

## Ian Mulgrew: Wounded Knee extradition was wrong, B.C. high court finds

*Complicated ruling drops case into the hands of federal Justice Minister David Lametti*

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Naneek Graham with photo of her father John, who says, "I wasn't even in South Dakota when this crime happened. I keep telling them over and over. It's a manufactured case. It's a fraudulent case." Photo by Arlen Redekop /PNG

Canada should reconsider the 2007 extradition of an Indigenous man on U.S. murder charges connected to the violent 1973 Wounded Knee standoff between the FBI and Red Power supporters, says B.C.'s top court.

In a ruling Tuesday, a three-justice division of the Court of Appeal told federal Justice Minister David Lametti that the amended 2010 order that sent John Graham south to face trial was tainted because he was never told about nor given a chance to oppose new state charges.

"That is a matter for the U.S. and possibly its courts," Justice David Frankel said.

Graham was convicted in the murder of Anna Mae Pictou Aquash, a 30-year-old Mi'kmaq and mother of two from Nova Scotia, who was suspected of being an informant against the American Indian Movement.

The complicated decision involves the “waiver of specialty” rule and a decade-old Conservative justice minister’s green light to allow U.S. authorities to prosecute Graham on a different charge than cited in the original extradition order.

“That rule, which is a principle of international extradition law, provides that without the consent of the surrendering jurisdiction, the requesting jurisdiction will not try a person surrendered for any previously committed offence other than the offence for which that person was surrendered,” Frankel explained for the unanimous panel.

“Nothing in (the) record supports an inference that the request to extradite (Graham) was made in bad faith or for an ulterior purpose.”

The court concluded the now 67-year-old was robbed of procedural fairness because he wasn’t given a chance to oppose the 2010 amendment to the extradition order made by the Conservative justice minister at the time, Rob Nicholson.

“It means John now will have an opportunity to present to the minister the various rationales that we argued should have been barriers to this prosecution in the first place,” his Vancouver lawyer, Marilyn Sandford, said.

The minister conceded the waiver should be set aside and that “procedural fairness” entitled every person to receive notice, an opportunity to make submissions, disclosure of the material provided except those portions protected by solicitor-client privilege, reasons for any decision, and a copy of those reasons.

Born in Whitehorse, Graham is a member of the Champagne and Aishihik First Nations.

He was originally extradited to face a U.S. federal first-degree murder charge but, when that prosecution collapsed, the U.S. sought permission to proceed with state charges of felony murder (a charge no longer allowed in Canada) and premeditated murder.

Nicholson did not provide reasons for agreeing in 2010 to the U.S. request.

Although federal lawyers initially insisted none of Graham’s arguments against extradition were persuasive, later assurances by Lametti that he did not have a closed mind persuaded Sandford that Graham would receive a fair hearing.

“What the minister can do at this stage is interesting because obviously (Graham) has been sent back and already been tried and convicted of the murder. It puts the mess back in front of the minister and gives us a chance to show him how much of a mess it is and how awful it was, so the minister can decide whether he agrees and if so, what should flow from that.”

She did not know how long that would take — some ministers have taken years — but she said that Lametti has usually dealt with such issues expeditiously.

A U.S. court may be willing to hear an appeal from Graham based on the B.C. decision, Sandford added.

The case revolves around American Indian Movement leader Leonard Peltier, convicted in 1977 of the first-degree murder of two FBI agents during a 1975 shootout following the notorious occupation at the site of the 1890 massacre of Oglala Lakota Sioux on the Pine Ridge Reservation.

Aquash was shot in the back of the head in Dec. 12, 1975, supposedly because she heard Peltier confess to the double murder, but her body was not discovered until Feb. 24, 1976.

At the turn of the century, new information surfaced about her slaying and indictments were issued against Graham and Arlo Looking Cloud, an American Indian Movement comrade.

Looking Cloud was convicted in 2004 and sentenced to life behind bars.

Graham was arrested in Vancouver on Dec. 1, 2003, but released on conditions while he waged a high-profile battle against extradition. He was returned to the U.S. on Dec. 6, 2007.

After two years of trying to proceed in Federal Court, however, American prosecutors asked Ottawa to agree to allow Graham to be tried in state court because the Justice Department lacked jurisdiction.

On Dec. 10, 2010, a jury convicted Graham of felony murder and acquitted him of premeditated murder.

His conviction was confirmed on appeal and he now is serving life without the possibility of parole in the South Dakota State Penitentiary in Sioux Falls.

Incarcerated since 2007, Graham didn't see the amended order until 2011.

The U.S. Eighth Circuit Appeal Court said in 2018 it didn't have jurisdiction to review the Canadian minister's decision and Graham must first deal with that before an American court could act.

He remained skeptical he'll ever see freedom in a recent interview.

"I've never had a voice, I've never been heard," he maintained. "They're trying to make me die in prison. ... I wasn't even in South Dakota when this crime happened. I keep telling them over and over. It's a manufactured case. It's a fraudulent case."

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