remains properly registered today. Accordingly, s. 71(2) operates and the interests of the holders of the right of first refusal are protected.

Disposition

[85] Accordingly, I would dismiss the appeal with costs to the respondents fixed at $14,000, inclusive of disbursements and applicable taxes.

Appeal dismissed.

The Attorney General of Canada (on Behalf of the United States of America) v. Leonard

The Attorney General of Canada (on Behalf of the United States of America) v. Gionet

[Indexed as: United States of America v. Leonard]

2012 ONCA 622

Court of Appeal for Ontario, Doherty, MacPherson and Sharpe JJ.A.
September 21, 2012

Criminal law — Extradition — United States seeking extradition of Aboriginal Canadian applicants to stand trial on drug charges — Prosecution in Canada for conduct that gave rise to U.S. charges being possible — Applicants facing considerably harsher sentences in United States than they would receive if convicted in Canada — Minister of Justice failing to properly consider Gladue factors in concluding that applicants' surrender would not violate their rights under s. 7 of Charter — Minister also erring in finding that Gladue factors were not relevant to analysis under s. 6 of Charter — Surrender order set aside — Matter not remitted to minister as there was no possibility that minister could marshal reasons to support surrender on basis that political considerations should override harsh consequences of surrender on applicants — Canadian Charter of Rights and Freedoms, ss. 6, 7.

L and M were Aboriginal Canadians whose extradition was sought by the United States of America to stand trial on drug charges. Their aboriginality and the systemic factors identified by the Supreme Court of Canada in *R. v. Gladue* would not be considered in U.S. sentencing proceedings. L and M could both be prosecuted in Canada for the conduct that gave rise to the U.S. charges. L entered the United States with approximately 46,000 ecstasy pills. He was 18 years old at the time of the offence and had no criminal record. If convicted, he would probably receive a sentence of between 15 years, 8 months' to 19 years, 7 months' imprisonment with no prospect of release until 85 per cent of the sentence had been served. The U.S. prisons to which he would likely be assigned if convicted lacked culturally appropriate programs for Aboriginal inmates. If tried and convicted in Canada, L would likely receive a conditional or relatively short

prison sentence. M was allegedly involved in importing oxycodone into the United States from Canada. If convicted in the United States, he faced a sentence of between six and ten years. He submitted that, in Canada, the sentencing range was three to five years and that consideration of his Aboriginal status and the *Gladue* principles could yield a lower sentence. L and M were committed for extradition. In considering whether to surrender them, the Minister of Justice found that their Aboriginal status and the *Gladue* principles were not relevant to an analysis under s. 6 of the *Canadian Charter of Rights and Freedoms*. He found that the *Gladue* factors were relevant in assessing the applicants' claims that surrender would violate their rights under s. 7 of the *Charter*, but concluded that surrendering them would not shock the conscience. He also found that surrender would not be "unjust or oppressive" under s. 44(1)(*a*) of the *Extradition Act*, S.C. 1999, c. 18. He ordered their surrender. The applicants applied for judicial review of that decision. L also appealed his committal order.

Held, the application should be granted.

Per Sharpe J.A. (MacPherson J.A. concurring): There was no error on the part of the extradition judge in committing L for extradition.

The minister erred in his consideration of the *Gladue* factors under s. 7 of the *Charter*. In each case, he found that it would be unfair if the applicant could "escape a trial" on the basis that he was an Aboriginal accused when accused persons in Canada must generally face prosecution regardless of their heritage. It is not unfair to other accused to consider the disadvantages suffered by Aboriginal accused on account of the systemic wrongs they have suffered because of their Aboriginal backgrounds. Moreover, the minister erred in positing his choice as being to either surrender the applicants to face justice elsewhere or to allow them to escape prosecution altogether. While no charges had yet been laid in Canada, the applicants could well be charged with the same offences in Canada if they were not extradited.

The minister erred in law by stating that the *Gladue* principles were not relevant to the *Cotroni* analysis under s. 6 of the *Charter*. He erred in treating the prosecutor's decision not to lay charges in Canada as conclusive of the *Cotroni* analysis. The fact that no charges had yet been laid did not mean that a trial in Canada was not possible.

The surrender orders should be set aside. It was difficult to imagine how the minister could marshal reasons to support the surrender of either applicant on the basis that political considerations should override the harsh consequences that surrender would have on the applicants. Accordingly, the matter should not be remitted to the minister for further consideration.

Per Doherty J.A. (dissenting in part): The reasons of Sharpe J.A. with respect to setting aside the surrender orders are agreed with. However, both matters should be remitted to the minister for reconsideration.

R. v. Gladue, [1999] 1 S.C.R. 688, [1999] S.C.J. No. 19, 171 D.L.R. (4th) 385, 238 N.R. 1, J.E. 99-881, 121 B.C.A.C. 161, 133 C.C.C. (3d) 385, [1999] 2 C.N.L.R. 252, 23 C.R. (5th) 197, 41 W.C.B. (2d) 402; *R. v. Ipeelee*, [2012] 1 S.C.R. 433, [2012] S.C.J. No. 13, 2012 SCC 13, 428 N.R. 1, 91 C.R. (6th) 1, 318 B.C.A.C. 1, 2012EXP-1208, J.E. 2012-661, 288 O.A.C. 224, EYB 2012-204040, 280 C.C.C. (3d) 265, 99 W.C.B. (2d) 642, [2012] 2 C.N.L.R. 218; *United States of America v. Cotroni; United States of America v. El Zein*, [1989] 1 S.C.R. 1469, [1989] S.C.J. No. 56, 96 N.R. 321, J.E. 89-920, 23 Q.A.C. 182, 48 C.C.C. (3d) 193, 42 C.R.R. 101, 7 W.C.B. (2d) 301, **consd**

Other cases referred to

Canada (Minister of Justice) v. Pacificador (2002), 60 O.R. (3d) 685, [2002] O.J. No. 3024, 216 D.L.R. (4th) 47, 162 O.A.C. 299, 166 C.C.C. (3d) 321, 6 C.R. (6th) 161, 97 C.R.R. (2d) 20, 55 W.C.B. (2d) 63 (C.A.) [Leave to appeal to S.C.C. refused [2002] S.C.C.A. No. 390, 101 C.R.R. (2d) 374]; *Frontenac Ventures Corp. v. Ardoch Algonquin First Nation* (2008), 91 O.R. (3d) 1, [2008] O.J. No. 2651, 2008 ONCA 534, [2008] 3 C.N.L.R. 119, 239 O.A.C. 257, 295 D.L.R. (4th) 108, 56 C.P.C. (6th) 237, 168 A.C.W.S. (3d) 301 [Leave to appeal to S.C.C. refused [2008] S.C.C.A. No. 357]; *Giguère v. Chambre des notaries du Québec*, [2004] 1 S.C.R. 3, [2004] S.C.J. No. 5, 2004 SCC 1, 235 D.L.R. (4th) 422, J.E. 2004-328, 128 A.C.W.S. (3d) 395, REJB 2004-53100; *Lake v. Canada (Minister of Justice)*, [2008] 1 S.C.R. 761, [2008] S.C.J. No. 23, 2008 SCC 23, EYB 2008-132986, J.E. 2008-970, 230 C.C.C. (3d) 449, 373 N.R. 339, 292 D.L.R. (4th) 193, 236 O.A.C. 371, 56 C.R. (6th) 336, 171 C.R.R. (2d) 280, 72 Admin. L.R. (4th) 30; *R. v. Kakekagamick* (2006), 81 O.R. (3d) 664, [2006] O.J. No. 3346, 214 O.A.C. 127, 211 C.C.C. (3d) 289, 40 C.R. (6th) 383, 70 W.C.B. (2d) 470 (C.A.); *R. v. Kapp*, [2008] 2 S.C.R. 483, [2008] S.C.J. No. 42, 2008 SCC 41, 175 C.R.R. (2d) 185, EYB 2008-135098, J.E. 2008-1323, [2008] 8 W.W.R. 1, 294 D.L.R. (4th) 1, 232 C.C.C. (3d) 349, [2008] 3 C.N.L.R. 347, 376 N.R. 1, 256 B.C.A.C. 75, 78 W.C.B. (2d) 343, 37 C.E.L.R. (3d) 1, 58 C.R. (6th) 1; *R. v. Sim* (2005), 78 O.R. (3d) 183, [2005] O.J. No. 4432, 203 O.A.C. 128, 201 C.C.C. (3d) 482, [2006] 2 C.N.L.R. 298, 67 W.C.B. (2d) 431 (C.A.); *R. v. Williams*, [1998] 1 S.C.R. 1128, [1998] S.C.J. No. 49, 159 D.L.R. (4th) 493, 226 N.R. 162, [1999] 4 W.W.R. 711, J.E. 98-1315, 107 B.C.A.C. 1, 56 B.C.L.R. (3d) 390, 124 C.C.C. (3d) 481, [1998] 3 C.N.L.R. 257, 15 C.R. (5th) 227, 52 C.R.R. (2d) 189, 38 W.C.B. (2d) 295; *Republic of Italy v. Caruana*, [2007] O.J. No. 2550, 2007 ONCA 488, 157 C.R.R. (2d) 1, 74 W.C.B. (2d) 355 (C.A.), affg [2004] O.J. No. 5851 (S.C.J.) [Leave to appeal to S.C.C. refused [2007] S.C.C.A. No. 474]; *Stetler v. Ontario Flue-Cured Tobacco Growers' Marketing Board*, [2009] O.J. No. 1050, 2009 ONCA 234, 93 Admin. L.R. (4th) 312, 247 O.A.C. 338, 176 A.C.W.S. (3d) 314, 311 D.L.R. (4th) 109 [Leave to appeal to S.C.C. refused [2005] S.C.C.A. No. 428]; *United States of America v. Burns*, [2001] 1 S.C.R. 283, [2001] S.C.J. No. 8, 2001 SCC 7, 195 D.L.R. (4th) 1, 265 N.R. 212, [2001] 3 W.W.R. 193, J.E. 2001-458, 148 B.C.A.C. 1, 85 B.C.L.R. (3d) 1, 151 C.C.C. (3d) 97, 39 C.R. (5th) 205, 81 C.R.R. (2d) 1, 48 W.C.B. (2d) 400, REJB 2001-22580; *United States of America v. Ferras; United States of America v. Latty*, [2006] 2 S.C.R. 77, [2006] S.C.J. No. 33, 2006 SCC 33, 268 D.L.R. (4th) 1, 351 N.R. 1, J.E. 2006-1461, 209 C.C.C. (3d) 353, 39 C.R. (6th) 207, 143 C.R.R. (2d) 140, 69 W.C.B. (2d) 711, EYB 2006-107828; *United States of America v. Gionet*, [2011] O.J. No. 1191, 2011 ONCA 217 (C.A.); *United States of America v. K. (J.H.)*, [2002] O.J. No. 2341, 160 O.A.C. 149, 165 C.C.C. (3d) 449, 4 C.R. (6th) 382, 54 W.C.B. (2d) 464 (C.A.); *United States of America v. Kwok*, [2001] 1 S.C.R. 532, [2001] S.C.J. No. 19, 2001 SCC 18, 197 D.L.R. (4th) 1, 267 N.R. 310, J.E. 2001-782, 145 O.A.C. 36, 152 C.C.C. (3d) 225, 41 C.R. (5th) 44, 81 C.R.R. (2d) 189, 49 W.C.B. (2d) 154, REJB 2001-23416; *United States of America v. Reumayr*, [2003] B.C.J. No. 1504, 2003 BCCA 375, 184 B.C.A.C. 251, 176 C.C.C. (3d) 377, 58 W.C.B. (2d) 237; *United States of America v. Thamby*, [2011] O.J. No. 1922, 2011 ONCA 333, 280 O.A.C. 298, 85 C.R. (6th) 133; *United States of America v. Whitley*, [1996] 1 S.C.R. 467, [1996] S.C.J. No. 25, 132 D.L.R. (4th) 575, 197 N.R. 169, 104 C.C.C. (3d) 447, 30 W.C.B. (2d) 206, affg (1994), 20 O.R. (3d) 794, [1994] O.J. No. 2478, 119 D.L.R. (4th) 693, 75 O.A.C. 100, 94 C.C.C. (3d) 99, 25 W.C.B. (2d) 189 (C.A.)

Statutes referred to

Canadian Charter of Rights and Freedoms, ss. 1, 6(1), 7

Constitution Act, 1982, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11, s. 35, (1)
Controlled Drugs and Substances Act, S.C. 1996, c. 19, s. 5(1)
Criminal Code, R.S.C. 1985, c. C-46, s. 718.2(*e*)
Extradition Act, S.C. 1999, c. 18, ss. 29, 40 [as am.], 44, (1)(*a*), 49, 57 [as am.], (6), (*b*)

Authorities referred to

Report of the Aboriginal Justice Inquiry of Manitoba, vol. 1, c. 4 (Winnipeg: Aboriginal Justice Implementation Commission, 1999)

APPEAL from the committal order of Fregeau J. of the Superior Court of Justice dated June 3, 2012; APPLICATIONS for judicial review of the surrender orders of the Minister of Justice dated April 14, 2011 (Leonard) and June 8, 2011 (Gionet).

Marlys Edwardh and *Jessica Orkin*, for Zachary Leonard.
Peter Copeland and *Erin Dann*, for Rejean Gionet.
Jeffrey G. Johnston, for Attorney General of Canada on Leonard's appeal from committal.
Nancy Dennison and *Monika Rahman*, for Minister of Justice on the applications for judicial review of the minister's surrender orders.
Jonathan Rudin and *Emily Hill*, for intervenor Aboriginal Legal Services of Toronto Inc.

[1] SHARPE J.A. (MACPHERSON J.A. concurring): — These applications for judicial review of ministerial extradition surrender orders require us to consider the relevance of an accused's Aboriginal background in the context of extradition. The tragic personal and family histories and current circumstances of both applicants closely correspond with many of the systemic factors identified by the Supreme Court in *R. v. Gladue*, [1999] 1 S.C.R. 688, [1999] S.C.J. No. 19 as requiring special consideration on account of the crisis in the Canadian criminal justice system arising from the disproportionate incidence of incarceration amongst Aboriginal peoples. Both applicants are sought for extradition to face drug charges in the United States, where their aboriginality and the *Gladue* principles will not be considered. They both could be prosecuted in Canada for the conduct that gave rise to the charges in the United States. They face the prospect of significantly harsher sentences in the United States than they would face if prosecuted in Canada.

[2] The Minister of Justice concluded that the applicants' Aboriginal status and the *Gladue* principles were not relevant to his consideration of their s. 6(1) *Canadian Charter of Rights*

and Freedoms right to remain in Canada. The applicants submit that that conclusion was wrong in law and that the minister's consideration of s. 6(1) was legally flawed. The minister did consider *Gladue* factors in assessing the applicants' s. 7 *Charter* claims. However, he decided that surrendering them to the United States would not "shock the conscience" as being contrary to the principles of fundamental justice in violation [of] their right to liberty and security of the person. Nor, he concluded, would surrender be "unjust or oppressive" under s. 44(1)(*a*) of the *Extradition Act*, S.C. 1999, c. 18 (the "Act"). The applicants submit that those decisions were both wrong in law and unreasonable.

[3] Leonard also appeals his committal order pursuant to s. 49 of the Act, submitting that the extradition judge erred by concluding that there was sufficient evidence to justify his committal.

Facts

(a) *Leonard*

[4] Leonard is sought by the United States of America to face trial on a charge of drug trafficking. Leonard and his older cousin, Stacy Peterson, were arrested upon entry into the United States on April 5, 2006, after customs officials found approximately 46,000 ecstasy pills hidden in the van in which they were travelling. Peterson, who was driving the van, pleaded guilty to the U.S. drug charges, agreed to testify against Leonard and others, and was given a 30-month sentence. Leonard fled the United States, in violation of his terms of release, and returned to Canada.

[5] The United States sought his extradition on June 19, 2008. On July 9, 2008, the Minister of Justice issued an authority to proceed ("ATP") specifying the corresponding Canadian offence, trafficking in a Schedule III substance, contrary to s. 5(1) of the *Controlled Drugs and Substances Act*, S.C. 1996, c. 19. On June 3, 2010, Leonard was committed for extradition and, on April 14, 2011, the Minister of Justice ordered his surrender.

[6] Leonard was 18 years old at the time of the alleged offence. He has no adult criminal record. He is a Canadian citizen and a member of the Rainy River First Nations. He has resided for almost his entire life at Manitou Rapids, the main reserve of the Rainy River First Nations.

[7] It is not disputed that Leonard has suffered from the litany of disadvantages that the Supreme Court of Canada has attributed to Canada's sorry history of discrimination and

neglect in relation to Aboriginal peoples. Leonard was exposed to adult substance abuse throughout his childhood. His mother was an alcoholic and died as a result of mixing pills and alcohol when he was 12 years old. His father, also an alcoholic, was not capable of caring for him and Leonard's aunt and her husband became his foster parents. Leonard removed himself from foster care at age 15. He had access to alcohol and marijuana from age 12 onwards, and abused both substances during his adolescent years. He has two daughters. The elder, now eight years old, was born when the applicant was 16. The younger daughter is now three years old. Both children live at Manitou Rapids. Leonard shares custody of the older child with her mother and has sole custody of the two-year-old.

[8] Many members of Rainy River First Nations, including Leonard's paternal grandparents and all of his maternal uncles and aunts, were victims of forced residential schooling. The intergenerational effects of residential school attendance and substance abuse feature prominently in Leonard's personal history.

[9] Leonard attaches great importance to his Aboriginal heritage, his connection to his community, ancestral lands and cultural and spiritual traditions.

[10] Since his apprehension for extradition in 2008, Leonard has made significant rehabilitative efforts. He has been subject to stringent bail conditions with which he has fully complied. Leonard has also committed himself to parenting his two daughters. If he is extradited, his two-year-old daughter will have to be placed in foster care.

[11] If Leonard is surrendered for extradition to the United States, he faces a lengthy sentence of imprisonment and the severance of his ties with his Aboriginal community. The presumptive sentence under the United States sentencing guidelines for the drug offence with which Leonard is charged in the United States is 15 years and eight months' to 19 years and seven months' imprisonment with no prospect of release until 85 per cent of the sentence has been served. The American prosecutor responsible for Leonard's case has stated that Leonard is likely to receive the presumptive sentence. The American justice system does not take aboriginality into account when determining sentence and, according to the affidavit of the American criminal defence lawyer submitted to the minister by Leonard, the U.S. prisons to which Leonard would likely be assigned if convicted lack culturally appropriate programs for Aboriginal inmates.

[12] While the Public Prosecution Service of Canada ("PPSC") decided that extradition to the United States was preferable to laying charges against Leonard in Canada, it is clear that he

could be prosecuted here for his conduct. The maximum penalty he would face for the offence of trafficking under the *Controlled Drugs and Substances Act* would be ten years. There is no minimum penalty. Given his age, lack of criminal record, peripheral involvement in the offence, Aboriginal status and the significant rehabilitative steps he has taken since his apprehension, it is likely that he would receive a conditional or relatively short custodial sentence if convicted in Canada.

(b) *Gionet*

[13] The United States seeks Gionet's extradition for prosecution in relation to his alleged involvement in importing oxycodone into the United States from Canada between August 2003 and July 2004 in co-operation with two Americans. Gionet was indicted by a grand jury in August of 2004. Two superceding indictments followed in December 2004 and August 2005. The United States requested Gionet's extradition on April 19, 2006. On January 9, 2009, the Minister of Justice issued an authority to proceed. Gionet was arrested in March of 2009 and has been in custody since that date pending the outcome of the extradition proceedings.

[14] On January 4, 2010, the extradition judge committed Gionet for surrender. The Minister of Justice ordered his surrender on March 18, 2010. The minister confirmed his decision ordering Gionet's surrender with reasons dated June 8, 2011.

[15] Gionet's appeal from committal was dismissed by this court on March 21, 2011: *United States of America v. Gionet*, [2011] O.J. No. 1191, 2011 ONCA 217.

[16] Gionet was born on July 13, 1977 in Thunder Bay. Gionet is a registered status Indian and a member of the Ginogaming First Nation. He describes both of his parents as alcoholics. His father is French Canadian and his mother is an Ojibway woman who is a member of the Ginogaming First Nation. Gionet's mother was sent to a residential school with three of her siblings.

[17] Gionet completed high school and attended college after graduation. He has a common-law partner, a daughter born in 2007 and a stepson. He worked at a casino for three or four years but was dismissed for lateness that he attributes to his drug problem. He started using alcohol in grade nine and he now self-identifies as an alcoholic.

[18] Gionet began using illegal drugs in grade 11, first hashish oil and marijuana typically combined with alcohol. He was introduced to cocaine when he was 18 or 19 years old and, in about 2003, he began using oxycodone in combination with cocaine. His use of the drug became an addiction and he

acknowledges that his addiction to oxycodone resulted in the loss of his job, his home and his vehicle, and strained his personal relationships. Since 2004, Gionet has attempted to overcome his addiction and, while he has relapsed on occasion, since his incarceration for extradition he has benefited from substance abuse programmes and says that he has not used oxycodone.

[19] As much of the conduct underlying the offences for which he is sought occurred in Canada, Gionet could be prosecuted here. Gionet faces a more severe sentence in the United States. In support of his submission to the minister, Gionet filed evidence to suggest that in the United States he faces a sentence of about six or seven years on a guilty plea or eight to ten years if convicted after a trial. He submits that in Canada, the range for sentence is three to five years and that consideration of his Aboriginal status and the *Gladue* principles could yield a lower sentence.

Extradition Act and Charter Provisions

[20] The applicants invoke this court's jurisdiction to review both the judicial and the executive phases of the extradition proceedings in which they are implicated.

[21] The extradition judge was directed by s. 29 of the Act to determine whether there is sufficient 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". Leonard appeals that decision to this court pursuant to s. 49. As I have noted, Gionet's appeal from committal has already been heard and dismissed by this court.

[22] Section 40 of the Act provides that, following committal, the Minister of Justice "may . . . personally order that the person be surrendered to the extradition partner". Both Leonard and Gionet apply to this court pursuant to s. 57 for judicial review of the minister's surrender order.

[23] In support of their applications for judicial review, the applicants rely on their rights protected by ss. 6(1) and 7 of the *Charter*:

> 6(1) Every citizen of Canada has the right to enter, remain in and leave Canada.
>
> . . . . . .
>
> 7. Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.

[24] The respondent concedes that as the applicants are Canadian citizens, the surrender order constitutes a *prima facie*

breach of s. 6(1), but argues that any breach may be justified as a reasonable limit pursuant to s. 1 of the *Charter*:

> 1. The *Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

[25] The applicants also assert that the minister should have refused to order their surrender pursuant to s. 44 of the Act:

> 44(1) The Minister shall refuse to make a surrender order if the Minister is satisfied that
>
> (*a*) the surrender would be unjust or oppressive having regard to all the relevant circumstances; or
>
> (*b*) the request for extradition is made for the purpose of prosecuting or punishing the person by reason of their race, religion, nationality, ethnic origin, language, colour, political opinion, sex, sexual orientation, age, mental or physical disability or status or that the person's position may be prejudiced for any of those reasons.

[26] The applicants argue that because they are Aboriginal, they have an enhanced right to remain in Canada by virtue of the *Constitution Act, 1982*, s. 35(1):

> 35(1) The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed.

[27] The powers of this court on an application for judicial review from the minister's surrender order are set out in s. 57(6) of the *Extradition Act*:

> 57(6) 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[.]

Leonard's Appeal from the Committal Order

[28] The extradition judge found that the committal evidence was not sufficient to justify the appellant's committal as a principal to the offence of trafficking, but concluded that there was sufficient evidence to support a reasonable inference that Leonard was a party to the offence.

[29] Leonard submits that the evidence of his involvement in the alleged offence amounted to nothing more than his presence in the van used by his cousin to transport the ecstasy pills into the United States. I am unable to accept that submission.

[30] There are four crucial pieces of evidence in relation to the appellants alleged participation in the trafficking of drugs:

— Peterson's evidence that the appellant had previously assisted her in trafficking drugs;

— Peterson's evidence that the appellant was aware that Peterson's vehicle had ecstasy concealed within it as they were crossing the Canada-U.S. border;

— Peterson's evidence that the appellant was aware that Peterson was delivering ecstasy to a third party in the U.S.; and

— the appellant's intercepted post-arrest statement indicating that his involvement went beyond mere presence and that he expected to be paid for agreeing to "take that shit across the border".

[31] I am satisfied that there was no error on the part of the extradition judge in committing Leonard for extradition on the basis of that evidence. The extradition judge applied the correct test for committal: was there available and reliable evidence upon which a reasonable jury, properly instructed, could convict a sought person for the corresponding Canadian offence listed in the Authorization to Proceed: *United States of America v. Ferras; United States of America v. Latty*, [2006] 2 S.C.R. 77, [2006] S.C.J. No. 33. Where, as in this case, the evidence is circumstantial in nature, an extradition judge must weigh the evidence, in the sense of assessing whether it is reasonably capable of supporting the inferences the trier of fact will be asked to make. "If the inferences required are within the field of inferences available on the whole of the evidence, nothing else matters": *Republic of Italy v. Caruana*, [2004] O.J. No. 5851 (S.C.J.), Watt J., at para. 153, affd [2007] O.J. No. 2550, 2007 ONCA 488, 157 C.R.R. (2d) 1, leave to appeal to S.C.C. refused [2007] S.C.C.A. No. 474.

[32] The extradition judge applied this test and concluded:

> The actions of a person who accompanies a drug courier, for whom he has previously trafficked drugs, across an international border to deliver illegal drugs to a third party with the expectation of receiving payment for so doing cannot be equated with "mere presence" or "passive acquiescence" in an attempt to avoid culpability as a party to the offence of trafficking by transporting. The inferences suggested by the Applicant, namely, that Leonard was available to assist Peterson, or that his presence was an attempt to provide a "veneer of normalcy" are reasonably supportable to establish some evidence that Leonard was a party to the offence of trafficking.

[33] In my view, those findings were supported by the evidence. I see no error on the part of the extradition judge and, accordingly, would dismiss the appeal from the committal order.

The Surrender Decisions

(a) *Leonard*

[34] The minister rejected Leonard's submission that Aboriginal people have an enhanced s. 6(1) *Charter* right to remain in Canada by virtue of s. 35(1) of the *Constitution Act, 1982* and Aboriginal peoples' historical ties to their land. The minister concluded that the right to remain in Canada attaches to citizenship and applies to all Canadian citizens equally. The minister rejected the contention that Leonard's personal circumstances, his aboriginality and the *Gladue* principles had to be considered in assessing whether surrendering Leonard to be prosecuted in the United States was justified under s. 1 of the *Charter* as a reasonable limit on his s. 6(1) *Charter* right to remain in Canada.

[35] The minister acknowledged that he had taken into account Leonard's aboriginality and the *Gladue* principles in considering Leonard's rights under s. 7 of the *Charter*. The minister reviewed Leonard's personal history in relation to the *Gladue* principles and agreed that

> . . . many of the systemic factors identified by the Supreme Court of Canada in *Gladue* are present in Mr. Leonard's case, including his family's experience with the residential school system and his own history with drug and alcohol abuse.

[36] The minister recited at some length the arguments made by Leonard's counsel that because of the presumptive sentence Leonard faces in the United States and because no consideration would be given to his Aboriginal status, surrender would "shock the conscience" as violating the principles of fundamental justice. He rejected that submission, concluding that

> . . . it would be unfair if Mr. Leonard could escape a trial on the offence alleged against him on the basis that he is an Aboriginal defendant or on the basis of his daughters' needs when accused persons in Canada must generally face prosecution regardless of their heritage, or the fact that surrender would have a negative effect on their family.

[37] The minister noted that the American courts retained the jurisdiction to depart from the presumptive sentencing range and to consider an offender's individual circumstances as mitigating factors. The minister cited case law upholding extradition despite the fact that a sought person faced a more severe sentence than a Canadian judge would impose for the same offence. He added that it would be inappropriate "for Canada to impose

the values underlying our legal system on our extradition partners" and observed that he was "satisfied that the American sentencing judge has sufficient discretion to impose a sentence that is fair according to American law".

[38] The minister concluded that it would not be contrary to the principles of fundamental justice or "shock the conscience" to surrender him as "to deny Mr. Leonard's surrender in these circumstances would violate Canada's treaty obligations and undermine the important interest of society in ensuring that persons wanted for criminal offences are brought to justice".

[39] Likewise, the minister concluded that there was nothing that warranted refusing the applicant's surrender pursuant to s. 44(1)(*a*) of the Act.

(b) *Gionet*

[40] The minister's reached the same conclusion with respect to Gionet's ss. 6(1) and 7 claims for similar reasons.

[41] With respect to s. 6(1), the minister rejected the submission that the *Gladue* factors had to be considered. The minister stated that he was "mindful" of the submission regarding the impact of the Gionet's Aboriginal status on the severity of the sentence he was likely to receive in the two jurisdictions but concluded that he was "not satisfied . . . that the potential disparity in sentences in both jurisdictions would unjustifiably violate Mr. Gionet's mobility rights".

[42] The minister rejected the submission that surrender would be "unjust or oppressive" under s. 44 of the Act or that it would "shock the conscience" under s. 7 of the *Charter*. The minister acknowledged that Gionet's personal circumstances reflected many of the systemic factors indentified in *Gladue* as calling for special consideration but concluded, as in *Leonard*,

> . . . that it would be unfair if Mr. Gionet could escape a trial on the serious offences alleged against him on the basis that he is an Aboriginal defendant or on the basis of his family's needs when accused persons in Canada must generally face prosecution regardless of their heritage, or the fact that surrender would have a negative effect on their family.

[43] The minister added that to refuse surrender would, in his view, violate Canada's treaty obligations and undermine the important societal interest "in ensuring that persons wanted for criminal offences are brought to justice".

[44] The minister stated that the potential disparity of sentence was not sufficient to justify refusal to surrender and that it would be inappropriate for Canada to impose its values upon our extradition partner.

[45] The minister also considered and rejected Gionet's argument that surrender should be refused on the ground of unreasonable delay. That argument had also been made and rejected in Gionet's committal hearing. I note that delay was not pressed as a ground for judicial review in this application.

Issues

[46] The applications for judicial review of the minister's surrender orders raise two issues:

(1) Did the minister err in law by failing to give adequate consideration to the applicants' Aboriginal status and the *Gladue* principles in relation to their s. 7 *Charter* claims?

(2) Did the minister err in law by failing to conduct a proper analysis of the applicants' s. 6(1) *Charter* right to remain in Canada?

Analysis

Standard of review

[47] It is well established that, in keeping with the political nature of the surrender decision, the minister's decision is entitled to substantial deference. The minister has the "expertise and [the] obligation to ensure that Canada complies with its international commitments" and it is the minister who "is in the best position to determine whether the factors weigh in favour of or against extradition": *Lake v. Canada (Minister of Justice)*, [2008] 1 S.C.R. 761, [2008] S.C.J. No. 23, 2008 SCC 23, at para. 41.

[48] However, as *Lake* also states at para. 41, "[r]easonableness does not require blind submission to the Minister's assessment" and, when determining "whether the Minister's decision falls within a range of reasonable outcomes", the court is required to "ask whether the Minister considered the relevant facts and reached a defensible conclusion based on those facts". The minister must also apply the correct legal test and the "Minister's conclusion will not be rational or defensible if he has failed to carry out the proper analysis".

Issue 1. Did the minister err in law by failing to give adequate consideration to the applicants' Aboriginal status and the Gladue principles in relation to their s. 7 Charter claims?

(a) *The Gladue principles*

[49] In *Gladue*, the Supreme Court stated, at para. 67, that "[y]ears of dislocation and economic development have translated,

for many aboriginal peoples, into low incomes, high unemployment, lack of opportunities and options, lack or irrelevance of education, substance abuse, loneliness, and community fragmentation". These conditions, together with bias and systemic racism, have contributed to what the court described, at para. 64, as a "crisis" in Canada's criminal justice system: the grossly disproportionate incidence of crime and incarceration amongst Aboriginal peoples. Section 718.2(*e*) of the *Criminal Code*, R.S.C. 1985, c. C-46, which directs sentencing judges to consider alternatives to imprisonment for all offenders but "with particular attention to the circumstances of aboriginal offenders", was interpreted in *Gladue*, at para. 33, as a "direction to sentencing judges to undertake the process of sentencing aboriginal offenders differently". The court held that a different approach was required to meet what it had described in *R. v. Williams*, [1998] 1 S.C.R. 1128, [1998] S.C.J. No. 49, at para. 58, as widespread bias against Aboriginal people within Canada and "evidence that this widespread racism has translated into systemic discrimination in the criminal justice system". In *Gladue*, the Supreme Court adopted the conclusion of the Royal Commission on Aboriginal Peoples (*Gladue*, at para. 62) and the Aboriginal Justice Inquiry of Manitoba (*Gladue*, at para. 63) that Canada's criminal justice had failed to take into account "the substantially different cultural values and experience of aboriginal people".

[50] *Gladue* mandates, at para. 66, a different framework of analysis for sentencing Aboriginal offenders, taking into consideration "the distinct situation of Aboriginal peoples in Canada" including:

> (A) The unique systemic or background factors which may have played a part in bringing the particular aboriginal offender before the courts; and
>
> (B) The types of sentencing procedures and sanctions which may be appropriate in the circumstances for the offender because of his or her particular aboriginal heritage or connection.

[51] The Supreme Court has emphasized, however, that the focus on systemic factors and specially tailored sanctions does not amount to reverse discrimination in favour of Aboriginal offenders by offering them an automatic reduction in sentence. To the contrary, the *Gladue* approach is intended to avoid the discrimination against Aboriginal offenders that flows from the failure of the justice system to address their special circumstances. As explained in *Gladue*, at paras. 87-88:

> The fact that a court is called upon to take into consideration the unique circumstances surrounding these different parties is not unfair to non-aboriginal people. Rather, the fundamental purpose of s. 718.2(*e*) is to treat aboriginal offenders fairly by taking into account their difference.
>
> . . . [T]he direction to consider these unique circumstances flows from the staggering injustice currently experienced by aboriginal peoples with the criminal justice system. The provision reflects the reality that many aboriginal people are alienated from this system which frequently does not reflect their needs or their understanding of an appropriate sentence.

[52] The *Gladue* approach has been reinforced by *R. v. Ipeelee*, [2012] 1 S.C.R. 433, [2012] S.C.J. No. 13, 2012 SCC 13, 280 C.C.C. (3d) 265, a decision handed down after the minister gave his reasons in this case. *Ipeelee* reiterates that the *Gladue* approach does not amount to reverse discrimination but is, rather, "an acknowledgement that to achieve real equity, sometimes different people must be treated differently": *Ipeelee*, at para. 71. *Gladue* recognizes that Canadian courts "have failed to take into account the unique circumstances of Aboriginal offenders that bear on the sentencing process" and "is intended to remedy this failure by directing judges to craft sentences in a manner that is meaningful to Aboriginal peoples": *Ipeelee*, at para. 75.

[53] The *Gladue* principles have been extended by decisions of this court beyond the context of sentencing to address the need to ensure appropriate treatment for Aboriginal people as they interact with the justice system. *Frontenac Ventures Corp. v. Ardoch Algonquin First Nation* (2008), 91 O.R. (3d) 1, [2008] O.J. No. 2651, 2008 ONCA 534, leave to appeal to S.C.C. refused [2008] S.C.C.A. No. 357, applying *Gladue* in the context of civil contempt of court, holds, at para 57: "Although *Gladue* was focused primarily on the serious problem of excessive imprisonment of aboriginal peoples, the case in a broader sense draws attention to the state of the justice system's engagement with Canada's First Nations." In *R. v. Sim* (2005), 78 O.R. (3d) 183, [2005] O.J. No. 4432 (C.A.), this court held, at para. 16, that the *Gladue* principles should not be limited to the sentencing process and that the Ontario Review Board has an obligation to consider the principles in reviewing the disposition of an Aboriginal NCR accused.

(b) *Did the minister err in law in his consideration of the Gladue factors?*

[54] The minister indicated that he was prepared to consider *Gladue* in relation to the applicants' s. 7 *Charter* claims but not in connection with their s. 6(1) claims. In the circumstances

of this case, there is clearly a very significant overlap in the application of *Gladue* to both claims. Both turn to a substantial degree on the issue of disparity of sentence and the potential impact of severe foreign sentences on Aboriginal offenders. As the *Gladue* issue arises more squarely under s. 7 than under s. 6(1), the appropriate starting point for analysis is the consideration of *Gladue* in relation to the s. 7 claims.

[55] I agree with the applicants' submission that the minister failed to apply the correct legal test and that he failed to carry out the proper analysis of the application of the *Gladue* factors when he considered the applicants' s. 7 claims.

[56] The applicants' s. 7 claims required the minister to consider whether, in the light of all the circumstances, the applicants' surrender would be inconsistent with the principles of fundamental justice and hence "shock the conscience" of Canadians. As the Supreme Court of Canada held in *United States of America v. Burns*, [2001] 1 S.C.R. 283, [2001] S.C.J. No. 8, at para. 68, the phrase "shocks the conscience" conveys "the exceptional weight of a factor such as the youth, insanity, mental retardation or pregnancy of a fugitive" that may tip the balance against surrender and

> . . . should not be allowed to obscure the ultimate assessment that is required: namely whether or not the extradition is in accordance with the principles of fundamental justice. The rule is *not* that departures from fundamental justice are to be tolerated unless in a particular case it shocks the conscience. An extradition that violates the principles of fundamental justice will *always* shock the conscience.

(Emphasis in original)

[57] Although the minister appears to accept that the *Gladue* principles are relevant to the determination of applicants' claims under s. 7 of the *Charter* and s. 44(1)(*a*) of the *Extradition Act*, it is my view that the minister's reasons reveal that he refused to apply the *Gladue* principle that the interests of justice require that Aboriginal defendants be accorded special consideration in order to ensure that entrenched patterns of discrimination are not maintained and repeated. To repeat, in *Leonard*, the minister stated:

> . . . I am also of the view that it would be unfair if Mr. Leonard could escape a trial on the offence alleged against him on the basis that he is an Aboriginal defendant or on the basis of his daughters' needs when accused persons in Canada must generally face prosecution regardless of their heritage, or the fact that surrender would have a negative effect on their family.

[58] In *Gionet*, the minister put it in virtually identical terms:

> . . . I am of the view that it would be unfair if Mr. Gionet could escape a trial on the serious offences alleged against him on the basis that he is an

Aboriginal defendant or on the basis of his family's needs when accused persons in Canada must generally face prosecution regardless of their heritage, of the fact that surrender would have a negative effect on their family.

[59] In my view, the minister's reasons reveal two significant errors of law.

[60] First, the minister's reasoning rests on the proposition that to consider the disadvantages suffered by the applicants on account of the systemic wrongs they have suffered because of their Aboriginal backgrounds would be "unfair" to other accused persons. As I have already attempted to explain, *Gladue* stands for the proposition that insisting that Aboriginal defendants be treated as if they were exactly the same as non-Aboriginal defendants will only perpetuate the historical patterns of discrimination and neglect that have produced the crisis of criminality and over-representation of Aboriginals in our prisons. Yet it is on the idea of formal equality of treatment the minister rests his *Gladue* analysis. That approach was soundly rejected by the Supreme Court in both *Gladue* and *Ipeelee*, which emphasize that consideration of the systemic wrongs inflicted on Aboriginals does not amount to discrimination in their favour or guarantee them an automatic reduction in sentence. Instead, *Gladue* factors must be considered in order to avoid the discrimination to which Aboriginal offenders are too often subjected and that so often flows from the failure of the justice system to address their special circumstances. Treating *Gladue* in this manner resonates with the principle of substantive equality grounded in the recognition that "equality does not necessarily mean identical treatment and that the formal 'like treatment' model of discrimination may in fact produce inequality": *R. v. Kapp*, [2008] 2 S.C.R. 483, [2008] S.C.J. No. 42, 2008 S.C.C. 41, at para. 15. The minister refused to apply this basic *Charter* principle in his s. 7 analysis.

[61] Second, the minister posits his choice as being to either surrender the applicants to face justice elsewhere or to allow them to escape prosecution altogether. In my view, this analysis is seriously flawed. While no charges have yet been laid in Canada, if surrender were refused, it would certainly be open to the PPSC to reconsider and to lay charges.

[62] As I will explain below in relation to the s. 6(1) claim, the minister's analysis ignores the possibility that the PPSC could reconsider and decide to prosecute in the event that Leonard or Gionet were not surrendered. Even if the minister himself has no authority to overrule the PPSC decision not to lay charges in Canada, there would be nothing to stop the PPSC from reassessing the matter and laying charges in Canada if surrender to

the United States is refused. By treating the choice as either surrendering the applicants to the United States or allowing them to "escape a trial", the minister has created a false dichotomy and erred in law.

[63] I wish to emphasize again that just as *Gladue* is not a "get out of jail free" card (*R. v. Kakekagamick* (2006), 81 O.R. (3d) 664, [2006] O.J. No. 3346 (C.A.), at para. 34), the application of *Gladue* in the context of extradition does not mean Aboriginal offenders get favoured treatment. To the contrary, application of *Gladue* is intended to guard against and avoid the discrimination that, as experience demonstrates, will occur where decision-makers fail to advert to the specific and particular problems faced by Aboriginal Canadians in our system of justice: see *Ipeelee*, at paras. 67-68.

[64] I conclude that the minister's s. 7 analysis reveals significant legal errors. As the minister erred in law and failed to apply legally relevant factors, his conclusion that surrender would not "shock the conscience" is unreasonable and must be set aside: see *Lake*, at para. 41; *United States of America v. Thamby*, [2011] O.J. No. 1922, 2011 ONCA 333, 280 O.A.C. 298, at para. 21.

[65] Given my conclusion with respect to s. 7, it is not necessary for me to deal with s. 44(1)(*a*) of the Act except to say that if follows from my finding of a s. 7 violation that the "unjust or oppressive" test in s. 44 has also been met: *Lake*, at para. 24.

Issue 2. Did the minister err in law by failing to conduct a proper analysis of the applicants' s. 6(1) Charter right to remain in Canada?

(a) *Extradition, the s. 6(1) right of Canadian citizens to remain in Canada and the Cotroni assessment*

[66] In *United States of America v. Cotroni; United States of America v. El Zein*, [1989] 1 S.C.R. 1469, [1989] S.C.J. No. 56, the Supreme Court of Canada held that extradition of a Canadian citizen constitutes a *prima facie* violation of that citizen's s. 6(1) *Charter* right to remain in Canada, but that the infringement can be justified under s. 1: see, also, *Lake*, at paras. 28-30. Both applicants are Canadian citizens and it is common ground that given the location of their alleged conduct, they both could be prosecuted in Canada for the offences corresponding to those for which they are sought for trial in the United States.

[67] *Cotroni* holds, at p. 1498 S.C.R., that the prosecutorial authorities "have an obligation flowing from s. 6(1) to assure themselves that prosecution in Canada is not a realistic option"

in the context of the extradition regime. They are required to "give due weight to the constitutional right of a citizen to remain in Canada" and ask themselves, in good faith, "whether prosecution would be equally effective in Canada, given the existing domestic laws and international co-operative arrangements". *Cotroni* identified, at pp. 1498-99 S.C.R., a non-exhaustive list of factors that are to be considered in the s. 1 analysis:

> In practice, the decision whether to prosecute, or not to prosecute in this country and allow the authorities in another country to seek extradition, is made following consultations between the appropriate authorities in the two countries. The factors that will usually affect such a decision . . . include:
>
> — where was the impact of the offence felt or likely to have been felt,
>
> — which jurisdiction has the greater interest in prosecuting the offence,
>
> — which police force played the major role in the development of the case,
>
> — which jurisdiction has laid charges,
>
> — which jurisdiction has the most comprehensive case,
>
> — which jurisdiction is ready to proceed to trial,
>
> — where the evidence is located,
>
> — whether the evidence is mobile,
>
> — the number of accused involved and whether they can be gathered together in one place for trial,
>
> — in what jurisdiction were most of the acts in furtherance of the crime committed,
>
> — the nationality and residence of the accused,
>
> — the severity of the sentence the accused is likely to receive in each jurisdiction.

[68] Where a Canadian citizen sought for extradition could be prosecuted in Canada rather than extradited to face prosecution abroad, the *Cotroni* factors are to be considered initially by the Canadian prosecutor, usually either a provincial Crown or the PPSC, and then again by the minister at the surrender stage.

[69] The minister's decision involves a fact-intensive balancing inquiry, weighing not only the *Cotroni* factors but also political and international relations concerns. In *United States of America v. Kwok*, [2001] 1 S.C.R. 532, [2001] S.C.J. No. 19, at para. 64, quoting *United States of America v. Whitley* (1994), 20 O.R. (3d) 794, [1994] O.J. No. 2478, 94 C.C.C. (3d) 99 (C.A.), affd [1996] 1 S.C.R. 467, [1996] S.C.J. No. 25, the Supreme Court held that in determining whether surrender would unjustifiably

violate a sought person's s. 6(1) rights, "[t]he Minister is charged with the responsibility of weighing these [*Cotroni*] factors and ultimately deciding whether prosecution in Canada would be equally effective".

[70] The case law makes it clear that while the prosecutor's decision not to lay charges in Canada is relevant to the minister's *Cotroni* analysis, the minister cannot treat the prosecutor's decision not to proceed with charges in Canada as conclusive of the separate and distinct *Controni* analysis that the minister is required to conduct. In *Kwok*, Arbour J. stated, at para. 89, that while the minister was entitled to receive assistance from local prosecutors in assessing the feasibility of a Canadian prosecution, that assistance "does not displace the Minister's discretion or his or her ability to render a decision". See, also, *Lake*, at para. 41, indicating that on judicial review, the court is required to assess the minister's own analysis:

> [T]he 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.

(Emphasis added)

[71] In *United States of America v. Reumayr*, [2003] B.C.J. No. 1504, 2003 BCCA 375, 176 C.C.C. (3d) 377, at para. 22, the British Columbia Court of Appeal observed that while the minister was entitled to note the provincial Attorney General's decision not to initiate a domestic prosecution, that decision does not bind the minister when making his own *Cotroni* assessment. If the minister's own *Cotroni* assessment concludes that prosecution in Canada would be preferable, it is generally open to the Crown to revive or initiate a domestic prosecution.

[72] I agree with the applicants' submission that the minister's letters ordering their surrender reveal that the minister failed to conduct an independent *Cotroni* assessment and that he effectively treated the initial decisions of the prosecutors not to proceed with charges in Canada as being conclusive.

[73] The minister's reasons for surrender in the *Leonard* case appear to endorse a framework under which the local prosecutor and the minister engage in separate *Cotroni* inquiries:

> As the Minister of Justice acting under s. 40 of the *Act*, my role is essentially political in nature. As such, I have no authority to interfere with the exercise of prosecutorial discretion, nor do I have the authority to direct the relevant Canadian investigative authorities to pursue an investigation or to lay charges against Mr. Leonard. However, *notwithstanding the conclusions*

> *of the PPSC, I am required to ensure that the decision to prefer extradition over domestic prosecution does not unjustifiably violate Mr. Leonard's s. 6(1) Charter rights (Cotroni, supra; Kwok, supra; Lake, supra).*

(Emphasis added)

[74] The minister goes on to conclude that "[b]ased on the totality of the circumstances, it is my view that surrendering Mr. Leonard to the United States would not unjustifiably violate his s. 6(1) *Charter* rights".

[75] However, the minister's conclusion in that regard ultimately rests on the assumption that the PPSC's decision not to lay charges is determinative and that as no charges have been laid, no trial in Canada is possible:

> [N]o charges have been laid in Canada. Although you submit that prosecuting Mr. Leonard in Canada would be effective and in the public interest, no trial is possible in the absence of charges.

Likewise, in *Gionet*, the minister stated as follows:

> . . . I note that the United States has laid charges and is ready to proceed to trial. By contrast, no charges have been laid in Canada. Although you submit that prosecuting Mr. Gionet in Canada would be equally effective, no trial is possible in the absence of charges.

[76] The minister's *Cotroni* analysis ignores the possibility that the PPSC could reconsider and decide to prosecute in the event that Leonard or Gionet were not surrendered.

[77] As counsel for Leonard submits, deference to the PPSC's decision cannot be stretched so far as to itself become a central justification for surrender. It would appear from his letters that the minister did not review the PPSC's *Cotroni* assessment. Leonard asked that it be produced and the minister refused on the ground that Leonard had been provided all the information the minister had considered except for privileged legal advice given to him by the International Assistance Group ("IAG"). For the purposes of these reasons, I will assume, without deciding, the correctness of the minister's assertion that he has no authority to review and modify the PPSC decision, although I note that the applicants strongly contest that assertion and the minister concedes that wearing his other hat as Attorney General he would have the power to direct a prosecution. For present purposes, it suffices to say that for the minister to rest his decision to surrender the applicants on the ground that PPSC has decided not to bring charges in Canada, a decision he has not reviewed, amounts to a form of unacceptably circular reasoning that effectively evades his obligation to conduct an independent *Cotroni* analysis and insulates the *Cotroni* analysis from judicial review.

[78] In my view, by positing the choice in these cases as being between surrender and allowing accused drug traffickers to walk free, the minister has misstated and distorted the true consequences of refusing surrender.

[79] I am, of course, mindful of the importance of Canada fulfilling its treaty obligations to our extradition partners and of the need to defer to the minister's political expertise in that regard. But that cannot justify improperly framing the inquiry as a stark choice between either surrender or allowing the applicants to escape being brought to justice.

[80] Accordingly, I conclude that the minister failed to conduct a proper legal analysis of the applicants' s. 6(1) *Charter* right to remain in Canada and, because of the legal errors that infect the minister's analysis, the surrender order must be set aside.

(b) *Did the minister err in law by stating that the Gladue principles were not relevant to the Cotroni analysis?*

[81] As I have stated, the starting point for consideration of *Gladue* is s. 7, where *Gladue* has a more direct bearing. There are, however, two issues that arise in relation to s. 6(1) that, for the sake of completeness, I will address as they were fully argued by the parties.

[82] First, I do not agree with the applicants' submission that their Aboriginal status gives them an enhanced s. 6(1) right to remain in Canada. The applicants have a s. 6(1) right to remain in Canada because they are Canadian citizens. As the minister correctly stated, the s. 6(1) right applies to all Canadian citizens equally. Aboriginal people do, of course, have rights that are not enjoyed by other Canadian citizens and that are protected by s. 35 of the *Constitution Act, 1982*. Those rights are derived in part from the distinctive relationship between Aboriginal peoples and their lands. I cannot agree, however, that the special connection between Aboriginal peoples and traditional Aboriginal lands shapes, strengthens or redefines the s. 6(1) right to remain in Canada, which attaches to the citizenship that Aboriginal people share with all other Canadians.

[83] The second s. 6(1) issue relates to the minister's statement that as *Gladue* bears upon sentencing and the *Cotroni* analysis involves prosecutorial discretion, *Gladue* need not be considered in relation to s. 6(1). For the following reasons, I reject the minister's proposition that the *Gladue* factors have no bearing on prosecutorial discretion.

[84] While most of the listed *Cotroni* factors bear upon the circumstances of the offence and the feasibility of prosecution in

Canada or elsewhere, two factors do call for consideration of the individual circumstances of the person sought, namely [at pp. 1498-99 S.C.R.], "the nationality and residence of the accused" and "the severity of the sentence the accused is likely to receive in each jurisdiction". As the circumstances of these cases demonstrate, *Gladue* clearly has a bearing on the question of the severity of the sentence the accused is likely to receive in each jurisdiction. Any reasonable evaluation of the severity of the likely sentence in each jurisdiction must take into account the possible effect of *Gladue*. In *Leonard*, the minister stated that "only one of the factors articulated by the Supreme Court of Canada in *Cotroni*, the nationality and residency of the accused, addresses the individual circumstances of the person sought". This is incorrect to the extent that the person's individual circumstances affects the severity of the sentence likely to be received in each jurisdiction.

[85] The jurisprudence that I have already reviewed indicates that the *Gladue* factors are not limited to criminal sentencing but that they should be considered by all "decision-makers who have the power to influence the treatment of aboriginal offenders in the justice system" (*Gladue*, at para. 65) whenever an Aboriginal person's liberty is at stake in criminal and related proceedings. That category includes extradition. Indeed, the minister himself appears to have recognized that the reach of *Gladue* extends beyond sentencing when he agreed that the *Gladue* principles are relevant to the determination of whether a sought person's personal circumstances would make extradition contrary to s. 7 of the *Charter*.

[86] The sound exercise of prosecutorial discretion is fundamental to the fair administration of criminal justice. The decisions of prosecutors have enormous implications for accused persons and for the justice system. Discretionary decision-making was identified in the *Report of the Aboriginal Justice Inquiry of Manitoba*, vol. 1, c. 4 (Winnipeg: Aboriginal Justice Implementation Commission, 1999) as a source of injustice to Aboriginal people in the criminal justice system:

> Many opportunities for subjective decision making exist within the justice system and there are few checks on the subjective criteria being used to make those decisions. We believe that part of the problem is that while Aboriginal people are the objects of such discretion within the justice system, they do not "benefit" from discretionary decision making, and that even the well-intentioned exercise of discretion can lead to inappropriate results because of cultural or value differences.

[87] Given the central importance of prosecutorial discretion to the administration of Canadian justice and to the extradition

process, I cannot accept the proposition that the *Gladue* principles have no bearing upon its exercise. In my view, the proper exercise of prosecutorial discretion in this context requires an assessment of the likely result if the case were prosecuted domestically and a comparison of that result to the likely outcome in the foreign state if the individual sought were surrender. In the case of an Aboriginal offender, I fail to see how that assessment and comparison could be accomplished without reference to the *Gladue* principles.

[88] I wish to emphasize here that I do not wish to be taken as saying that application of *Gladue* somehow requires prosecutors to lay charges in Canada rather than agree to foreign proceedings. That would be inconsistent with *Gladue*, which merely states that some consideration must be given to the distinct situation of Aboriginal peoples in Canada to avoid the further perpetuation of discrimination and disadvantage.

[89] Accordingly, I conclude that to the extent the minister condoned the propriety of prosecutors exercising their discretion whether to lay charges on Canada or allow the prosecution to proceed elsewhere without regard to the *Gladue* factors, he erred in law.

Remedy

[90] Section 57(6)(*b*) of the Act confers broad remedial powers on the court hearing an application for judicial review of a ministerial surrender order. We can simply "declare invalid or unlawful, quash, set aside" the surrender decision, we can "set aside and refer back" to the minister "for determination in accordance with directions", or we can "prohibit or restrain the decision of the Minister".

[91] The minister's surrender decision is discretionary and involves the exercise of political judgment. Where a surrender decision is set aside by the court on account of legal error, but where the court's decision leaves open the possibility of more than one reasonable disposition, it will be appropriate to remit the matter to the minister for reconsideration in the light of the legal principles articulated by the court. The court should not usurp the minister's political role by choosing among reasonable alternatives. For example, where it is conceivable that the minister could articulate reasons for surrender consistent with the court's articulation of the applicable legal principles or take additional steps, such as seeking assurances from the extradition partner, that would make surrender consistent with the *Charter*, the matter should be remitted.

[92] However, as provided by s. 57(6)(*b*) and as recognized in the case law, there are cases where it will be appropriate for a court to exercise a statutory power simply to set aside a discretionary decision, namely, where remitting the case for reconsideration would be "pointless" because, "in light of the circumstances and the evidence in the record, only one interpretation or solution is possible, that is, where any other interpretation or solution would be unreasonable": *Stetler v. Ontario Flue-Cured Tobacco Growers' Marketing Board*, [2009] O.J. No. 1050, 2009 ONCA 234, at para. 42, leave to appeal to S.C.C. refused [2005] S.C.C.A. No. 428, citing *Giguère v. Chambre des notaires du Québec*, [2004] 1 S.C.R. 3, [2004] S.C.J. No. 5, 2004 SCC 1, at para. 66. For application of this principle in the context of extradition, see, *e.g.*, *Canada (Minister of Justice) v. Pacificador* (2002), 60 O.R. (3d) 685, [2002] O.J. No. 3024 (C.A.), leave to appeal to S.C.C. refused [2002] S.C.C.A. No. 390, 101 C.R.R. (2d) 374.

(a) *Leonard*

[93] In my view, when all the circumstances pertaining to Leonard are taken into account, it would be "pointless" to remit the matter to the minister for reconsideration. I can see no possibility that the minister could marshal reasons to support surrender on the basis that political considerations outweigh the devastating impact of the drastically different treatment to which Leonard would be subjected if surrendered. There has been no suggestion that the minister could seek assurances that will reduce that disparity.

[94] It would be contrary to the principles of fundamental justice to surrender this young Aboriginal first-offender to face a lengthy, crushing sentence in the United States that would almost certainly sever his ties to his family and Aboriginal culture and community with which he so closely identifies. Leonard's personal history corresponds precisely with the factors identified in *Gladue* and *Ipeelee* as requiring special consideration. It is clear that he will not get that consideration if surrendered to the United States and that he did not get it here from the Minister of Justice. His involvement in the alleged offence was, at worst, peripheral, and he has made substantial strides towards rehabilitation since his apprehension. I recognize that there is a considerable body of authority to the effect that extradition will not be refused simply because the person sought will receive a lengthier sentence in the foreign state: see, *e.g.*, *United States of America v. K. (J.H.)*, [2002] O.J. No. 2341, 165 C.C.C. (3d) 449 (C.A.). However, in this case, the sentence the applicant faces in the United States — about 15 to 19 years, as compared

to a conditional or short custodial sentence in Canada — is so grossly disproportionate in light of the applicant's personal circumstances that I conclude this is one of those exceptional cases where the "shocks the conscience" test outlined in *Burns*, para. 69, quoted above at para. 56, has been met.

[95] On these facts, there is only one possible conclusion and, accordingly, I would set aside the surrender order but not remit this matter to the minister for further consideration.

(b) *Gionet*

[96] Gionet's is a 34-year-old Aboriginal man whose personal history also corresponds precisely with the factors identified in *Gladue* and *Ipeelee* as calling for special consideration. His mother attended residential school and both his parents were alcoholics. He had serious alcohol and drug addictions and his alleged offences were non-violent and linked to his addiction. He has only a minor criminal record for shoplifting.

[97] Gionet faces a sentence of six to ten years in prison in the United States if convicted for an offence alleged to have occurred seven years ago. He has made significant rehabilitative efforts to overcome his addictions and has not consumed alcohol or drugs for several years. He has a long-term spousal relationship and a five-year-old daughter.

[98] While the disparity in sentence Gionet faces if surrendered to the United States is not as severe as that faced by Leonard, Gionet has been in custody since his arrest in March 2009. The three and one-half years he has already served falls within the three to five year range of the sentence he would likely face if prosecuted in Canada. If the matter were remitted to the minister for reconsideration, Gionet's time in custody would creep even closer to the likely six to ten-year sentence in the United States.

[99] When all these factors are considered, I find it difficult to imagine how the minister could marshal reasons to support surrender on the basis that political considerations should override the harsh consequences that surrender would have on this Aboriginal offender who already has served a substantial period in prison and who has made substantial strides on the way to rehabilitation and reintegration in his community. Accordingly, I would set aside the surrender order but not remit the matter to the minister for further consideration.

Disposition

[100] For these reasons, I would dismiss Leonard's appeal from the committal order but allow his application for judicial

review of the minister's surrender order and set that order aside. I would also allow Gionet's application for judicial review of the minister's surrender order and set aside that order.

[101] DOHERTY J.A. (dissenting): — I have had the pleasure and advantage of reading the reasons of Sharpe J.A. I agree with those reasons save and except his proposed remedy. While I too would allow the applications and set aside the minister's surrender orders, I would remit both matters to the minister for reconsideration in accordance with the reasons of this court.

[102] Like Sharpe J.A., I recognize that the decision to surrender a Canadian citizen to a foreign jurisdiction for trial is essentially a political decision. The minister is charged with the heavy responsibility of balancing competing interests and upholding Canada's international obligations under its treaties. The failure to meet those obligations may have serious ramifications. Courts are given limited authority to review the minister's surrender orders. They are not, however, responsible for Canada's international obligations. The courts cannot, and should not, assume those responsibilities in the context of a judicial review application. The surrender decision is for the minister. It must be a rare case where the court will take it upon itself to make that decision.

[103] In these cases, the minister was required to consider, apparently for the first time, the intersection of the *Gladue* [*R. v. Gladue*, [1999] 1 S.C.R. 688, [1999] S.C.J. No. 19] principles with those principles governing the exercise of the minister's jurisdiction to surrender under the *Extradition Act*, S.C. 1999, c. 18. The minister took a certain view of that interaction, which this court has held was wrong in law. The minister exercised his discretion to order surrender based on a misapprehension of the relevance of the *Gladue* principles. He should have an opportunity to exercise his discretion on a proper application of those principles.

[104] Sharpe J.A. opines that on a proper application of the *Gladue* principles surrender orders in both cases would inevitably violate s. 7 [of the *Canadian Charter of Rights and Freedoms*]. My colleague's analysis assumes that the record would be the same were the matters to be remitted to the minister for reconsideration. I do not think that assumption should be made. The minister, with the benefit of my colleague's analysis of the interaction between the *Gladue* principles and the surrender power under the *Extradition Act*, might well require additional information about the backgrounds of Mr. Leonard and Mr. Gionet and their potential treatment in the American justice system were they to be surrendered for extradition. Indeed, in