

**SUPREME COURT OF CANADA**

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| **Citation:** Canada (Attorney General) *v.* Barnaby, 2015 SCC 31, [2015] 2 S.C.R. 563 | **Date:** 20150529  **Docket:** 35548 |

Between:

Attorney General of Canada

Appellant

and

Anthony Barnaby

Respondent

**Coram:** McLachlin C.J. and Abella, Rothstein, Cromwell, Moldaver, Karakatsanis, Wagner, Gascon and Côté JJ.

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| **Reasons for Judgment:**  (paras. 1 to 12) | The Court |

Appeal heard and judgment rendered: April 23, 2015

Reasons delivered: May 29, 2015

Canada (Attorney General) *v.* Barnaby, 2015 SCC 31, [2015] 2 S.C.R. 563

Attorney General of Canada Appellant

v.

Anthony Barnaby Respondent

**Indexed as: Canada (**Attorney General) ***v.*** Barnaby

2015 SCC 31

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Present: McLachlin C.J. and Abella, Rothstein, Cromwell, Moldaver, Karakatsanis, Wagner, Gascon and Côté JJ.

on appeal from the court of appeal for quebec

*Extradition — Surrender order — Judicial review — Minister of Justice surrendering accused to U.S. on charges of murder — Whether Minister’s decision to order surrender was reasonable — Whether extraditing accused to possibly be subjected to a fourth trial would be contrary to principles of fundamental justice.*

The Minister of Justice ordered the surrender of B and a co-accused, C, to the U.S. on charges of first and second degree murder. B proceeded to trial on those charges on three occasions, in 1989 and 1990. Each trial ended in a hung jury. In 2010, the New Hampshire State authorities reopened the investigation into the alleged crimes and in 2011, evidence seized from the crime scene was submitted for DNA testing using techniques that were not available at the time of the initial investigation. C’s profile was identified but the new DNA evidence did not directly link B to the crimes. On judicial review, the Court of Appeal of Quebec concluded that there was no new evidence against B and that a fourth trial would be contrary to the protection afforded by the *Canadian Charter of Rights and Freedoms*. Hence, the Minister of Justice’s decision to surrender B was unreasonable in the circumstances. B’s application for judicial review was granted and the Minister’s surrender order was quashed.

*Held*: The appeal should be allowed and the decision of the Minister of Justice reinstated.

The Minister’s decision to surrender B was reasonable and the Court of Appeal erred in finding otherwise. The issue before the Court of Appeal was whether extraditing B to face a situation in which he may be subjected to a fourth trial would be contrary to the principles of fundamental justice guaranteed by s. 7 of the *Charter* so as to “shock the conscience” or otherwise be “unjust or oppressive” under s. 44(1) of the *Extradition Act*. The possibility of holding a fourth trial so many years after the alleged crime does not sufficiently violate our sense of fundamental justice to tilt the balance against extradition. Canadian case law suggests that fourth trials are permissible in some circumstances, and the United States case law takes a broadly similar approach. B will be able to raise all of his arguments about the unfairness of a fourth trial and his objections to the purported new evidence before the court in New Hampshire. The particular treatment awaiting B in New Hampshire cannot reasonably be seen as violating our sense of fundamental justice so as to justify refusal of surrender. Further, a refusal of surrender is deeply inconsistent with the principles of international cooperation that are the foundation of an extradition treaty. Canada is expected to defer to the foreign courts on matters of due process. This is not a case in which intervention is warranted.

**Cases Cited**

**Referred to:** *United States v. Burns*, 2001 SCC 7, [2001] 1 S.C.R. 283; *Lake v. Canada (Minister of Justice)*, 2008 SCC 23, [2008] 1 S.C.R. 761; *R. v. Badgerow*, 2014 ONCA 272, 119 O.R. (3d) 399, leave to appeal refused, [2014] 3 S.C.R. v; *R. v. Anderson* (2002), 57 O.R. (3d) 671; *Caplin v. Canada (Justice)*, 2015 SCC 32, [2015] 2 S.C.R. 570; *Germany (Federal Republic) v. Schreiber* (2006), 206 C.C.C. (3d) 339, leave to appeal refused, [2007] 1 S.C.R. xiv; *Canada (Justice) v. Fischbacher*, 2009 SCC 46, [2009] 3 S.C.R. 170; *R. v. Babos*, 2014 SCC 16, [2014] 1 S.C.R. 309.

**Statutes and Regulations Cited**

*Canadian Charter of Rights and Freedoms*, s. 7.

*Extradition Act*, S.C. 1999, c. 18, s. 44(1).

New Hampshire Constitution, Part 1, Article 14.

United States Constitution.

APPEAL from a judgment of the Quebec Court of Appeal (Duval Hesler C.J. and Levesque and Savard JJ.A.), 2013 QCCA 1305, [2013] AZ-50991418, [2013] Q.J. No. 8752 (QL), 2013 CarswellQue 7615 (WL Can.), allowing an application for judicial review from a surrender order made by the Minister of Justice. Appeal allowed.

Marc Ribeiro and Ginette Gobeil, for the appellant.

Clemente Monterosso and Marie-Philippe Tanguay, for the respondent.

The following is the judgment delivered by

1. The Court — The Minister of Justice’s decision to surrender Mr. Barnaby was reasonable. In our view, the Court of Appeal erred in finding otherwise.
2. First, the Court of Appeal did not apply the correct legal test. The question before the court was whether the Minister’s decision to surrender Mr. Barnaby was reasonable. In analyzing this question, the court stated that “the only issue is whether a fourth trial would constitute an abuse of process in his case” (2013 QCCA 1305, at para. 9 (CanLII)). However, the issue was not whether submitting Mr. Barnaby to a fourth trial would constitute an abuse of process — either in Canada or in the United States. Rather, the issue was whether extraditing Mr. Barnaby to face a situation in which he maybe subjected to a fourth trial would be contrary to the principles of fundamental justice guaranteed by s. 7 of the *Canadian Charter of Rights and Freedoms* so as to “shock the conscience” or otherwise be “unjust or oppressive” under s. 44(1) of the *Extradition Act*, S.C. 1999, c. 18. Properly analyzed, this question requires the Minister to engage in a balancing exercise, which recognizes that the principles of fundamental justice usually support extradition: *United States v. Burns*, 2001 SCC 7, [2001] 1 S.C.R. 283, at para. 69; *Lake v. Canada (Minister of Justice)*, 2008 SCC 23, [2008] 1 S.C.R. 761, at para. 32. It is only where a “particular treatment” in the requesting state — in this case, the possibility of holding a fourth trial so many years after the alleged crime — sufficiently violates our sense of fundamental justice that the balance will be tilted against extradition: *Burns*, at para. 69.
3. The Court of Appeal was required to assess the Minister’s weighing of the various relevant factors to determine whether his conclusion was reasonable. The court did not do so. In coming to the conclusion that the Minister’s surrender order was unreasonable, the court did not turn its mind to the key factors that supported the reasonableness of the Minister’s decision. One important benchmark is whether subjecting an accused to a fourth trial under similar circumstances in Canada would constitute a breach of the principles of fundamental justice. It is clear that there is no *per se* rule to that effect. The parties have pointed us to Canadian case law suggesting that fourth trials are permissible in some circumstances: see, e.g., *R. v. Badgerow*, 2014 ONCA 272, 119 O.R. (3d) 399, leave to appeal refused, [2014] 3 S.C.R. v; *R. v. Anderson* (2002), 57 O.R. (3d) 671 (C.A.). From this, it is apparent that a fourth trial cannot be viewed as invariably constituting a breach of s. 7. All of the circumstances must be assessed.
4. The material before us is to the effect that the United States case law takes a broadly similar approach. The record shows that, according to the United States authorities, Mr. Barnaby will be able to raise all of his arguments about the unfairness of a fourth trial before the court in New Hampshire, where his due process rights will be protected by Part 1, Article 14 of the New Hampshire Constitution, as well as the United States Constitution. The New Hampshire court will have all of the witnesses and evidence before it and will be in a better position to determine if a fourth trial would be abusive in these circumstances.
5. To paraphrase *Burns*, the “particular treatment” awaiting Mr. Barnaby in New Hampshire cannot reasonably be seen as violating our sense of fundamental justice so as to justify refusal of surrender. In fact, it appears that broadly similar principles will be applied in New Hampshire as would be applied here in order to determine whether a fourth trial, under all of the circumstances, is fair and just.
6. The Court of Appeal also failed to consider the principle of comity and Canada’s international obligations. A refusal of surrender is deeply inconsistent with the principles of international cooperation that are the foundation of an extradition treaty. The Minister had to give weight to these principles and the Court of Appeal erred in failing to recognize this.
7. Turning to the particular circumstances of this case, the Court of Appeal also erred in concluding that there was no “true ‘new evidence’” against Mr. Barnaby (para. 13). The foreign authorities certified that there was new evidence against Mr. Barnaby. The Minister noted that Mr. Barnaby failed to explain why he did not feel that this evidence was new. On the record, it is clear that some testimonial evidence relates to facts and conversations that only occurred in recent years. In addition, there is new DNA evidence that, if accepted, would directly implicate his co-accused, Mr. Caplin (see *Caplin v. Canada (Justice)*, 2015 SCC 32, [2015] 2 S.C.R. 570). In doing so, it would also indirectly implicate Mr. Barnaby. This evidence may be considered confirmatory of Mr. Barnaby’s prior statements that the two men committed the murders together. Given that Mr. Barnaby did not indicate why he did not believe this evidence to be new, the Minister was entitled to rely on the representations of the U.S. authorities that it was new evidence for the purposes of his analysis.
8. It is for the extradition judge — not for the Minister or a court reviewing the Minister’s decision — to determine whether there is sufficient evidence to warrant committal. Once the person sought has been committed, “weighing the evidence or assessing its reliability are matters for trial in the foreign jurisdiction. The[se] are not matters for the Minister to address when considering whether to surrender the [person sought]”: *Germany (Federal Republic) v. Schreiber* (2006), 206 C.C.C. (3d) 339 (Ont. C.A.), at para. 64, leave to appeal refused, [2007] 1 S.C.R. xiv. As this Court explained in *Canada (Justice) v. Fischbacher*, 2009 SCC 46, [2009] 3 S.C.R. 170, at para. 52:

. . . it is not for the Canadian authorities, judicial or executive, to evaluate a foreign state’s decision to prosecute the person sought for a given offence, nor to assess the sufficiency of the evidence adduced at the committal hearing against the elements of the foreign offence. To do so offends the underlying principle of comity and risks undermining the foundation of effective extradition practice.

1. As we have noted, Mr. Barnaby will be able to raise his objections to this evidence before the New Hampshire court, as could an accused if a retrial were being sought in similar circumstances in Canada. The New Hampshire court, which will have all of the facts before it, is better placed to assess these arguments and weigh the relevant considerations in light of all of the circumstances. This process is consistent with the Canadian sense of justice, not an affront to it.
2. Before disposing of this appeal, we wish to address Mr. Barnaby’s argument that the Minister applied the wrong test for abuse of process. The Minister stated that to find an abuse of process, evidence of bad faith or an improper motive on the part of the foreign authorities is required. We agree with Mr. Barnaby that this was not a correct statement of the law. As this Court stated in *R. v. Babos*, 2014 SCC 16, [2014] 1 S.C.R. 309, abuse of process also captures conduct short of bad faith that nonetheless risks undermining the integrity of the justice system.
3. Despite this error, we conclude that the Minister’s misstatement of the legal test for abuse of process does not render his decision unreasonable. The question before the Minister was whether surrendering Mr. Barnaby would shock the conscience of Canadians or be otherwise unjust or oppressive. The many factors that the Minister is required to balance in the extradition context means that our domestic abuse of process doctrine cannot automatically be equated with the “shocks the conscience” standard. Whether or not Canada would label these circumstances an abuse of process is therefore not determinative of the question the Minister was required to answer. Reading the Minister’s reasons as a whole, it is clear that he considered all of the relevant factors pertaining to the issue before him.
4. The Minister’s decision was reasonable. Interference with the Minister’s decision is limited to “exceptional cases of ‘real substance’”: *Lake*, at para. 34. Absent such circumstances, Canada is expected to defer to the foreign courts on matters of due process. In our view, this is not a case in which intervention is warranted. Consequently, we would allow the appeal and reinstate the Minister’s surrender order.

*Appeal allowed.*

Solicitor for the appellant: Attorney General of Canada, Montréal.

Solicitors for the respondent: Clemente Monterosso, Montréal; Marie-Philippe Tanguay, Montréal.