COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: ***Karas v. Canada (Minister of Justice and Attorney General),***
2009 BCCA 1

Date: 20090107
Docket: CA032316

2009 BCCA 1 (CanLII)

Between:

Michael Joseph Charles Karas

Applicant

And

The Minister of Justice and the Attorney General of Canada

Respondent

Before: The Honourable Mr. Justice Hall
The Honourable Mr. Justice Low
The Honourable Mr. Justice Bauman

G. Orris, Q.C.
C. Bauman — Counsel for the Applicant

T. Beveridge
M. Namazi — Counsel for the Respondent

Place and Date of Hearing: Vancouver, British Columbia
15 October 2008

Place and Date of Judgment: Vancouver, British Columbia
7 January 2009

Written Reasons by:
The Honourable Mr. Justice Hall

Concurred in by:
The Honourable Mr. Justice Low
The Honourable Mr. Justice Bauman

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Reasons for Judgment of the Honourable Mr. Justice Hall:

[1] The applicant Michael Karas seeks judicial review of the decision of the Minister of Justice that he be surrendered to Thailand to be tried for the killing Ms. Suwannee Ratanaprakorn in Thailand on 23 or 24 September 1996. Mr. Karas and Ms. Ratanaprakorn were married or in a marriage-like relationship. There is evidence that the applicant caused the death of the victim at a hotel in Pattaya, Thailand, where they were residing together at that time. There also exists evidence that he cut up her body and disposed of her body parts in a swampy area located not far from the area of the hotel. The torso of the victim was never located but her head, arms and legs were recovered by police officers on 24 September 1996. The applicant flew to Canada from Thailand on 25 September 1996. On 27 September 1996, after the recovery of the body parts of the victim, Thai authorities issued an arrest warrant alleging that the applicant, then using the name of Morgan, had intentionally murdered Ms. Ratanaprakorn. Murder is an offence that can be punishable by death in Thailand. Of course the applicant could not be arrested on the warrant because he had fled to Canada. Only if he is extradited from Canada will he be prosecuted for the Thailand homicide.

[2] Canada and Thailand are extradition partners under the ***Extradition Act***, S.C. 1999, c. 18 (the "***Act***"), as a result of the ***Treaty between the United Kingdom and Siam Respecting the Extradition of Fugitive Criminals***, 4 March 1911, U.K.T.S. 1911 No. 23 (the "***Treaty***"). The ***Treaty*** was entered into force for Canada on 24 November 1911. The ***Treaty*** obliges the parties, pursuant to Art. 1, to deliver

up fugitive criminals for any of the offences listed in Art. 2. This list includes murder and manslaughter.

[3] On 3 October 1996, the applicant was arrested in Vancouver for a matter unrelated to the homicide. He was discovered at this time to be a parole violator and he was committed to prison to complete a custodial sentence. He has been in custody in Canada since that date, serving time originally for Canadian offences and, more recently, as a result of these extradition proceedings. The present proceedings originated in July 1997 when Thailand, by diplomatic note, requested the extradition of the applicant from Canada. In October 1999, a Canadian extradition arrest warrant was issued for the applicant. It was served on the applicant on 25 October 1999 while he was in custody in Canada, serving time for Canadian offences. Various packages of materials related to the requested extradition were forwarded to the Canadian authorities by Thai authorities between June 1997 and December 1999.

[4] An authority to proceed against the applicant was issued by the Minister on 9 August 1999, pursuant to s. 15 of the ***Act***. The original authority listed only the crime of murder, but this was amended during the proceedings before the extradition judge, Mr. Justice Lysyk, to include the crime of manslaughter. On 1 June 2001, in reasons for judgment indexed as 2001 BCSC 799, Lysyk J. committed the applicant for surrender on the charge of manslaughter, as set out in the amended authority to proceed. He said:

> [45] I conclude that a properly instructed jury, having regard to the evidence as a whole, could not reasonably draw an inference that the

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evidence establishes the requisite mental state for the offence of murder.

…

[46] The requirements of s. 29(1)(a) of the *Act* having been satisfied with respect to the offence of manslaughter, an order of committal to await surrender will issue.

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[5] Some background of how this matter came to this Court is set forth in the earlier reasons in ***Karas v. Canada (Minister of Justice and Attorney General***), 2007 BCCA 637, 233 C.C.C. (3d) 237:

[4] Mr. Karas has applied under s. 57 of the *Act* for judicial review of the surrender order of the Minister of Justice dated 2 September 2005, together with the Minister's subsequent letter dated 20 April 2007, which confirmed the Minister's order surrendering him to Thailand. The surrender order which is at issue on the review application permits Thailand to proceed with a charge of murder.

[5] The judicial review application is prompted by the fact that the Minister's order of surrender was without condition as to the charge or penalty when the committal order made by Mr. Justice Lysyk was for the non-capital offence of manslaughter, and the fact that the Minister issued the surrender order without a written assurance from Thailand that if Mr. Karas is prosecuted for the offence of murder, the death penalty will not be imposed if he is convicted.

[6] The points put forward by Mr. Karas on the judicial review application, in the order they were advanced in argument, are as follows:

Ground 1: That the Minister violated the Applicant's rights under s. 7 of the *Charter of Rights and Freedoms* by ordering the surrender of the Applicant for extradition on the alleged conduct of the Applicant pursuant to s. 58(b) of the *Extradition Act*, which form of order allows the requesting state to charge, try and convict the Applicant for murder when the requesting state could not satisfy the extradition hearing judge that there was evidence capable of supporting such a charge.

> Ground 2: That the Minister acted without jurisdiction in ordering the surrender of the Applicant for extradition on the alleged conduct of the Applicant pursuant to the *Extradition Act*, which form of order allows the requesting state to charge, try and convict the Applicant with murder when the requesting state could not satisfy the committal hearing Judge that there was evidence capable of supporting such a charge.
>
> Ground 3: That the Minister violated the Applicant's rights under s. 7 of the *Charter of Rights and Freedoms* by ordering him to be surrendered to face a charge of murder in Thailand without first obtaining assurances from the requesting state that the death penalty will not be imposed or, if imposed will not be carried out.

> [7] It is the respondent's position that the three grounds of review put forward by Mr. Karas should be restated as follows:
>
> > Issues 1 and 2: Dual criminality: Is the surrender order of the Minister supported by the committal order of the extradition judge or does surrender with reference to the conduct found to be criminal by the extradition judge deprive the applicant of the protection of specialty?
> >
> > Issue 3: Is the applicant's case a death penalty case, and if it is, does it fall within the exception set out by the Supreme Court of Canada in *United States of America v. Burns*, [2001] 1 S.C.R. 283, such that surrender of the applicant without assurances is constitutionally compliant?

[6] This Court allowed the application for judicial review on 24 December 2007, and the matter of the surrender of the applicant was returned for reconsideration to the Minister. The case was thereafter sought to be appealed to the Supreme Court of Canada. On 12 June 2008, the Supreme Court of Canada gave the following direction:

> The application for leave to appeal from the judgment of the Court of Appeal for British Columbia (Vancouver), Number CA032316, 2007

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> BCCA 637, dated December 24, 2007, is remitted to the Court of Appeal of British Columbia for reconsideration in accordance with the standard of judicial review articulated in *Talib Steven Lake v. Canada (Minister of Justice)* (31631)….

[7] It therefore now falls to this Court to act on the direction from the Supreme Court of Canada.

[8] In ***Lake v. Canada (Minister of Justice)***, 2008 SCC 23, [2008] 1 S.C.R. 761, 292 D.L.R. (4th) 193, the Supreme Court held that the applicable standard for a court reviewing a ministerial decision concerning extradition ought to be reasonableness. Formerly, a number of decisions in this Court, including the earlier decision of this Court in ***Karas***, had posited a correctness standard for the review of a ministerial decision on extradition, including alleged ***Charter*** violations. Mr. Justice LeBel found this to not be the appropriate standard. He said this:

> [40] The appellant also pointed to several decisions of the British Columbia Court of Appeal in which the Minister's assessment of a fugitive's *Charter* rights and of whether extradition would be unjust or oppressive within the meaning of s. 44(1)(*a*) of the *Extradition Act* was reviewed on a correctness standard: *Stewart v. Canada (Minister of Justice)* (1998), 131 C.C.C. (3d) 423; *United States of America v. Gillingham* (2004), 184 C.C.C. (3d) 97; *United States of America v. Maydak* (2004), 190 C.C.C. (3d) 71; *United States of America v. Kunze* (2005), 194 C.C.C. (3d) 422; *Hanson v. Canada (Minister of Justice)* (2005), 195 C.C.C. (3d) 46; *United States of America v. Fordham* (2005), 196 C.C.C. (3d) 39; *Ganis v. Canada (Minister of Justice)* (2006), 216 C.C.C. (3d) 337. In *Stewart*, the first case in which a court held that the appropriate standard was correctness, Donald J.A. expressed the concern that "[i]f deference were accorded [the Minister's] assessment of the constitutional validity of [his] own act then I believe that judicial review would be unacceptably attenuated" (para. 18). With respect, this concern is misplaced. It rests on an incorrect understanding of the Minister's role in assessing the interests at stake in the extradition context. It is also inconsistent with this Court's jurisprudence on the judicial review of extradition decisions.

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[9] He also observed at para. 34 that "[r]easonableness is the appropriate standard of review for the Minister's decision, regardless of whether the fugitive argues that extradition would infringe his or her rights under the *Charter*." He made reference to the case of ***Dunsmuir v. New Brunswick***, 2008 SCC 9, [2008] 1 S.C.R. 190, 291 D.L.R. (4th) 577, as explanatory of the reasonableness standard.

[10] A recent judgment of this Court, ***Investment Dealers Association of Canada v. Dass***, 2008 BCCA 413, made reference to the principles set out in ***Dunsmuir***. Smith J.A. said:

> [19] Reasonableness is a deferential standard reflecting respect for legislative choices to leave some matters for the decision of administrative tribunals using their processes, and drawing on their particular expertise and experiences (para. 49). Thus, *Dunsmuir* explained at para. 47,
>
> > . . . certain questions that come before administrative tribunals do not lend themselves to one specific, particular result. Instead, they may give rise to a number of possible, reasonable conclusions. Tribunals have a margin of appreciation within the range of acceptable and rational solutions. A court conducting a review for reasonableness inquires into the qualities that make a decision reasonable, referring both to the process of articulating the reasons and to outcomes. In judicial review, reasonableness is concerned mostly with the existence of justification, transparency and intelligibility within the decision-making process. But it is also concerned with whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law.
>
> [20] On the other hand, correctness is a more exacting standard of review. Of this standard, the majority in *Dunsmuir* stated at para. 50,
>
> > . . . it is . . . without question that the standard of correctness must be maintained in respect of jurisdictional and some other questions of law. This promotes just decisions and avoids inconsistent and

> unauthorized application of law. When applying the correctness standard, a reviewing court will not show deference to the decision maker's reasoning process; it will rather undertake its own analysis of the question. The analysis will bring the court to decide whether it agrees with the determination of the decision maker; if not, the court will substitute its own view and provide the correct answer. From the outset, the court must ask whether the tribunal's decision was correct.
>
> [21] *Dunsmuir* also provides guidance for the identification of jurisdictional questions. "Jurisdiction" is now to be given a narrow interpretation for purposes of determining whether a question under review is jurisdictional. As explained at para. 59,
>
>> "Jurisdiction" is intended in the narrow sense of whether or not the tribunal had the authority to make the inquiry. In other words, true jurisdiction questions arise where the tribunal must explicitly determine whether its statutory grant of power gives it the authority to decide a particular matter. The tribunal must interpret the grant of authority correctly or its action will be found to be *ultra vires* or to constitute a wrongful decline of jurisdiction . . .

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[11] It is first necessary, as observed in para. 62 of ***Dunsmuir***, for a reviewing court to determine "whether the jurisprudence has already determined in a satisfactory manner the degree of deference to be accorded with regard to a particular category of question." As noted previously, the standard of review of a ministerial decision concerning the surrender of a fugitive to an extradition partner is now generally to be a standard of reasonableness as was determined by the Supreme Court in ***Lake***. There is no need to consider the second step in para. 62 of ***Dunsmuir*** as the jurisprudence has already defined the degree of deference for this category of question.

[12] In its earlier decision concerning this applicant, this Court found, at para. 73, that ministerial decisions on issues of law, including alleged violations of the

Charter, should be reviewed on the standard of correctness. The Court observed, at para. 85, that the "real issue" was "the Minister's jurisdiction under the *Act* to permit surrender on different terms than those supported by the committal order." As noted previously, the order made by Lysyk J., after the committal hearing, was that the applicant Karas should to be committed for surrender on the offence of manslaughter as set out in the amended authority to proceed. The Minister, after receiving submissions on behalf of the applicant, determined that the applicant should be surrendered "on the conduct described by Judge Lysyk in his reasons in support of committal, dated June 1, 2001." In the result, he was ordered surrendered to face prosecution on the murder charge extant in Thailand, where he would be liable to conviction on that offence or some lesser offence. The prosecution would be on the facts related to the killing of Ms. Ratanaprakorn.

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[13] The ***Act*** provides as follows in s. 3(1)(b) and s. 3(2):

> 3 (1) A person may be extradited from Canada in accordance with this Act and a relevant extradition agreement on the request of an extradition partner for the purpose of prosecuting the person or imposing a sentence on — or enforcing a sentence imposed on — the person if
>
> > …
> >
> > (*b*) the conduct of the person, had it occurred in Canada, would have constituted an offence that is punishable in Canada,
> >
> > > (i) in the case of a request based on a specific agreement, by imprisonment for a maximum term of five years or more, or by a more severe punishment, and

> > (ii) in any other case, by imprisonment for a maximum term of two years or more, or by a more severe punishment, subject to a relevant extradition agreement.
>
> (2) For greater certainty, it is not relevant whether the conduct referred to in subsection (1) is named, defined or characterized by the extradition partner in the same way as it is in Canada.

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[14] As may be observed from the earlier reasons of this Court (see paras. 36-57 of ***Karas***), there was a certain measure of confusion in the communications between Thai officials and Canadian officials as to what charge the applicant could face in Thailand for the alleged homicide. Ultimately, the Thai officials advised the Minister that they could not amend the charge in Thailand from murder to manslaughter once laid, in the absence of new evidence, nor could they fetter the discretion of the Thai court to impose the death penalty. The Court noted:

> [49] In a letter to counsel for Mr. Karas dated 2 September 2005, the Minister set out the additional information which he had obtained as a result of these meetings with Thai officials:
>
> - In the absence of new evidence, Thai law does not allow a prosecutor to amend a charge once laid;
> - After a murder trial, a judge may convict on the lesser included offence of manslaughter;
> - Thailand has legislation pending before the Thai Parliament to allow them to provide a death penalty assurance if requested to do so in the context of an extradition request;
> - A Thai sentencing judge can take into account a diplomatic request from Canada that the death penalty not be imposed;
> - Since 2000, although there have been 318 persons charged with murder in the Pattaya region of Thailand, where the applicant is charged with murder, no

> one, neither Thai national nor foreigner, has been sentenced to the death penalty; and
>
> - When a foreign country has provided a diplomatic request seeking clemency from the King of Thailand with respect to one of their citizens who has been sentenced to death in Thailand, the King has granted a pardon in every case.
>
> [50] The letter of 2 September 2005 also explained the reasons behind the Minister's changes to the Amended Surrender Order. The Minister stated that by diplomatic note dated 1 September 2005, Thailand had confirmed that while it was unable to provide a death penalty assurance in advance of trial, a pardon was traditionally granted in cases not involving narcotics.

[15] Based on the information received from the Thai officials, the Minister concluded that it would be appropriate to order surrender of the applicant for trial in Thailand because it could not reasonably be anticipated that the applicant in fact would face the jeopardy of execution in Thailand if convicted of the homicide. The Minister went on to further conclude that even if it could be considered the applicant would face the possibility of execution upon conviction, the case could be considered as falling within the "exceptional circumstances" alluded to in ***United States v. Burns***, 2001 SCC 7, [2001] 1 S.C.R. 283, 195 D.L.R. (4th) 1. The Minister gave the following reasons for finding that surrender without assurances would not be unjust or oppressive:

- Canada has no jurisdiction to prosecute the applicant for a murder that took place on Thai soil;
- If the applicant is not surrendered he will not be prosecuted for the murder and dismemberment of a young Thai woman;

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- A decision not to surrender will not only ensure that the applicant will not face justice, but may also promote lawlessness on the part of Canadians overseas in death penalty jurisdictions;
- The chance of the applicant being sentenced to death is remote, and there is no real risk that the death penalty will be carried out even if imposed;
- Thailand cannot, rather than will not, provide a death penalty assurance;
- While the Thai government cannot provide Canada with a death penalty assurance, the fact that Thai officials are able to advise that the King has never refused a pardon, when clemency was sought by a foreign government, constitutes an informal assurance; and
- The Supreme Court of Canada in *Burns* did not expressly rule on whether or not it would be unconstitutional to surrender a Canadian citizen without a death penalty assurance in situations where such an assurance is not possible.

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The Minister's surrender order was based on the conduct that supported the applicant's committal for surrender on the charge of manslaughter as set forth in the amended authority to proceed. This surrender order resulted in the judicial review application before this Court and the Supreme Court of Canada.

[16] It was noted in the case of ***United States of America. v. Ferras; United States of America v. Latty***, 2006 SCC 33, [2006] 2 S.C.R. 77, 268 D.L.R. (4th) 1, that:

> [38] The inquiry into sufficiency of the evidence to commit for extradition involves an evaluation of whether the conduct described by the admissible evidence would justify committal for trial in Canada: s. 29(1). Evidence that would justify committal in Canada requires at least some evidence on every element of the parallel Canadian crime—the double criminality requirement. The judge's inquiry is focused on "conduct"—whether the acts disclosed in the admissible

> evidence are criminal in Canada (see *McVey (Re)*, [1992] 3 S.C.R. 475, at p. 526).

[17] The task of an extradition judge on a committal hearing is to determine whether the “conduct” involved would constitute a crime in Canada (the so-called “double criminality” requirement). Goudge J.A. noted in ***Canada (Attorney General) v. Gorcyca***, 2007 ONCA 76, 216 C.C.C. (3d) 403, that s. 15(3) of the ***Act*** “requires that the named Canadian offences [set out in the authority to proceed] correspond to the alleged conduct of the person sought, not the foreign offences” (para. 39) and: “the alleged conduct of the person sought, had it occurred in Canada, would warrant committal for an offence named in the Authority to Proceed” (para. 45).

[18] In ***Canada (Minister of Justice) v. Reumayer***, 2005 BCCA 391 at para. 150, leave to appeal to S.C.C. refused 31072 (December 8, 2005), 199 C.C.C. (3d) 1, Ryan J.A., after referring to s. 3(1)(b) of the ***Act***, observed that, “as long as the conduct supports a Canadian offence, it does not matter what the offence might be or how the constituent elements are described in Canada. The person is liable to extradition.”

[19] In my opinion, it is clear from applicable authorities that it is for the extradition judge to decide whether the conduct of the person sought by an extradition partner would have constituted an offence under domestic law, had the conduct occurred in Canada. If committal for surrender is ordered by the judge, it then devolves upon the Minister to decide whether it would be appropriate to surrender the person for trial to the extradition partner. Under s. 58(b) of the ***Act***, an order of surrender can

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refer either to the offence in respect of which the extradition is requested, the offence for which the committal was ordered or the conduct on which the person is to be surrendered. Under s. 40(3) of the ***Act***, the Minister may seek assurances considered appropriate from the extradition partner, including a condition that the person not be prosecuted for any other matter than that for which the person is surrendered.

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[20] The reason why one of the three methodologies set forth in s. 58(b) should be used arises from the rule of specialty, a key rule in extradition matters. As La Forest J. noted in ***R. v. Parisien***, [1988] 1 S.C.R. 950 at 957, 41 C.C.C. (3d) 223, a fugitive surrendered to a requesting state in respect of a particular crime is not to be tried for any other crime previously committed without permission of the surrendering state. To do so would violate the contractual nature of the arrangement between states that underpins the extradition process.

[21] Article 6 of the ***Treaty*** provides:

> A person surrendered can in no case be detained or tried in the State to which the surrender has been made, for any other crime or on account of any other matters than those for which the extradition shall have taken place, until he has been restored or had an opportunity of returning to the State by which he has been surrendered.

[22] Section 18(1)(b) of the former ***Extradition Act***, R.S.C. 1985, c. E-23, was as follows:

> 18(1) The judge shall issue a warrant for the committal of the fugitive to the nearest convenient prison, there to remain until surrendered to the foreign state, or discharged according to law,

> …
>
> (b) in the case of a fugitive accused of an extradition crime, if such evidence is produced as would, according to the law of Canada, subject to this Part, justify the committal of the fugitive for trial, if the crime had been committed in Canada.

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[23] Section 25 of that statute was as follows:

> Subject to this Part, the Minister of Justice, on the requisition of the foreign state, may, under his hand and seal, order a fugitive who has been committed for surrender to be surrendered to the person or persons who are, in the Minister's opinion, duly authorized to receive the fugitive in the name and on behalf of the foreign state, and the fugitive shall be so surrendered accordingly.

[24] The present ***Act*** has somewhat different provisions. Under s. 29 of the current legislation, an extradition judge makes a decision as to whether there is evidence of conduct that, had it occurred in Canada, would justify committal for trial in Canada on the offence set out in the authority to proceed. If an order of committal for surrender is made, the Minister must then decide whether surrender to the extradition partner with or without assurances is appropriate. The salient provisions are s. 58(b) and (f) which provide that an order for surrender must:

> 58(b) describe the offence in respect of which the extradition is requested, the offence for which the committal was ordered or the conduct for which the person is to be surrendered; [and]
>
> …
>
> (f) set out any assurances or conditions to which the surrender is subject;

[25] The present ***Act*** makes explicit the ability of the Minister to surrender an individual on the basis of conduct, which is what was done in the instant case. This

appears to accord with the approach in recent years of courts in the United Kingdom. See ***In re Nielsen***, [1984] A.C. 606, [1984] 2 All E.R. 81(H.L.); ***United States Government and others v. McCaffery***, [1984] 2 All E.R. 570, [1984] 1 W.L.R. 867 (H.L.). The House of Lords in the recent decision of ***Norris v. Government of the United States of America and others***, [2008] UKHL 16, [2008] 2 All E.R. 1103, [2008] 2 W.L.R. 673, has come down in favour of the conduct test as being the appropriate test under the United Kingdom's statutory regime, placing reliance upon the Canadian cases of ***McVey (Re)***; ***McVey v. United States of America***, [1992] 3 S.C.R. 475, 97 D.L.R. (4th) 193, and ***In re Collins*** (1905), 11 B.C.R. 436, 10 C.C.C. 80 (S.C.). The English legislation contains language similar to our ***Act***.

[26] The reference to conduct in s. 58(b) of the ***Act*** seems entirely consistent with the terminology adopted by Parliament in other sections, namely in s. 3(1)(b) and s. 3(2), which also speak of conduct. As observed by the House of Lords in ***Norris*** at para. 89, the conduct-based approach should simplify and expedite extradition proceedings since it “avoids the need always to investigate the legal ingredients of the foreign offence”. What has occurred in the instant case may illustrate a lack of simplicity and expedition given that the proceedings in Canada have lasted some 11 years in duration. A process that takes so long does not appear to me to be satisfactory. Canada and other extradition partners should be able to do better. The comments of La Forest J. in ***Canada v. Schmidt***, [1987] 1 S.C.R. 500 at 524, 39 D.L.R. (4th) 18, appear to me to be apposite:

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> I would add that the lessons of history should not be overlooked. Sir Edward Clarke instructs us that in the early 19th century the English judges, by strict and narrow interpretation, almost completely nullified the operation of the few extradition treaties then in existence: see *A Treatise Upon the Law of Extradition* (4th ed. 1903), c. V. Following the enactment of the British *Extradition Act, 1870* (U.K.), 33 & 34 Vict., c. 52, upon which ours is modelled, this approach was reversed. The present system of extradition works because courts give the treaties a fair and liberal interpretation with a view to fulfilling Canada's obligations, reducing the technicalities of criminal law to a minimum and trusting the courts in the foreign country to give the fugitive a fair trial, including such matters as giving proper weight to the evidence and adequate consideration of available defences and the dictates of due process generally.

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[27] Having reached a decision to surrender a person committed by an extradition judge, the Minister must then sufficiently define what the person is being surrendered for to the extradition partner in order that the rule of specialty will be observed by the requesting state. In the present case, that requirement is met by surrender on the basis of conduct, namely the killing of Ms. Ratanaprakorn in September 1996, for which the applicant was ordered to be committed for extradition. There can be no doubt that the applicant may only be tried in Thailand for the killing of Ms. Ratanaprakorn. The fact that the offence may be differently described by the requesting state or may attract a different penalty appears to me to be not a relevant consideration. Neither the committing court nor the Minister ought to be required to inquire into details of the foreign law, save only in one respect which I will deal with presently – namely, if prosecution for the foreign crime could involve the imposition of the death penalty. Of course, if the conduct for which a fugitive is sought would not amount to an extradition crime in Canada, then neither committal nor surrender would be appropriate. For an example, see ***Washington***

(State of) v. Johnson, [1988] 1 S.C.R. 327, 40 C.C.C. (3d) 546, as explained in ***McVey***.

[28] Applying here the standard enunciated by the Supreme Court of Canada in ***Lake*** to the decision of the Minister to surrender this applicant to Thailand, on the basis of the conduct underlying the foreign crime and the committal order made by Lysyk J., namely reasonableness as explained in ***Dunsmuir***, I consider the decision of the Minister to be supportable. The killing of Ms. Ratanaprakorn was a serious crime and the reasons given by the Minister in his decision to surrender the applicant appear to me to be intelligible, justifiable and within the jurisdiction of the Minister to decide.

[29] The applicant made reference to the case of ***Canada (Attorney General) v. Fischbacher***, 2008 ONCA 571, a case decided after ***Lake***. There appears to be a distinction between the case of ***Fischbacher*** and the instant case, in that it appears that in ***Fischbacher*** the surrender decision referred to the foreign charge of first degree murder, whereas the surrender decision in the present case was on the basis of conduct. I would not necessarily want to be taken as agreeing with the case of ***Fischbacher*** but I need not reach any concluded decision about this because in my view that case is distinguishable from the present case as the basis for surrender here was different.

[30] The applicant submits the Minister violated his rights under s. 7 of the ***Charter of Rights and Freedoms***, by ordering his surrender for trial in Thailand without receiving assurances that the death penalty would not be imposed upon

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conviction or, if imposed, would not be carried out. In the earlier decision of this Court, 2007 BCCA 637, it was held that the Minister erred in law by ordering surrender without assurances. While it was not explicitly stated which standard was being applied, correctness or reasonableness, it appears to me that the previous decision concerning assurances was based on a correctness analysis. The Court said this in the course of its reasons:

> [139] On appeal, the Supreme Court of Canada held that examination of the death penalty issue was most appropriate under s. 7 of the *Charter*. The extradition order, if implemented, would have deprived Burns and Rafay of their rights of liberty and security of the person because "[t]heir lives [were] potentially at risk." (at para. 59) The issue before the court was whether this threatened deprivation was in accordance with the principles of fundamental justice.
>
> …
>
> [148] In my opinion, the standard of review to be applied is correctness. In this case, the Minister's decision to surrender Mr. Karas to Thailand without assurances that the death penalty will not be imposed or, if imposed, will not be carried out, is one that engages Mr. Karas' rights under s. 7 of the *Charter*. In this case, the Minister has made a decision to surrender without assurances. Executive decisions that engage the rights and freedoms guaranteed by the *Charter* are reviewed on a standard of correctness (*United States of America v. Kwok*, 2001 SCC18, [2001] 1 S.C.R. 532; *United States of America v. Gillingham*, 2004 BCCA 226, 239 D.L.R. (4th) 320; *Ganis v. Canada (Minister of Justice),* 2006 BCCA 543, 216 C.C.C. (3d) 337, leave to appeal to S.C.C. refused, [2007] S.C.C.A. No. 111).

[31] This approach to alleged ***Charter*** violations by the Minister in the extradition context is no longer the applicable standard, as was made clear by LeBel J. in ***Lake*** at para. 40. LeBel J. went on to observe:

> [40] Reasonableness does not require blind submission to the Minister's assessment; however, the standard does entail more than one possible conclusion. The reviewing court's role is not to re-assess

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> the relevant factors and substitute its own view. Rather, the court must determine whether the Minister's decision falls within a range of reasonable outcomes. To apply this standard in the extradition context, a court must ask whether the Minister considered the relevant facts and reached a defensible conclusion based on those facts. I agree with Laskin J.A. that the Minister must, in reaching his decision, apply the correct legal test. The Minister's conclusion will not be rational or defensible if he has failed to carry out the proper analysis. If, however, the Minister has identified the proper test, the conclusion he has reached in applying that test should be upheld by a reviewing court unless it is unreasonable. This approach does not minimize the protection afforded by the *Charter*. It merely reflects the fact that in the extradition context, the proper assessments under ss. 6(1) and 7 involve primarily fact-based balancing tests. Given the Minister's expertise and his obligation to ensure that Canada complies with its international commitments, he is in the best position to determine whether the factors weigh in favour of or against extradition.
>
> [Emphasis added.]

[32] As I observed earlier, it appears to me that the Minister was empowered by the ***Act*** with the jurisdiction to decide whether assurances were required. The Minister decided that it would not be unjust or oppressive (s. 44 of the ***Act***) to order surrender without assurances in the circumstances of this case because he concluded that the applicant faced no realistic jeopardy of execution should he be found guilty of murder. In my view, this was a reasonable, fact-based conclusion in the circumstances of this case. Since, in my judgment, the order made by the Minister was not unreasonable, I would not accede to the argument that the Minister erred in making the impugned order for surrender of the applicant to Thailand.

[33] In view of this conclusion, I do not find it necessary to consider whether the Minister was entitled to take the view that this was a case of "exceptional circumstances" of the sort referred to in ***Burns***. That issue can be dealt with in some future case where it may be necessary to do so, but it is not necessary to

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explore this in the present case. I would dismiss the application for review of the decision of the Minister.

"The Honourable Mr. Justice Hall"

I agree:

"The Honourable Mr. Justice Low"

I agree:

"The Honourable Mr. Justice Bauman"

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