2009 start date of the Petitioner's trial, over his objection. In proceedings before Judge Piersol on May 5, 2009, when the potential adjournment was discussed, the Court raised the potential that principles of double jeopardy would preclude later State prosecution of the Petitioner if the jurisdictional issue of Indian status led to acquittal at a federal trial.

51. In a decision dated 28 July 2009 the U.S. Eighth District Court of Appeals upheld Judge Piersol's dismissals of the counts. The trial on the remaining counts was again rescheduled, to commence October 6, 2009.

U.S. v. Graham. 572 F.3d 954 (8t h Cir.)

52. In a press release issued 19 August 2009 the South Dakota Governor announced that one of the two federal prosecutors involved in the Petitioner's prosecution, Marty Jackley, was appointed State Attorney General, with his term to commence effective September 4, 2009.

53. Within days of Mr. Jackley's appointment, on September 9, 2009, State prosecutors held a grand jury session at the conclusion of which State charges were laid against the Petitioner and a new co-accused, Thelma Rios, charging the Petitioner with felony murder (rape), felony murder (kidnapping), and premeditated murder. An arrest warrant related to the Petitioner was sought by the prosecution and issued by the State Court. The prosecutors sought and obtained an order sealing the Indictment. Former federal prosecutor Jackley announced publicly that he would now be one of the State Court prosecutors on the case. A State trial judge was appointed.

54. The applicable State statutory provision in effect in 1975, and under which the Petitioner was charged with felony murder, stipulated that "Homicide is murder when

perpetrated without any design to effect death by a person engaged in the commission of any felony." That provision was repealed by South Dakota in 2005.

55. The charges in State Court did not require proof that the Petitioner had "Indian" status.

56. The Requesting State did not have the consent of Canada at the time to charge the Petitioner with the new felony murder charges.

57. Meanwhile, the federal charges remained technically alive, though dismissal was now inevitable given the Petitioner could not be proven to meet the legal definition of "Indian." On September 9, 2009, the same day that the State grand jury approved State murder charges against the Petitioner, federal court Judge Piersol granted the federal prosecution's application to adjourn the federal trial scheduled for October 6, 2009, as the prosecution advised it intended to seek the appeal court agree to a rehearing of the appeals from the dismissals. The adjournment was granted over the objection of the Petitioner,

58. The Petitioner filed a motion in the federal proceedings on September 11, 2009 seeking an extension of time within which to pursue disclosure motions in that Court. He argued that he had been given only limited access to his State Court file, and that the Federal Court was the only avenue by which he could obtain discovery of State grand jury transcripts that were relevant to the federal charges.

59. Judge Piersol directed that both the State and the federal prosecutors respond to the motion filed by the Petitioner. Federal prosecutor Mandel filed a motion response in which he indicated that the federal Prosecutors did not possess the State grand jury transcripts, and that the United States was only obliged to produce disclosure in the possession of the United States. The State prosecutor, former federal prosecutor and now State Attorney General Jackley, filed a response on behalf of the State. Judge Piersol declined to order the relief sought.

60. Meanwhile, the federal prosecution petitioned the Eighth District Court of Appeals for a rehearing by the panel or *en banc* of the denial of the appeals of the dismissals of the charges. The petitions to the Eighth District Court of Appeals were dismissed by the appellate court in a decision dated 4 November 2009.

U.S. v. Graham, reh'g and reh'g en banc denied, 598 F.3d 930 (8th Cir. 2009)

61. In 2009, on a date unknown to the Petitioner, the United States first communicated with Canada regarding potential prosecution of the Petitioner on new charges he had not been extradited on: namely, felony murder. The Canadian Department of Justice opened a file regarding a U.S. application for Canada's consent to a waiver of specialty allowing for such a prosecution on November 16, 2009, two months after the State charges that included felony murder had been initiated. Canada did not advise the Petitioner that consent to waiver of specialty had been proposed.

62. In Court proceedings before Judge Piersol on November 17, 2009, the federal prosecutors advised, in response to questioning by the trial judge, that they did not know whether there would be a further appeal of the dismissals, in the form of an application for *certiorari* to the United States Supreme Court from the 4 November decision of the Eighth Circuit Court of Appeals upholding the dismissals of the federal charges. The prosecutor advised that such an application for *certiorari* had to be brought within 90 days of the decision sought to be reviewed. The prosecutor further advised that if no application were brought for *certiorari,* then the prosecution would probably dismiss the federal charges and allow the State trial against the Petitioner to proceed.

63. At the time the prosecutors made these representations to the court on November 17, 2009 Canada had not consented to waive specialty and thereby consent to the State charges of felony murder.

64. As December of 2009, then, the status was that the Petitioner faced murder charges related to the death of Anna Mae Aquash in two jurisdictions. His trial on federal murder charges was scheduled to commence February 17, 2010, and his trial on State

charges of murder and felony murder, on which charges he had not yet been arraigned, was scheduled to commence in March 2010. The Petitioner had not been advised that the Requesting State was making application to Canada requesting consent to waiver of specialty and to his prosecution on felony murder charges.

65. On December 17, 2009, on application of the Petitioner's co-accused, Marshall, Judge Piersol ordered that the federal prosecutors make inquiries of the Denver Police Department concerning undisclosed evidence.

66. Through Diplomatic Note #852 forwarded by the U.S. to Canada on December 18, 2009, the U.S. formally sought consent to waiver of specialty. As the Canadian Department of Justice file relating to that request had been opened a month earlier, it is evident some communications pre-dated the diplomatic note. The note and other communications between the countries relating to charging the Petitioner with felony murder have not been disclosed to the Petitioner, and the nature of the information communicated by the U.S. to Canada regarding the request that the Minister consent to waiver of specialty has not been disclosed to the Petitioner.

67. The Petitioner is unaware whether the United States advised the Minister, for example, that: the jurisdictional "Indian" status issue had been a concern of the U.S. authorities years prior to the application for extradition; a State prosecution that included felony murder had been initiated without Canada having consented to waive specialty; two years of delay post-extradition had arisen due in part from the "Indian" issue; the sentence that would be applicable to a conviction for felony murder was life without parole, a greater sentence than that which the Petitioner had been extradited to face.

68. The Minister of Justice did not invite submissions from the Petitioner as to whether he should consent to specialty being waived. The Minister did not refer the matter to the Extradition Judge for a judicial hearing of the issue. He did invite the Petitioner to make submissions as to next steps.

69. On 15 January 2010 federal Judge Piersol directed the prosecution to advise no later than 3 February 2010 whether or not it intended to proceed with the charges against the Petitioner in federal Court.

70. On February 2, 2010 Minister Nicholson consented to Waiver of Specialty, thus allowing the Petitioner to be tried for felony murder. The Decision was recorded in a formal document, endorsed by the Minister. The Petitioner was not served with the Decision.

71. The Decision does not contain Reasons for the Minster reaching his decision. No separate Reasons have ever been disclosed related to the Decision.

72. The federal prosecutors in the U.S. applied to dismiss the federal murder charges the next day, February 3, 2010, "without prejudice," and the charges were ordered dismissed. On that same day the Petitioner appeared and was arraigned in State Court on the State Indictment. Prosecutors publicly announced that the government had been unlikely to succeed regarding the Indian status issue. Federal prosecutor(s) including Robert Mandel, who had been involved in the investigation of potential charges in the 1990s, was referred to in the Holmes/Schreier letter, and provided the certification of the Record of the Case in 2004, thereafter assisted the State prosecutors, including the former federal prosecutor Jackley, now the State Attorney General. Mr. Mandel was appointed "Special Assistant Attorney General" for the sole purpose of the Graham prosecution."

73. On February 4, 2010 federal Judge Piersol ordered disclosure to the Petitioner's former federal co-accused, Marshall, of the contents of Denver police materials known as the "Aquash Box."

74. On February 12, 2010 the Petitioner applied in State court for disclosure related to the Decision. His counsel submitted that he had received no disclosure related to Canadian authorization of the new State charges, had not received a copy of the Decision, and required disclosure as it was relevant to the legality of the Petitioner's detention.

Regarding disclosure generally, he noted that the "Aquash Box" materials had not been disclosed to his former co-accused in the federal prosecution until 10 February 2010.

75. While the Minister of Justice did not communicate with the Petitioner concerning the Decision, or provide Reasons, his spokesperson commented on the consent to waiver specialty in February 2010 to a Yukon newspaper: "Extradition is completed once a person has been surrendered to the Requesting State. In this instance, Mr. Graham has been surrendered to the United States and therefore the extradition is complete. While the U.S. federal indictment against Mr. Graham was recently dismissed by the U.S. District Court in South Dakota, Mr. Graham is still facing charges under South Dakota law in relation to the same conduct."

76. On February 14, 2010 the Petitioner applied in the State proceedings for disclosure of the Denver police materials, known as the Aquash Box. On 16 March 2010 those materials were ordered disclosed. Contained within the large volume of new materials in the "Aquash Box" were the 1998 Holmes/Schreier letter and the 1998 letter by the Deputy Attorney General for the State of South Dakota, both described above, which disclosed that there was known to be a serious jurisdictional issue regarding federal prosecution, the "Indian" issue. These two documents had not been previously disclosed to the defence, nor had their content been communicated.

77. Submissions were made in South Dakota State Court on March 8, 2010 related to the Petitioner's 12 February 2010 motion seeking disclosure of the Decision. Counsel for the Petitioner advised the Court that the Petitioner had not had Canadian representation regarding the consent to waiver of specialty and had not had any input in Canada regarding the Decision.

78. At the March 8, 2010 hearing, the prosecutor and the Court expressed the view that it was irrelevant how the Petitioner came to be in the U.S. jurisdiction. The federal prosecutor who was assisting in the State prosecution, Mr. Mandel, (who had certified the Record of the Case for Canadian authorities) advised the Court that "The Administer (sic)

of Justice up there considered the similarities between the State case and the federal case and waived the Rule of Specialty to put him here in State court for the State to proceed against him." He submitted that under Canadian law there was no right to representation in that process, "which is why they didn't provide him representation up there." Mr. Mandel also advised that he did not know what documentation would now be producible to the Petitioner regarding the Decision. At the request of the Court, prosecutor Mandel agreed to make inquiries (i.e. of Canada) with respect to potential disclosure to the Petitioner of the Decision.

79. Subsequently, on March 9, 2010, the prosecution provided information in written form to the State Court, which documentation was sealed. The prosecution advised that Canada did not agree to the Decision being disclosed. A copy of the Decision was provided by the prosecution *in camera* to the Court, with Canada's consent, for the purpose of an *in camera* review of the document by the Court so that the U.S. Court could determine "any value or relevance this document may have to the defence" which would allow for disclosure. The prosecution advised in the sealed document that "Canada considers this document non-public." Neither the Decision nor the written application in which Canada's position was set out was disclosed to the defence. This was effectively the end of the issue, and the Petitioner's application to the U.S. Court for access to the Decision thus failed.

80. In an application dated March 22, 2010 the Petitioner applied to the federal Court seeking the counsel be appointed to bring an application on his behalf to have the federal charges, which had earlier been dismissed "without prejudice," dismissed "with prejudice." The Petitioner argued, *inter alia*, that the prosecution had unfairly withheld from him the information contained in the Holmes/Schreier letter, and that the prosecution knew as early as 1998 that the Petitioner did not meet the definition in law of "Indian" and hence that a federal prosecution would not succeed. Counsel for the Petitioner furthermore indicated that it was his belief that this information had also been withheld from Canada when extradition was sought in 2003.

81. U.S. counsel for the Petitioner was interviewed by the Canadian media in and around this time, and press reports made public in Canada his complaint that the Petitioner had been denied access to the Decision, and his allegation that the American authorities had been aware prior to extradition that the federal charges were jurisdictionally problematic. One press report indicates that the Minister declined a press inquiry seeking comment.

82. The federal murder trial of the Petitioner's former co-accused Marshall proceeded in April 2010 and resulted in his acquittal.

83. The State trial of the Petitioner and his new co-accused, Thelma Rios, was adjourned from the previous March 2010 trial date and scheduled to commence on July 6, 2010. It was then adjourned again and re-scheduled to commence November 29, 2010. Prior to the commencement of the trial Ms. Rios pleaded guilty to being an accessory to kidnapping and received a non-custodial suspended sentence.

84. On November 29, 2010, as the Petitioner's State trial was about to commence, the prosecutor advised the trial judge that while the Indictment contained a charge of felony murder (rape), "Canada doesn't have felony murder rape and has not allowed us to proceed." He further advised "I can't move forward on that count because of Canada," "I don't want to create an international incident," "because of the extradition agreements, we are unable to move forward on the felony murder rape," which was Count II on the Indictment. Nothing has ever been disclosed to the Petitioner concerning communications between Canada and the United States related to the issue of his potential prosecution in the U.S. for felony murder (rape,) and he is unaware how or why the Minister distinguished that offence from felony murder (kidnapping) for the purpose of consent to waiver of specialty. Neither is an offence in Canada.

85. The jury trial on the remaining State charges commenced. Mid-trial, on December 6, 2010, former Canadian counsel for the Petitioner, Greg DelBigio QC, wrote to advise the Minister that it had come to his attention that the Applicant was being tried in the U.S. on a

charge he had not been extradited on. He submitted that this offended principles of specialty, and sought that the Minister secure the Petitioner's return to Canada. The Minister's response, if any, has not to date been disclosed to the Petitioner.

86. The Petitioner's former co-accused Arlo Looking Cloud, who had earlier been convicted and sentenced to life imprisonment for the Aquash homicide, testified for the prosecution at the Petitioner's trial, and in exchange received a sentence reduction. The trial concluded after eight days, on 10 December 2010, with the Petitioner being found not guilty of premeditated murder but guilty of felony murder (kidnapping). He was sentenced to life without parole on 28 January 31, 2011. He had been in custody in the United States for 1334 days to that point.

87. The Petitioner appealed his conviction. He argued, *inter alia*, that there had been no jurisdiction to try him, based on the rule of specialty. He noted that he had not been provided with notice, representation, or an opportunity to contest the process or argue the matter of consent to waiver of specialty. He had been "denied access to basic documents relative to the alleged claim of jurisdiction over him" as the Decision had not been produced to him at his trial. He further submitted that he had been wrongly denied the right to return to Canada to contest his extradition on the new charge.

88. In August 2011, in the course of the appellate proceedings, the Petitioner's counsel brought an application to unseal the Decision, and the State documents related to it. He argued that he required those documents for the purpose of arguments to be advanced on appeal. The State consented and the Court ordered the documents be unsealed. The Petitioner was provided for the first time with the Decision, and the State's rationale for its earlier non-disclosure, which was that Canada had not consented to it being disclosed to him unless the State judge deemed that necessary for the defence.

89. The South Dakota appellate court confirmed Graham's conviction in a decision dated May 30, 2012. The Court held that the doctrine of specialty did not protect a defendant if the extraditing country waived objection to prosecution for a crime for which

the defendant had not been extradited. As Canada had not objected to his prosecution for felony murder, the Petitioner had no standing in the U.S. to challenge Canada's decision to consent to waiver of specialty.

State v. Graham, 815 N.W.2d 293, 299-301 (S.D. 2012)

90. In May 2013 the Petitioner, who was now self-represented, filed an application for a writ of *habeas corpus* in the State Court. He argued, *inter alia*, that as felony murder was not an offence in Canada the requirements of dual criminality had not been met and there had been no jurisdiction to prosecute him. He claimed that the State appellate Court had erred in not finding that he had standing to raise the issue of specialty. He furthermore argued that Canada could not waive his extradition *Treaty* rights. He also claimed that the State trial judge had erred in engaging in an *in-camera* proceeding, in his absence, regarding the Minister of Justice's consent to waiver of specialty.

91. The State Court dismissed the application for *habeas corpus*, finding, *inter alia*, that *res judicata* barred the Petitioner from raising the issue of the waiver of specialty as it had been dealt with by the Court that heard his conviction appeal. The Petitioner sought to appeal from that decision, but the appeal was dismissed.

92. On September 17, 2013 the Petitioner filed a federal application for *habeas corpus* in the federal Court. In the hand-written Petition initiating that application he identified the waiver of specialty as the primary ground for challenging his conviction. He sought that the court order appointment of State-funded counsel for the purpose of the application, and sought waiver of filing fees, based on his indigence. Those orders were granted. Paul Wolf was later appointed counsel.

93. The prosecution opposed the relief sought in the *habeas corpus* application. The State filed a motion seeking dismissal or a summary trial. That motion was ordered dismissed.

94. In 2015, at public events, which had been covered by the media, State Attorney general and prosecutor Mr. Jackley: stated the Petitioner had "killed" Anna Mae Aquash;

expressed frustration with the federal judges who had dismissed the charges because the Petitioner was a Canadian Indian; asserted that the Petitioner had raped Aquash; suggested that the Petitioner may have information and/or played a role in the homicide of another AIM member who disappeared in 1973 (at which time the Petitioner was aged 17 and living in Canada); stated that the Petitioner would never get out of prison unless the Governor pardoned him or unless the Petitioner decided to cooperate with law enforcement in solving other crimes; stated that he had promised Aquash's two daughters that he "won't cooperate with cutting Graham any deals unless the daughters agree."

95. Counsel for the Petitioner on the *habeas corpus* application, Mr. Wolf, wrote to Mr. Jackley expressing concerns about what he had publicly stated. He requested that he desist in making public statements about the case. In Mr. Jackley correspondence in reply he declined to do so, and incorrectly asserted that the Petitioner had been convicted by a jury of first degree murder.

96. The Petitioner filed an application to the federal Court taking issue with the manner in which State Attorney General Jackley had spoken publicly about the case in 2014 and 2015, including in the course of his campaign for re-election as Attorney General, and seeking a "gag order" while the *habeas corpus* matter was before the Courts. The State, in response to the application, did not deny the statements had been made, and opposed the relief sought, arguing, *inter alia,* "if Graham does not like people talking bad about him, he should have thought of that before he kidnapped Anna Mae Aquash and marched her to a lonely, painful death on a frozen Badlands night."

97. District Judge Piersol dismissed the application for a "gag order," finding that there was not a substantial likelihood of material prejudice to the pending non-jury *habeas corpus* proceeding, and that the issue of a gag order to prevent possible prejudice in the event of a future retrial at some date well into the future was too speculative to warrant relief.

98. The decision on the Petitioner's 2013 federal *habeas corpus* petition was handed

down three years after the application was filed, on 26 October 2016. Judge Piersol agreed with the Petitioner's position that he had personal standing to raise an objection to his extradition, and that his standing was not dependent on Canada raising an objection. He further held that Canada's consent to waiver of specialty did not waive Graham's standing to raise an objection to his prosecution, including one based in double criminality. The Judge disagreed with the position advanced on appeal by the Petitioner related to double criminality, and dismissed the application. He provided a "certificate of appealability" on the double criminality issue, which allowed for the Petitioner to appeal.

99. The Petitioner appealed the denial of his *habeas corpus* application to the Eighth Circuit Court of Appeals through notice of appeal filed on November 21, 2016. In his written argument filed on the appeal he argued that Judge Piersol had erred in a number of respects, including in finding that only Canada, and not the Petitioner, had standing to challenge his prosecution on a charge he had not been extradited on. Counsel for the Petitioner characterized the U.S. prosecution as a "bait and switch."

100. In the argument filed on 5 April 2017 in response, which was filed over the name of Marty Jackley, the Attorney General of South Dakota, the State argued, *inter alia*, that "the proper forum for Graham's grievance with his own government resided, if anywhere, in a Canadian Court of law," and that "Graham never challenged the Canadian Minister of Justice's determination that felony murder was an extraditable offence under Canadian law in any Canadian Court." The State further argued that U.S. Courts were not well-positioned to correct a foreign government's alleged misapplication of its own laws, and that the Minister of Justice's decision was not reviewable in a U.S. Court.

101. Oral submissions on the appeal were heard on October 19, 2017, with Counsel Paul Wolf appearing for the Petitioner and Attorney Paul Swedlund for the State. Mr. Swedlund submitted that it was for the courts of the extraditing country to hear challenges to specialty. He submitted that it was open to Canada to extradite based not on legal principles, but rather for diplomatic reasons, and that Canada could therefore consent to extradition for any reason or no reason at all. Mr. Swedlund submitted that even if the

Canadian Court held that the dual criminality test had not been met, the Canadian Minister of Justice could nonetheless "still step in and go, we don't care, as a matter of diplomacy we're turning him over anyway." He argued that the Petitioner had failed to challenge the consent to waiver of specialty in the Canadian Courts: in response to questions from the Court, Mr. Swedlund submitted again that the Petitioner could have challenged the consent document in the Canadian Courts but failed to do so, and that there was a procedure available for him in Canada that he had failed to avail himself of. Mr. Swedlund argued that the Petitioner's remedy, if it was anywhere, was in Canada.

102. In its decision of March 30, 2018, the Eighth District Court of Appeals held that the issue on the *habeas corpus* application turned on the legal effect of the consent to waiver of specialty, rather than on double criminality. The Court agreed with the position the Petitioner had advanced on his earlier conviction appeal: that treaties may confer rights on persons that are capable of being enforced in Courts. The appellate Court held that the Petitioner was thus entitled to raise whatever objection to his prosecution that Canada could have raised under the *Treaty*. However, there were no case authorities that addressed the right of a person who had been extradited to raise an objection to their prosecution when the surrendering country had expressly consented to waiver of specialty. The Court further held that the Minister's authority to consent to waiver of specialty was an issue of Canadian law that could not be collaterally attacked in the U.S. Accordingly, the appeal was dismissed.

Graham v. Young, 886 F. 3d 700 (2018)

E. Procedural Chronology: 2018 to date

103. The Petitioner has at all times intended to challenge the Minister's decision. The Petitioner's efforts to challenge the Minister's decision were rendered more difficult by: the Minister's failure to communicate the Decision; the initial failure of his efforts to compel its disclosure through the U.S. Courts; the complex procedural question of the appropriate jurisdiction within which to do so; his custodial status; his limited financial resources; the fact that for significant periods of time he was without Canadian and/or American legal representation; and, by his incarceration in the United States, far from this jurisdiction and

from counsel familiar with the highly specialized area of Canadian extradition law.

104. The efforts on the part of counsel herein for the Petitioner to assemble the necessary materials related to this application, and the associated chronology, are addressed in the Affidavits herein.

Part 3: LEGAL BASIS

(I) The legal framework for extradition

105. The process of extradition from Canada has two stages, the first of which is judicial and the second executive. At the first stage, the committal hearing, the Extradition Judge assesses whether the evidence discloses a *prima facie* case, and whether on a balance of probabilities the person before the court is the person whose extradition is sought. The Extradition Judge is also empowered under s. 25 to grant a remedy for any infringement of the fugitive's *Charter* rights that may occur at the committal stage.

106. Following committal for extradition, the Minister of Justice determines whether there should be Surrender to the Requesting State. The Minister's discretion must be exercised in accordance with the restrictions set out in the *Extradition Act*, and in a manner consistent with the *Charter*. Section 43(1) of the *Extradition Act* provides that the individual committed for extradition may make submissions to the Minister opposing Surrender. The Minister must consider those submissions before making his decision. If the Minister orders Surrender, he must provide reasons for his decision, and must respond to any submissions made opposing surrender and explain why he disagrees.

Baker v. Canada 1999 CanLII 699 (SCC)
United States of America v. Taylor (2003), 2003 BCCA 250 (CanLII)

107. The Minister must refuse to order Surrender of the Minister is satisfied that the prosecution is "barred by prescription or limitation under the law that applies to the extradition partner."

Extradition Act s. 46(1)(a)

108. Similar considerations may often apply to both s. 7 of the *Charter* and Surrender under the *Act* where Surrender would be contrary to the principles of fundamental justice. As the Minister acknowledged in his decision to Surrender herein, Surrender may be refused based on grounds related to the Act, the *Treaty*, and/or the *Charter.*

Lake, para. 24

109. In determining whether Surrender is consistent with the *Charter*, the Minister must consider many factors, including Canada's international obligations and its relationships with foreign governments. In determining whether Surrender would violate an individual's rights under s. 7 of the *Charter,* the ultimate assessment is whether the extradition is in accordance with the principles of fundamental justice. The relevant factors may be specific to the fugitive, or they may be general, such as considerations related to the potential punishment.

Lake, paras. 27, 31, 32, 33, 37

110. The person whose extradition is sought may appeal against the order of committal and apply to the provincial appellate court for judicial review of the Minister's decision to order Surrender. Pursuant to s. 57(7) of the *Extradition Act*, the grounds that may form the basis of judicial review of Surrender are those contained in s. 18.1(4) of the *Federal Courts Act*, R.S.C. 1985, c. F-7. Review of the Minister's decision to Surrender by the provincial appellate court is a form of administrative law review, and the standard of review is reasonableness, regardless of whether the fugitive argues that extradition would infringe his or her rights under the *Charter.*

Lake, paras. 26, 31-41;
Extradition Act. s. 57(2)

(II) The rule of specialty

111. Pursuant to a doctrine known as the rule of specialty, a person who has been extradited cannot be tried for any offences committed before extradition other than those for which he was surrendered unless he has had an opportunity to return to the surrendering state. This has been described as a "solemn state obligation."

The King v. Buck, (1917) 55 S.C.R. 133
United States v. Rauscher, 119 U.S. 407 (1886)
LaForest's Extradition to and from Canada, 3rd ed.

(Aurora: Canada Law Book Ltd.,991), p. 231
R. v. MacIntosh, 2008 NSCA 124 (CanLII)

112. Article 12 of the *Treaty* contains terms relating to specialty. It provides that a person extradited under the *Treaty* shall not be tried in the Requesting State for an offence other than that for which extradition has been granted, unless, *inter alia,* the Requested State has consented to that person's trial for an offence other than that for which extradition was granted.

113. The rule that the Requesting State will not try the fugitive for any other crime previously committed without the permission of the surrendering state has been held by the Supreme Court of Canada to arise out of proper construction of treaties, as opposed to a customary rule of international law. In so finding the Supreme Court of Canada departed from the finding on that issue of the U.S. Supreme Court in its leading decision on specialty, *U.S. v. Rauscher.*

R. v. Parisien, 1988 CanLII 85 (SCC), p. 957
Saxena v. Canada (Minister of Justice), 2009 BCCA 223 (CanLII), para. 26
United States v. Rauscher, 119 U.S. 407 (1886)

114. *Rauscher* implies that the right to specialty is intended to benefit the individual whose extradition is sought and suggests individuals may apply to the courts for breach of rights under extradition treaties. The Eighth Circuit Court of Appeals, the federal appellate Court whose jurisdiction includes South Dakota, has held that the person extradited has standing to advance any objection that the Requested State may raise related to their prosecution, and took that position herein.

U.S. v. Thirion, 813 F.2d 146 (8th Cir. 1987)
Graham v. Young, 886 F. 3d 700 (2018)

115. Canadian case authorities reflect that persons who are the subject of extradition requests have standing to challenge alleged breaches of the rule of specialty. That specialty creates rights of a personal nature is also reflected in the *Extradition Act,* s. 72(2), which describes mandatory terms related to waiver of extradition, and stipulates that when such waiver is made the judge is required to inform the person of "the consequences of the waiver including the consequences of that person *waiving the protection of*

specialty." Thus, the *Act* makes evident that specialty operates as a "protection" of the individual.

U.S.A. v. Wakeling, 2012 BCCA 397 (CanLII), para. 52
R. v. MacDonald, 1982 CanLII 3788 (ON SC)
United States of America v. Lopez-Turatiz, 2014 BCCA 39 (CanLII)

116. Waivers of specialty by the Executive are exceedingly rare. Canadian data is not known to be publicly available, and there are few case authorities related to instances where the Canadian Minister of Justice consented to waiver of specialty. In the United States, in the time frame 1991 – 2005, the U.S. made requests to other nations to waive specialty in only 6 cases, acceded to other nations' requests that it do so in 17 cases. In other cases, such requests were denied by the U.S.

Hearing before the Committee of Foreign Relations, United States Senate, One Hundred Ninth Congress, First Session, November 15, 2005, p. 88 (Written responses to questions by Senator Biden, witnesses Mary Ellen Warlow, Director, Office of International Affairs, Criminal Division, Department of Justice, and Samuel M. Witten, Deputy Legal Advisor, Department of State)

(III) Consent to waiver of specialty is justiciable

117. Decisions of governmental actors that have serious consequences have traditionally been held to be subject to judicial review.

Nicholson v. Haldimand-Norfolk Board of Comm. of Police, 1978 CanLII 24 (SCC)

118. Judicial review is available with respect to any decision affecting rights, liberties, privileges, or property, irrespective of classification of the decision as an administrative or quasi-judicial function.

Knight v. Indian Head School Division No. 19, 1990 CanLII 138 (SCC)
Baker v. Canada (Minister of Citizenship and Immigration), 1999 CanLII 699 (SCC)
Martineau v. Matsqui Institution Disciplinary Board, 1979 CanLII 184 (SCC)

119. The fact that Canada is not the ultimate decision-maker with respect to the Petitioner's fate does not mean that the issue herein is not justiciable.

Smith v. Canada (Attorney General), [2010] 1 FCR 3, 2009 FC 228 (CanLII)
(Prime Minister) v Khadr, 2010 SCC 3, ("*Khadr II*")

120. A power of the Crown that is not statutory is a prerogative power. Such powers are "the residue of discretionary or arbitrary authority, which at any given time is legally left in the hands of the Crown."

Delivery Drugs Ltd. v. Ballem 2007 BCCA 550
Introduction to the Study of the Law of the Constitution (8th ed. 1915), at p. 420, as cited in *Khadr II*, para 34

121. The source of governmental power, whether statutory or prerogative, does not affect the availability of judicial review: "the expanding scope of judicial review and of Crown liability make it no longer tenable to hold that the exercise of a prerogative power is insulated from judicial review merely because it is a prerogative and not a statutory power." The courts have the jurisdiction and the duty to determine whether a prerogative power asserted by the Crown, including the foreign affairs prerogative, exists and, if so, whether its exercise infringes procedural fairness and/or constitutional principles.

Khadr II, paras. 35-49
Hupacasath First Nation v Canada (Min. Foreign Affairs), 2015 FCA 4, para 63
Operation Dismantle v. R. [1985] 1 S.C.R. 441
Smith v. Canada (Attorney General), 2009 FC 228 (CanLII)
United States v. Burns, 2001 SCC 7 (CanLII)
Black v Canada (Prime Minister) (2001), 2001 CanLII 8537 (ON CA),
Stagg v. Canada (Attorney General), 2019 FC 630 (CanLII), paras. 41-51
R (on the Application of Miller) (Appellant) v. The Prime Minister (Respondent); Cherry and others (Respondents) v. Advocate General for Scotland (Appellant)(Scotland) [2019] UKSC 41

122. The decision-making power in issue herein amounted to a reconsideration of the terms of the order of Surrender under s. 40 of the *Extradition Act*, and hence was an exercise of a statutory power.

Adam v. U.S.A., 2003 CanLII 31874 (ON CA)
United States of America v. Fong, 2005 CanLII 2055 (ON CA)
India v. Badesha, 2018 BCCA 470 (CanLII)
Schreiber v. Canada (Attorney General), 2007 ONCA 791 (CanLII)

123. In the alternative, if the decision-making power in issue on this application is found to be non-statutory, then it involved exercise of Crown prerogative. Notably, however, the decision was made against the backdrop of a statutory scheme that makes explicit that the Minister's decision-making powers related to extradition, such as the decision to order Surrender, are reviewable by the Courts under the *Extradition Act*. Further, the Minister's

issuance of an Authority to Proceed or a provisional arrest warrant may lead to the granting of a remedy under the *Charter* by an extradition judge notwithstanding the absence of any statutory provision that allows for such review. Analogously, so is the decision-making power herein.

Froom v. Canada (Minister of Justice), 2004 FCA 352 (CanLII)
Alfred-Adekeye v. A.G. Canada, B.C.S.C. No. 25413, May 17, 2011

124. Courts are empowered to make orders ensuring that the government's foreign affairs prerogative is exercised in accordance with the Constitution.

Khadr II

125. The exercise of decision-making power herein had serious consequences for the Petitioner. While involving matters of foreign relations, that factor cannot oust the power of the Courts to ensure Ministerial compliance with the Petitioner's *Charter* rights and the Minister's obligation to provide procedural fairness. The decision in issue was made in the context of the extradition process, to which *Charter* rights and procedural fairness principles are unquestionably applicable to a very high degree. The decision in issue, whether viewed as statutory or prerogative, is not beyond the scope of judicial review and is justiciable.

(IV) This Court has exclusive original jurisdiction to review the Decision

126. Pursuant to s. 57(1) of the *Extradition Act*, the provincial appellate courts of the province in which committal was ordered have exclusive original jurisdiction to hear and determine applications for judicial review under the *Extradition Act*, made "*in respect of* the decision of the Minister under section 40" to order Surrender (emphasis added.)

127. The jurisdiction of the provincial appellate courts pursuant to s. 40 of the *Extradition Act* to hear an application for judicial review "in respect of" a decision to order Surrender is not confined only to the initial Surrender decision itself. It has been held that judicial review of the Minister's decision refusing to amend the Surrender decision (when so requested by the person whose extradition is sought) is "clearly *in respect of*" the Surrender decision, and hence reviewable by the provincial appellate courts under s. 40.

Adam v. U.S.A., 2003 CanLII 31874 (ON CA)
United States of America v. Fong, 2005 CanLII 2055 (ON CA)
India v. Badesha, 2018 BCCA 470 (CanLII)
Schreiber v. Canada (Attorney General), 2007 ONCA 791 (CanLII)

128. There is no difference in principle between the person whose extradition is sought seeking amendment of the Surrender order and the Requesting State doing so by calling upon the Minister to consent to waive specialty: Ministerial decisions in response to either request are "in respect of" the Surrender decision, and hence the latter is reviewable by this Court under the *Act* on the same basis as is the former.

(V) Grounds for review of the Decision

A. Legal bases on which relief may be claimed

129. Section 57(6) of the *Extradition Act* provides that on an application for judicial review the Court of Appeal may: (a) order the Minister to do any act or thing that the Minister has unlawfully failed or refused to do or has unreasonably delayed in doing; or (b) declare invalid or unlawful, quash, set aside, set aside and refer back for determination in accordance with any directions that it considers appropriate, prohibit or restrain the decision of the Minister.

130. Section 57(7) provides that this court may grant relief on any of the grounds on which the Federal Court may do so under subsection 18.1(4) of the *Federal Courts Act*, which stipulates relief may be granted where the decision-maker:

> (a) acted without jurisdiction, acted beyond its jurisdiction or refused to exercise its jurisdiction;
>
> (b) failed to observe a principle of natural justice, procedural fairness or other procedure that it 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;
>
> * * *
>
> (f) acted in any other way that was contrary to law.

131. Under s. 57(10), unless inconsistent with the *Extradition Act*, provincial laws and rules with respect to judicial review apply, with modifications as the circumstances require, to judicial review applications under the *Extradition Act*.

B. The Decision breached principles of procedural fairness and s. 7 of the *Charter*

i. The content of the duty of procedural fairness associated with the Decision

132. There are no authorities that describe the content of procedural fairness specifically related to consent to waiver of specialty. The content of the applicable procedural fairness may be determined through consideration of *Extradition Act* provisions, principles of administrative fairness, and the *Charter*.

133. A duty of procedural fairness arises where a decision affects rights and interests. All of the circumstances must be considered in order to determine the content of the duty of procedural fairness.

Baker v Canada (Min. Citizenship and Immigration), 1999 SCC paras. 20, 21
Cardinal et al. v. Director of Kent Institution, 1985 CanLII 23 (SCC)

134. Discretion must be exercised in accordance with the rule of law, principles of administrative law, the fundamental values of Canadian society, and the *Charter*. The more personal the nature of the matter go be decided, the more the principle of fairness is applicable.

Baker, para. 56
Canadian Shipowners Assn. v. Canada (1995), 103 F.T.R. 170 (F.C.T.D.), para. 24

135. In *Baker* the Supreme Court of Canada described five non-exhaustive factors that assist in determining the content of the duty of fairness. Under the first factor, the closer the process is to the judicial process the more likely it is that procedural protections closer to the trial model will be required.

Baker, para. 23

136. While it cannot be said that the Minister was engaged in a judicial process when he made the Decision, it cannot be divorced from the judicial committal phase. The Minister made, presumably, an assessment that incorporated the same criteria regarding the

committal stage findings that were necessary for a foreign prosecution to take place: that a *prima facie* case for committal on felony murder had been made out. He furthermore must also have undertaken an assessment of the matters relevant to Surrender in making his decision regarding waiver of specialty. While the Surrender process is not judicial in nature, it involves significant statutory procedural safeguards and *Charter* protections for the person sought to be surrendered. Thus, considering the first factor in *Baker*, procedural protections akin to a trial mode, or in event very significant protections, were required herein.

137. The second factor described in *Baker* is the nature of the (statutory) scheme and the role of the decision within it. Greater procedural protections will be required when no appeal procedure is provided within the statute, or when the decision is determinative of the issue.

138. The decision in issue amounted to a revision or amendment of the Surrender order made under s. 40 of the *Extradition Act*, and thus under s. 43(1) the Petitioner had the right prior to the Decision to make submissions regarding any grounds relevant to the Decision as it went to the heart of the very matter to be determined under the statutory scheme of extradition. He furthermore had the right under the *Act* to judicial review of the Decision. As the Decision was determinative, there was a heightened requirement for procedural safeguards.

139. A third factor described in *Baker* is the importance of the decision to those affected by it: the "more important the decision is to the lives of those affected and the greater its impact on that person or those persons, the more stringent the procedural protections that will be mandated." Applying that factor, few if any decisions can be more important than that which resulted in the Petitioner being prosecuted, convicted, and receiving a sentence of life without parole.

Baker, para. 25

140. Fourthly, under *Baker,* the Court will examine legitimate expectations A legitimate expectation that a specific procedure will be followed can create a right

to that procedure, and a legitimate expectation regarding the nature of a decision gives rise to enhanced procedural safeguards prior to a contrary decision being made. If a claimant has a legitimate expectation that certain procedures will be followed, those procedures will be required by the duty of fairness. This doctrine considers that the content of the duty may reflect the promises or regular practices of administrative decision-makers.

Baker, para. 26
Mount Sinai Hospital v Quebec (Min. Health and Social Services), 2001 SCC 41, para. 63

141. Applying the fourth factor, the Petitioner had a legitimate expectation that any effort to prosecute him on a new charge would be preceded by a committal-like judicial process at which he would be afforded full procedural protections, and/or that he would in any event have been afforded the opportunity to provide input to the Minister prior to the Decision, consistent with *Charter* principles and the requirements of procedural fairness.

142. The fifth factor Courts will look to is the decision-maker's choice of procedure. Important weight must be given to the choice of procedures made by the decision-maker, and its institutional constraints. Here, the Minister chose to employ no "procedure" at all: rather, the Decision was made without input from the Petitioner or notice to him, and the procedures employed failed to meet even the most minimal standard of procedural fairness.

Baker, para. 27

143. The various factors of relevance thus support that a high degree of procedural fairness was required associated with the Decision. The extradition context is critical to the assessment of the content of the Minister's duty of procedural fairness, as s. 7 of the *Charter* permeates the entire extradition process.

United States of America v. Cobb 2001 SCC 19, para. 34

144. Given the above, the duty of procedural fairness herein included at a minimum: the right to notice that the Minister had been asked to consent to waive

specialty; the right to make submissions; the right to be represented by counsel; the right to be provided with Reasons for the Decision; the right to notice of the Decision once made; the right to a judicial determination of matters relevant to whether the new charge met the test for committal. These rights were all breached.

145. The various components of procedural fairness that the Petitioners claims were applicable, and were breached, are addressed below.

ii. Particulars of breaches

a. The Minister failed to provide an opportunity to be heard

146. The nature of the decision in issue was such that the Petitioner had the right to an opportunity to be heard. The failure to provide notice or opportunity to be heard infringed principles of procedural fairness, s. 43(1) of the *Act,* and the Petitioner's s. 7 *Charter* rights.

147. By analogy, while the United States provides for the person extradited to have an opportunity to make representations by counsel related to proposed consent to waiver of specialty in cases where a foreign state seeks that the U.S. consent to waive specialty, no such procedural protections were provided by the Minister herein.

Bassiouni, p. 597

148. There were significant and material issues that the Petitioner could have addressed with the Minister had he been provided an opportunity to be heard. They are addressed below.

(1) Submissions regarding the failure to disclose the "Indian" issue at extradition

149. Noting in the materials before the Extradition Judge disclosed that the ethnicity of the accused was an essential element of the American murder charges he faced once extradited. This was a highly complex case. The Petitioner, and Canada, were entitled to know what he faced in the Requesting State on his extradition. There had not been transparency on the part of the Requesting State regarding the U.S. charges when

extradition was sought. Comity, and the Petitioner's *Charter* and Indigenous rights, required more.

United States of America v. Babuin, 2002 BCSC 1032 (CanLII)

150. That the trial to come would involve the Requesting State endeavouring to prove the Petitioner was an "Indian," should have been made clear in the materials filed by the Requesting State on extradition, so that the potential impact on committal could have been addressed by the Petitioner and assessed by the Extradition Judge. It could have been argued to the Minister at the consent to waiver stage, had the opportunity been provided, that the Requesting State's failure to disclose to the Minister in 2003 when extradition was requested as required by Article 9-1 of the *Treaty*, or in the Record of the Case disclosed to the Extradition Judge and the Petitioner, that it intended to prosecute the Petitioner on a federal charge that required proof that he was "Indian," should disentitle it to the requested consent to waiver of specialty.

151. Further, or in the alternative, non-disclosure by the Requesting State to Canada, the Extradition Judge, and the Applicant at the time of extradition that it was known to the Requesting State that there was it was jurisdictionally questionable whether the offence could be proven, given the legal definition of "Indian" in U.S. law, could have been argued to disentitle the Requesting State to the benefit of consent to waiver of specialty had the opportunity been provided.

(2) In the alternative, submissions regarding the failure of the Minister to disclose the "Indian" issue at extradition

152. Alternatively, if the Requesting State made disclosure to the Minister at the time that extradition was first sought that it intended to prosecute the Petitioner federally as an "Indian," as required by Article 9-1 of the *Treaty*, then given that this information was not communicated to the Petitioner by the Minister at the time of extradition, the Petitioner could have submitted to the Minister at the time waiver of specialty was sought that his initial decision to order Surrender had been made in circumstances that breached ss. 6, 7, 15 and 35 of the *Charter*. It could have been submitted that consent to waiver of specialty would serve to render those breaches more serious, as the Minister's failure to disclose to

the Petitioner at the time extradition was sought the "Indian" issue breached principles of procedural fairness and the Petitioner's *Charter* and Indigenous rights.

153. Further, if the Requesting State made the Minister aware at the time of extradition that it was known that it was questionable whether the Petitioner met the legal definition of "Indian," then the Minister's failure to communicate that information to the Petitioner and/or his having ordered Surrender arguably infringed the Petitioner's rights under ss. 6, 7, 15 and 35 of the *Charter.* It could have been submitted, had the opportunity been provided, that consent to waiver of specialty would serve to render those breaches more serious.

154. The honour of the Crown, the principle that the Crown must conduct itself with honour in its dealings with Aboriginal peoples, precludes sharp dealing and coercing or unilaterally imposing outcomes. In situations where the Crown is a decision-maker and where the decision may impact Aboriginal rights as protected by s. 35 of the *Charter*, it must act in good faith, provide meaningful consultation appropriate to the circumstances and in accordance with the procedural safeguards of natural justice demanded by administrative law. If the Minister was aware that Indian status was an element of the U.S. offence, and//or if he was aware that there was a serious jurisdictional question regarding the "Indian Issue" that he had failed to disclose at the time of extradition, then the Petitioner could have submitted that this failure to disclose breached these principles, thus tainting committal and Surrender, and an argument could have been advanced that this weighed against the Minister consenting to waiver of specialty.

Prov. Ontario v Canada and Prov. Quebec In re Indian Claims (1895),25 S.C.R. 434, 511-512

R. v. Sparrow [1990] 1 S.C.R. 1075, 1107
R. v. Badger [1996] 1 S.C.R. 771, para 41
Haida Nation v British Columbia (Minister of Forests), 2004 SCC 73, paras 16, 32, 41, 42, 62
Manitoba Métis Federation v Canada,2013 SCC 14, para 65
R v Marshall, [1999] 3 SCR 456, paras 49-51

(3) Submissions with respect to assurances regarding parole

155. The potential sentence for premeditated murder described in the documents before the Extradition Judge was life imprisonment. That sentence was not in issue on the

Extradition hearing or in Submissions made to the Minister on Surrender. The Petitioner's co-accused Arlo Looking Cloud was convicted on the same charge of premeditated murder. In submissions by the federal Prosecutor Mr. Mandel on his sentencing it was explained that because the homicide occurred in 1975, the sentencing regime that was applicable allowed for the possibility of parole. The Sentencing Judge's decision regarding Mr. Looking Cloud reflected that it was open to the U.S. Parole Commission to allow for parole. In other words, the sentence for the federal charge of premeditated murder that the Petitioner was originally extradited on was life imprisonment, with the possibility of parole.

156. Following consent to waiver, the Petitioner was sentenced in State Court on the less serious charge of felony murder to life imprisonment *without* the possibility of parole.

157. Had the Petitioner been provided with the opportunity to make submissions to the Minister regarding consent to waiver of specialty, then he could have argued that if the Minister did consent to waive specialty it should be on the condition that the Requesting State provided assurances that the sentence of imprisonment that could be imposed would provide for parole eligibility after a reasonable period.

Fowler v. Canada (Minister of Justice) 2011 QCCA 1076

158. Multiple factors would have supported such assurances being required. First, the Extradition Judge had ordered extradition, and the Minister had ordered Surrender, on the more serious charge of premeditated murder, on the basis that the sentence imposed on conviction would be life with the possibility of parole. That the extradition of the Petitioner should result in a more serious sentence than that which was in issue in the extradition, and that this more serious sentence should result from conviction on a *less* serious offence than that for Surrender had been ordered, one involving no proven culpability in the homicide, offends principles of fundamental justice.

159. Another factor supporting that such assurances would have been appropriate was that that offence of felony murder is unconstitutional in Canada by reason of a

constitutionally insufficient *mens rea* element, and a sentence of life without parole for such an unconstitutional offence would shock the conscience of Canadians.

160. The Petitioner could also have pointed to the conduct of the Requesting State associated with the extradition proceedings as a factor supporting that assurances were required. The Requesting State had sought extradition on an offence that its prosecutors knew it would have difficulty proving for jurisdictional reasons, and had failed to disclose that to the Petitioner or the Extradition Judge at the extradition phase. The Requesting State had persisted in that prosecution for two years, until the fortuitous appointment of the federal prosecutor as State Attorney General allowed for the State charge to be laid: the previous State Attorney General had never proceeded with criminal charges against the Petitioner. That this manipulation of the extradition system should advantage the Requesting State when it came to penalty would strongly support that assurances were necessary.

(4) Submissions regarding the taint of the "Indian" issue prosecution

161. A criminal charge that relies on the Indigenous ethnic status of the accused offends long-standing principles of Canadian jurisprudence and constitutional principles that promote equality and the rights of Indigenous persons and recognize the special constitutional relationship between Indigenous peoples and the Crown. This argument could have been advanced to the Minister, had the opportunity been permitted, as tainting the entire extradition process.

R. v. Drybones [1970] S.C.R. 282
R. v. Turpin, 1989 CanLII 98 (SCC)
Canadian Charter of Rights and Freedoms, ss. 15, 35

162. Further, the Petitioner could have submitted to the Minister at the waiver stage, had the opportunity been provided, that the preceding two years of a prosecution that was premised on a foreign state attempting to prove, unsuccessfully, that he met that foreign state's definition of "Indian" had been an affront to his Indigenous status and his rights under the *Charter,* and offensive to principles of international law that support that Indigenous persons have the right to determine their own identity and membership in

accordance with their customs and traditions. It could have been argued these principles should preclude Canada's assisting with further U.S. prosecution.

United Nations Declaration of the Rights of Indigenous Peoples, General Assembly res. 61/295 (September 13, 2007), Article 33 (Canadian objector status rescinded A/Res/61/295)
Charter s. 35

(5) Submissions related to Section 44(1)(b) of the Extradition Act

163. Had the Minister provided the opportunity, the Petitioner could have addressed in submissions s. 44 (1)(b) of the *Extradition Act*, which mandates that the Minister shall refuse to make a surrender order if satisfied that "the request for extradition is made for the purpose of prosecuting or punishing the person by reason of their race, religion, nationality, ethnic origin.... *or that the person's position may be prejudiced for any of those reasons.*"

164. The Petitioner's counsel Mr. La Liberte had addressed s. 44(1)(b) of the *Extradition Act* in his Submissions to the Minister in 2006 opposing Surrender. In his decision ordering Surrender Minister Toews had found "I am not satisfied that there is evidence to warrant a conclusion that [the Petitioner] will be prejudiced at his trial because of his Aboriginal status." (p. 13) At the time defence counsel made Submissions to the Minister regarding s. 44(1)(b), counsel was unaware that the U.S. prosecution would be on a charge that included as an element that the Petitioner was "Indian."

165. Had the Petitioner's right to make representations to the Minister regarding the proposed consent to waiver of specialty been respected, then the Petitioner could have urged upon the Minister refusal of the request for consent to waiver of specialty based on the record to that date of his position having been prejudiced by reason of his ethnic origin. Had he not been of Indigenous heritage then the federal U.S. authorities would not have any purported jurisdiction to prosecute him.

166. As it was, the Requesting State had to that point in the proceedings in the U.S. taken the position that the particulars of the Petitioner's Indigenous aboriginal heritage were irrelevant: in effect, that all North American Indigenous persons met the definition of

"Indian." This position would never have been advanced had the Petitioner's ethnicity been, for example, Caucasian.

167. Thus, the Petitioner's position on extradition had been throughout the seven-year history leading up to the Decision prejudiced by the fact of his Aboriginal heritage. Indeed, the charge he had been extradited to face was inapplicable to those who were non-aboriginal, a fact not before the Extradition Judge on the committal phase. At the waiver stage, he could have argued, this history should preclude the relief sought by the Requesting State.

(6) Submissions that felony murder is unconstitutional in Canada

168. Had the Minister provided the required opportunity, then the Petitioner could have made submissions that extradition should not be permitted for the purpose of trying him in the United States on a charge, felony murder, that has been held in Canada to be unconstitutional. It was not possible to argue this in the first instance at the time of his extradition, as this Court has held that the possibility that the prosecutor might seek to amend the charge after extradition has occurred to include an allegation of felony murder is so remote that it is not a basis for refusing surrender.

R. v. Vaillancourt 1987 CanLII 2 (SCC)
*R. v. Martineau*1990 CanLII 80 (SCC)
R. v. Sit 1991 CanLII 34 (SCC)
United States v. Lopez-Turatiz 2014 BCCA 39

(7) Submissions regarding delay

169. Had he been permitted to make submissions, the Petitioner could have raised before the Minister the factor of the wholly unnecessary two-year delay on the part of the Requesting State from the time of his extradition to the time of the request for consent to waiver of extradition, including the re-laying of charges identical to ones previously dismissed by the U.S. Courts. This weighed against consent being provided to waiver of specialty.

(8) Submissions seeking to impugn the Record of the Case

170. The Petitioner could have made submissions to the Minister impugning the Requesting State's certification in the Record of the Case, the basis of the Petitioner's committal hearing, by reason of non-disclosure of the jurisdictional issue related to the federal prosecution that was to follow extradition. The Petitioner could have argued that the certification by the Requesting State that the evidence was "sufficient under the laws of the United States to justify prosecution" was false given the known difficulty in proving federal jurisdiction to prosecute, and that this should disentitle the Requesting State from consent to waiver of specialty.

(9) Submissions regarding the post-Surrender applicability of the Charter

171. The Minister's explanation through a spokesperson to the press concerning the Decision, that "the extradition was complete," demonstrates that the Minister had lost sight of the constitutional requirements that permeate the extradition process, and the need to weigh the Petitioner's *Charter* rights when considering whether to consent to waive specialty. This is evidenced as well by the Minister's entire approach to the Decision, including his failure to provide notice. Had the Minister provided the Petitioner with an opportunity to be heard, he would have had the benefit of the Petitioner's legal analysis of how constitutional considerations apply to the rarely-utilized decision-making power to consent to waiver of specialty .

(10) Submissions regarding political motivations of the prosecution

172. The Petitioner could have made submissions to the Minister concerning the political aspects of the prosecution, as evidenced by the federal authorities' vehemence in asserting jurisdiction notwithstanding a jurisdictional impediment, and the disinclination of the State to charge the Petitioner with any offence until the timely appointment of the federal prosecutor to the position of State Attorney General.

(11) Submissions regarding delayed U.S. disclosure

173. Had he been provided the opportunity, the Petitioner could have advised the Minister of the struggles he had faced in the U.S. to obtain disclosure, including the very

late disclosure of voluminous materials contained in the "Aquash box," which the Requesting State's prosecutors had resisted disclosing. It was only more than two years into the prosecution, when these materials were disclosed as ordered by the trial judge, that the Petitioner learned the extent to which the prosecution had been aware for years of the known jurisdictional issue associated with federal prosecution.

(12) Submissions that felony murder charges were laid without Canadian consent; that the Petitioner faced murder charges for months in two different courts at the same time; and, regarding his not having been discharged from custody when the initial Indictment was dismissed

174. The Petitioner could have made submissions to the Minister, had he been provided the opportunity, regarding the impropriety of his being charged in State Court in September 2009 with charges that included felony murder, a charge on which he had not be extradited, and one which Canada had not then consented to him being prosecuted for. Following that, the Application could have pointed out, he faced for five months the scenario of upcoming trials in two different jurisdictions related to the same murder. He could have submitted that the conduct of the Responding State in initiating the laying of felony murder charges without having obtained Canadian consent as a precondition should disentitle it to the consent to waiver.

175. Further, the dismissal of the first Indictment in the U.S. on October 3, 2008 ought to have led to the immediate discharge of the Petitioner from custody as there were no charges outstanding. Instead, he was detained until a new process issued some hours later. The Petitioner could have made submissions to the Minister that this detention was unlawful and/or breached the terms of the *Treaty* and ought to disentitle the Requesting State from the requested waiver of specialty.

(13) Submissions concerning the impact on the Petitioner of the actions of the Requesting State

176. The Petitioner could have made submissions in which he outlined for the Minister the impact on him of his time in custody time in the U.S., including the stresses placed on him by the U.S. authorities' re-laying of the charges after dismissal, and multiple resulting

trial adjournments, and the affront to his Indigenous status of the insistence for two years that he was an "Indian."

(14) Conclusion – matters that could have been raised

177. There were thus many significant matters that the Petitioner could have put before the Minister for his consideration on the question of consent to waiver had the opportunity been provided. The denial of procedural fairness resulted in an enormously consequential decision being made by the Minister without any input from the person affected, in circumstances where there was much to be said, and where the Minister was constitutionally mandated to carefully weigh such submissions.

b. The Minister failed to provide notice of his intended decision-making

178. It was necessary for the Minister to advise the Petitioner that the consent to waiver had been requested. Had the Minister done so, then the Petitioner could have made submissions to the Minister regarding appropriate process, including the right to be heard. Had the Minister declined to provide an opportunity to be heard then the Petitioner could have sought to compel him to do so through application to the Canadian Courts. The conducting of the entire process in secrecy and without notice breached requirements of procedural fairness.

c. The Minister failed to provide for a judicial assessment of matters relevant to committal

179. A person is not to be extradited without a fair process, having regard to the history, purposes and policies that underlie extradition. A *prima facie* case for conviction must be established through a meaningful judicial process, which involves three related requirements: a separate and independent judicial phase; an impartial judge or magistrate; and, a fair and meaningful hearing.

United States v. Ferras, 2006 SCC 33, paras. 19-22

180. The judicial aspect of the process provides a check against state excess by protecting the integrity of the proceedings and the interests of the person sought to be extradited. It is essential that the judicial phase be independent in appearance and

substance. The principles of fundamental justice require that the person sought for extradition must receive a meaningful judicial determination of whether the case for extradition has been established. This requires: an independent judicial phase; that the decision be made by an independent and impartial judge; and, that a judicial decision be made based on an assessment of the evidence and the law.

Ferras, para. 23-26

181. It would defeat the purpose of the committal hearing if the Minister's discretion extended to surrender for offences substantively beyond those supported by evidence at the committal hearing.

United States of America v. Reumayr, 2003 BCCA 375 (CanLII), para. 42

182. The consent to waiver of specialty herein was not accompanied by a judicial assessment of those matters relevant to committal for extradition on the new charge of felony murder. The Petitioner says that procedural fairness included the right to a judicial determination of whether the new offence that the U.S. sought to prosecute met the legal test for committal for extradition. The Petitioner should have been provided the procedural protections of a judicial hearing before the extradition judge, with the right to be heard, at which it could be determined whether the proposed new charge met the appropriate legal test, and whether any of the bars to prosecution in the U.S. that it is within the powers of a judge on committal to assess precluded prosecution on the new charge.

183. If the Extradition Judge had determined that the order of committal could properly be amended to reflect the new charge, then the Petitioner should have had the opportunity to make submissions to the Minister regarding whether the executive should nonetheless approve such a prosecution. If the Extradition Judge failed to order amendment of the committal order to reflect the new charge, or the Minister failed to approve amendment of his Surrender order, the Requesting State should have been required to return the Petitioner to Canada and, if approved by Canada, initiate a new extradition process with respect to the new charges.

184. Similar procedures are employed in the United States when a foreign state seeks that a person extradited to the foreign state be tried on charges that are not among those for which he was extradited. The Secretary of State cannot make a unilateral executive decision consenting to waiver of specialty. As a first step, the Extradition Judge must determine whether the new charge is captured by the Court's earlier findings of facts establishing a *prima facie* case for extradition. The person extradited has notice of that hearing and the opportunity to be represented by counsel, though they are not returned to the United States for the purpose of attendance at the hearing. If the new charge does not meet the requirements of this judicial analysis, then the person surrendered must be returned to the U.S. to face a new extradition hearing on the new charge.

International Extradition, United States Law and Practice,
Oxford University Press, 6th edition, 2014, M. Cherif Bassiouni, p. 597

185. The Minister could have required that the Extradition Judge assess whether the Committal Order should be amended to reflect the proposed new charge, at a hearing at which the same evidence that was considered at the initial committal was placed before the Court. At such a hearing the Extradition Judge could have provided *Charter* remedies with respect to those matters within her jurisdiction. That hearing, at which the Petitioner would have been represented, could have addressed the test for committal as well as whether the conduct of the Requesting State to that point should impact committal. This was especially important given the cause of the failure of the prosecution in 2010 had been known to the Requesting State to be a likelihood when the extradition process was initiated in 2003. The other matters outlined above could also have been raised to the extent they were issues relevant to committal.

186. If the Extradition Judge did not authorize extradition on the new charge, but if Canada later approved the initiation of a new extradition process, the Petitioner could have been returned to Canada for that purpose.

187. In the absence of a new committal hearing, the decision to waive specialty offended against the principle that there cannot be a difference of substance between the offence

on which there is committal for extradition and the offence on which there is surrender.

U.S.A. v. Hislop, 2009 BCCA 94, paras. 60,61

188. The failure to provide for a judicial phase in the process of determination of the consent to waiver issue infringed procedural fairness and the Petitioner's s.7 *Charter* rights.

189. The initiation of a new extradition process would also have allowed for those issues set out above that fall within the sphere of matters relevant to surrender to be addressed to the Minister post-committal at a new Surrender phase, with the usual procedural protections and the right of judicial review.

d. The Minister failed to provide Reasons for the decision to consent to waive specialty

190. The Minister's Consent to Waiver of Specialty contains no analysis. The Minister did not provide in that document, or separately, any Reasons related to the decision. There is thus no evidence that the Minister weighed appropriate considerations, including the impact of the consent to waiver of specialty on the Petitioner's *Charter* and Aboriginal rights.

191. The Minister provided a small Yukon newspaper with more information than he did the Petitioner concerning the rationale for his decision. A decision of vital significance to the Petitioner's liberty interests required more.

192. The absence of a considered written decision on the merits of the request to consent to waive specialty breached principles of procedural fairness and the Petitioner's *Charter* rights under s. 7.

e. The Minister failed to communicate the Decision to the Petitioner

193. The Minister failed to provide the Petitioner with the most basic level of procedural fairness, as the Decision was not served upon him or his counsel. When the Petitioner sought its disclosure through the U.S. Court, it was produced in an *in camera* session and

was sealed in the file of the U.S. Court that later tried him for felony murder as a secret document that he and his counsel were not permitted to see. The Petitioner was also denied access to the document that indicated Canada opposed the disclosure. It was only at the appellate state that his counsel managed to obtain access to the document. The Minister has never communicated the Decision to the Petitioner, as is contemplated by the *Extradition Act* and required by principles of procedural fairness

Extradition Act, s. 57(3)

194. Service was readily within the Minister's control and ought to have been required by him as a prerequisite for the initiating of new U.S. process. The Petitioner, in custody in a foreign jurisdiction and facing the most serious of charges, was left in the dark concerning the Decision. Procedural fairness and the Petitioner's s. 7 *Charter* rights were grossly violated.

f. Conclusion – Procedural fairness

195. The Petitioner claims that what occurred herein breached essential all of the bedrock principles that underly procedural fairness. The failure to provide for basic procedural protections furthermore breached the Petitioner's rights under s. 7 of the *Charter*. In the circumstances the Decision failed to meet legal or constitutional standards.

M.M. v. USA, 2015 SCC 62

C. The Requesting State abused the extradition process

196. The Minister is required to refuse to order surrender if satisfied that the prosecution is "barred by prescription or limitation under the law that applies to the extradition partner." The federal charges under which extradition had initially been ordered ought never to have formed the basis for an extradition request as the Requesting State was aware of a serious jurisdictional issue with respect to U.S. federal prosecution, and failed to disclose that to the Minister.

Extradition Act s. 46(1)(a)

197. The conduct of the Requesting State in failing to advise the Minister in 2003 when extradition was sought that the prosecution was jurisdictionally problematic was an abuse of the extradition process. Principles of comity require that the state actors not act in a

manner that demeans the jurisdiction, laws, or courts of another state. Seeking to invoke the Canadian extradition process but failing to disclose to Canada that a federal prosecution was intended to be advanced notwithstanding the serious jurisdictional issue associated with such a prosecution infringes principles of comity and is an abuse of process.

Alfred-Adekeye v. A.G. Canada, B.C.S.C. No. 25413, May 17, 2011
U.K. v. Tarantino, 2003 BCSC 1134
United States of America v. Tollman, 2006 CanLII 31732
United States of America v. Licht, 2002 BCSC 1151 (CanLII)
United States of America v. Babuin, 2002 BCSC 1032 (CanLII)
United States of America v. Abdullah Khadr, 2011 ONCA 358 (CanLII)

198. Further, or in the alternative, if the Requesting State failed to fully and fairly set out the relevant details of the jurisdictional history from 2007-2010 when it sought the Minister's consent to waiver of specialty, then that non-disclosure abused the extradition process and violated the Petitioner's s. 7 rights.

199. Further, or in the alternative, if the Requesting State failed to advise Canada at the time of extradition that it intended to prosecute the Petitioner for an offence that included ethnicity as an element, then that non-disclosure was an abuse of the extradition process.

D. Further, or in the alternative, the Minister abused the extradition process

200. If the fact that "Indian" status was an element of the offence was known to the Minister at the time of extradition, and/or if the jurisdictional impediment regarding the proposed federal prosecution were made known to the Minister by the Requesting State when extradition was initially sought and/or when consent to waiver of specialty was requested, then in approving the extradition request, in failing to disclose the "Indian issue" so that he could raise it before the Extradition Judge on Committal and before the Minister on Surrender, in failing to provide the Petitioner with disclosure at the consent to waiver stage and with full procedural safeguards, and/or in providing his consent to waiver of specialty, the Minister violated the Petitioner's s. 7 *Charter* rights and abused the extradition process.

(VI) Remedy

i. Powers of Review, Standard of Review, and Remedial powers

201. Those grounds for judicial review referred to in s. 18.1(4) of the *Federal Courts Act* are stipulated in s. 57(10) of the *Extradition Act* to be applicable to judicial review in respect of a decision to Surrender. The Petitioner says those same powers apply to review of the Decision herein.

202. The standard of review for questions of procedural fairness has been held to be correctness.

Mission Institution v Khela, 2014 SCC 24 (CanLII), para. 79
Canada (Citizenship and Immigration) v Khosa, 2009 SCC 12 (CanLII), para 43
Dunsmuir v. New Brunswick, 2008 SCC 9

203. Alternatively, the issue of procedural fairness is distinct from that of standard of review, and the reviewing Court must determine whether the decision was made in circumstances of procedural fairness, considering the factors in *Baker.*

Canadian Pacific Railway Company v. Canada (Attorney General), 2018 FCA 69 (CanLII)

204. The test for availability of relief under s. 18.1(4) of the *Federal Courts Act* and s. 57(10) of the *Extradition Act* is met herein.

205. The remedial powers of this Court on judicial review are described in paragraph 18.1(3) of the *Federal Courts Act*, which the *Extradition Act* incorporates as the grounds for review of a decision to Surrender. The Court may: (a) order the Minister to do any act or thing he has unlawfully failed or refused to do; or (b) declare invalid or unlawful, or quash, set aside or set aside and refer back for determination in accordance with such directions as it considers to be appropriate, prohibit or restrain, the Minister's decision, order, or act. The Petitioner says these powers are applicable to review of the Decision.

206. To the extent that the statutory remedial powers may not fully address the harms herein, then s. 24(1) of the *Charter* provides for constitutional remedial powers.

Canada (Prime Minister) v. Khadr 1 FC 7; 2009 FCA 246; 2010 SCC 3

Manitoba Metis Federation Inc. v. Canada (A.G.), 2013 SCC 14, paras. 134, 135, 140, 143

ii. Relief Sought

207. As remedy for the breaches of procedural fairness, the *Charter*, and/or for abuse of process, the Petitioner seeks, first, that the Decision be quashed or set aside.

208. Secondly, the remedy of referral back to the Minister for re-determination, with directions as appropriate, is available to this Court. In the event that this court orders re-determination of the issue of consent to waiver, then the Petitioner seeks that appropriate procedural safeguards to guide the reconsideration form part of the Order, including that a judicial process be directed to occur before the Extradition Judge related to the amendment of the committal order that is the *de facto* consequence of a decision to consent to waive specialty.

209. Further, or in the alternative, the Petitioner seeks declaratory relief.

210. The fact that the Petitioner is within the jurisdiction of the Requesting State and his prosecution has concluded support declaratory relief.

211. Section 57(6) of the *Extradition Act* specifies that the Court, on judicial review in respect of the Minister's decision, may, *inter alia*, "declare it invalid or unlawful." The Petitioner seeks that an order to this effect be made.

212. This Court's ability to craft appropriate declaratory relief is broader than that described in the statutory provision. The discretionary remedy of a declaration is remedy that is available without a cause of action and whether or not any consequential relief is available. The test for declaratory relief requires that it be established: that the Court has jurisdiction to hear the issue: the issue before the court is real and not theoretical; the party raising the issue has a genuine interest in its resolution; the respondent has an interest in opposing the declaration sought.

Ewert v. Canada, [2018] 2 SCR 165, 2018 SCC 30 (CanLII) para. 81

213. Declaratory relief should normally be declined, however, where there exists an adequate alternative statutory mechanism to resolve the dispute or to protect the rights in question.

Ewert v. Canada, para. 83

214. In the 2010 decision of the Supreme Court of Canada in *Khadr*, the Court overturned the remedy ordered below as a *Charter* remedy arising from breach of Khadr's rights, which was that Canada request Khadr's repatriation. The Court substituted for that remedy under s. 24(1) a declaration that Khadr's *Charter* rights had been infringed. The Court held at para. 37 that "courts are empowered to make orders ensuring that the government's foreign affairs prerogative is exercised in accordance with the constitution."

Khadr II

(VII) Extension of Time

215. Unusually, the statutory provision stipulates that time commences to run not on the date of the decision "in respect of Surrender" or the date the decision becomes known to the person affected, but rather on the date *the Minister communicates* the decision to the person affected. The Petitioner says that the Decision was never communicated to him by the Minister, and hence time never began to run with respect to applying for judicial review of the Decision.

Extradition Act, s. 57(3)

216. Service of the Decision could readily have been effected by the Minister by imposition of that requirement on the Requesting State as a matter of comity or a condition of the consent to waiver of specialty. Furthermore, the Petitioner's counsel could have been asked whether they would accept service on his behalf. No such measures were taken, and the intention of the Minister can be concluded to have been secrecy surrounding the Decision. Thus, time has never commenced to run.

217. In the alternative, of this Court finds that the Decision was communicated to the Petitioner by the Minister, then s. 57 of the *Extradition Act* allows for the appellate Court to extend the time for filing an application for judicial review.

218. The test to be applied on applications for extension of time to judicially review the decisions in respect of Surrender is not addressed in the case authorities. Principles can be discerned from tests associated with other reviews and appeals. The test to be applied in assessing whether a Court should exercise its discretion to grant an extension of time to file an application for judicial review under the *Federal Courts Act* requires that the Petitioner establish: a continuing intention to pursue the application; some merit to the application; no prejudice to the Respondent; a reasonable explanation for the delay; the interests of justice can override an Petitioner's failure to meet the test.

219. Similarly, the test for extension of time to appeal in this court requires that the appellant establish special circumstances, taking into account factors such as: whether the Petitioner had a *bona fide* intention to appeal before the expiration date of the appeal date; whether the Petitioner informed the respondent either expressly or impliedly of his intention; whether the extension will cause undue prejudice to the respondent; that the appeal involves merit in the sense of reasonably arguable grounds; it is in the interest of justice that an extension be granted. The weight to be given to any of these factors will depend on the circumstances of each case.

R. v. Smith, [1990] B.C.J. No. 2933 (B.C.C.A.) paras. 4-5

220. It has been the Petitioner's intention since he became aware of the Minister's decision to see to challenge it. The judicial record demonstrates that the issue was actively litigated by his U.S. counsel, and in more recent years by the Petitioner as an unrepresented litigant, but in U.S. forums in which it was ultimately determined there was no jurisdiction to grant a remedy.

221. In the time period since the decision of the Eighth District Court of Appeals' decision in March 2018, the Petitioner diligently sought to obtain Canadian counsel to pursue the matter in this jurisdiction. Once counsel commenced to act, then some additional delay was inevitable as the large file needed to be reassembled.

222. There can be no suggestion here of prejudice to the Minister. The application has merit. There has been an intention throughout to pursue remedy arising from the decision

in issue, and the explanation for the delay is reasonable. Thus, the test for relief is met.

223. In any event, the interests of justice support the extension of time being granted.

(VIII) Disclosure

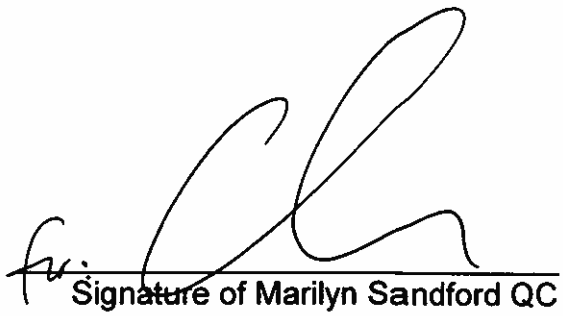
224. The Petitioner seeks disclosure, including of the Record before the Minister. Details will be elaborated upon through applications to this Court.

Part 4: MATERIAL TO BE RELIED ON:

1. Record of the Case, Authority to Proceed, and other Exhibits filed in *A.G. Canada on behalf of U.S.A. v. Graham*, BCSC File No. 22296, as contained in the appeal books filed in *Graham v. U.S.A.*, CA032715
2. The record before the Minister of Justice on Surrender;
3. Consent to Waiver of Specialty, Minister of Justice Rob Nicholson, February 2, 2010
4. Documents filed in the U.S. District Court for the District of South Dakota, CRIM. NO. 08-50079-01, *U.S. v. Graham*
5. Transcripts of proceedings in the U.S. District Court for the District of South Dakota, CRIM. NO. 08-50079-01, *U.S. v. Graham*
6. Documents filed in the State of South Dakota, Circuit Court, Seventh Judicial District, CRIM. NO. 09-3953, *South Dakota v. Graham*
7. Transcripts of Proceedings in the State of South Dakota, Circuit Court, Seventh Judicial District, CRIM. NO. 09-3953, *South Dakota v. Graham*
8. Documents filed in *habeas corpus* application by John Graham in U.S. District Court for the District of South Dakota, case # 4:13-cv-04100
9. Documents filed in *habeas corpus* application by John Graham in State of South Dakota, Circuit Court, Seventh Judicial District
10. Documents and submissions filed in appeals arising from the State and federal proceedings listed above;
11. Communications with the Press re: John Graham: Carole Saindon, spokesperson for Minister of Justice Rob Nicholson
12. Affidavit of John Graham, sworn September 13, 2019;
13. Affidavit of Alix Tolliday, sworn September 30, 2019;
14. Affidavit of Howard Rubin QC, sworn September 27, 2019;
15. Affidavit of Terrence La Liberte QC, sworn September 21, 2019;

16. Affidavit of Rod Holloway, sworn September 19, 2019;
17. Affidavit of Larry Wartels, sworn September 16, 2019;
18. Affidavit of Terry Gilbert, sworn September 23, 2019;
19. Affidavit of Mark Kadi, sworn September 23, 2019;
20. Such other affidavits as counsel may advise;
21. Hearing before the Committee of Foreign Relations, United States Senate, One Hundred Ninth Congress, First Session, November 15, 2005, p. 88 (Written responses to questions by Senator Biden, witnesses Mary Ellen Warlow, Director, Office of International Affairs, Criminal Division, Department of Justice, and Samuel M. Witten, Deputy Legal Advisor, Department of State)
22. Such further and other material and evidence as counsel may advise and this Honourable Court may permit.

Dated: September 30, 2019



Signature of Marilyn Sandford QC
Counsel for the Petitioner