Court File No. 36981

IN THE SUPREME COURT OF CANADA
(ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA)

BETWEEN:

THE ATTORNEY GENERAL OF CANADA
ON BEHALF OF THE REPUBLIC OF INDIA

Appellant

AND:

SURJIT SINGH BADESHA and
MALKIT KAUR SIDHU

Respondents

APPELLANT'S MEMORANDUM OF ARGUMENT

(Pursuant to Rule 42 of the Rules of the Supreme Court of Canada)

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APPELLANT'S FACTUM

PART I - STATEMENT OF FACTS

I. OVERVIEW

1. The British Columbia Court of Appeal erred in setting aside a surrender order that would have returned the Respondents to India to face trial for their alleged role in perpetrating the brutal and notorious "honour" killing of a Canadian citizen. Effectively, the Court of Appeal has all but prohibited extradition to India.

2. The majority misapprehended its role in reviewing the Minister's assessment of the jeopardy faced by the Respondents and substituted its own views on surrender. The person sought for extradition must establish that he or she faces a substantial and personalized risk of serious mistreatment such that surrender would "shock the conscience" or be "unjust or oppressive". While the Minister recognized the importance of ensuring that the Respondents' human rights would not be violated by surrender, and gave serious consideration to the Respondents' submissions, he reasonably concluded that the Respondents failed to substantiate their argument that surrender would put them at risk of mistreatment. The Respondents relied exclusively on evidence that had no direct nexus to the particular circumstances they would face if extradited. The majority applied the wrong standard of proof in assessing risk, then failed to consider whether the Respondents had met their evidentiary burden and instead erroneously relied on the fact that the Minister sought health and safety assurances as proof of a substantial risk. This approach runs afoul of both Canadian and international jurisprudence.

3. Furthermore, rather than affording the Minister deference for his expertise in weighing the numerous factors relevant to the surrender decision, the majority's review focussed exclusively on one factor: the reliability of India's diplomatic assurances. The majority failed to recognize that the Minister properly assessed the reliability of India's assurances, including India's capacity to honour those assurances, as part of a factual matrix that, examined as a whole, led him to conclude that the Respondents could be safely surrendered. In concluding that surrender was justified, the Minister balanced a broad range of interests including the absence of personalized risk to the Respondents, their right to consular access as Canadian citizens, Canada's obligations to its treaty partner, the fact that India is a democracy governed by the rule of law, India's

membership in international treaties prohibiting torture and mistreatment, India's interest in prosecuting a murder that took place in its territory, human rights reports on India's prisons, and India's record for honouring its commitments to its treaty partners.

4. The implications of the majority's decision extend far beyond Canada's extradition relationship with India. They impact upon the entire network of extradition treaties on which Canada depends for the enforcement of its criminal laws, the prosecution of transnational crime, and the protection of Canadian society. The need to fulfill Canada's obligations in relation to extradition is always a crucial factor precisely because of the objectives of the extradition regime including the importance of seeing justice done in the jurisdiction in which crimes are committed and the need to prevent Canada from becoming a safe haven for criminals. If a refusal to surrender to a treaty partner can be based on considerations that fail to establish a personalized risk, Canada's ability to comply with its international obligations will be undermined, despite the fact that the executive has already determined a treaty partner to have a system of justice that sufficiently corresponds to Canadian standards. In such circumstances, the reciprocity Canada expects from its treaty partners will be cast in doubt, potentially frustrating Canadian attempts to bring fugitives to justice. If courts treat the mere existence of diplomatic assurances as evidence of a substantial risk that Canada's treaty partners will mistreat the person sought for extradition, the good faith, trust and cooperation, which serve as the foundation of Canada's extradition agreements, will be at risk.

II. HISTORY OF EXTRADITION PROCEEDINGS

A. The Extradition Request and the Committal Order

5. On June 8, 2000, Jaswinder Kaur Sidhu and her husband, Sukhwinder Singh Sidhu travelled by scooter from the village of Malerkotla in Punjab, India, toward a small village in which they had taken refuge.[1] It is alleged that several weeks earlier, Jaswinder Sidhu had fled her home in Maple Ridge, British Columbia, after enduring six months of abusive treatment from the Respondents (her uncle and mother), as a result of her marriage to Sukhwinder Sidhu, a rickshaw driver considered by the Respondents to be of an inferior social class.[2] She returned to India to be

[1] *India v. Badesha*, 2014 BCSC 807, Appellant's Record ("AR"), Vol. I, p. 27 at para. 121 [*Badesha BCSC*].
[2] *Ibid*, AR, Vol. I, pp. 6-7 at para. 10.

with her husband, with the hope of bringing him to Canada and starting a new life together.[3] As the couple travelled, they were stopped on a bridge by a group of men brandishing hockey sticks and a sword. The couple was ambushed.[4] Sukhwinder Sidhu was beaten by his assailants and left at the scene. He later recovered from his injuries. Jaswinder Sidhu was seized by the attackers, forced into a car, and driven away. The next day, her lifeless body was found on the bank of a canal. Her throat had been cut.[5]

6. Indian authorities charged thirteen individuals with the murder, including the Respondents. Of the eleven co-accused prosecuted by Indian authorities in 2005, seven were convicted and four were acquitted. Three of the seven were acquitted on appeal. One more was acquitted on further appeal, leaving three serving life sentences. [6]

7. India sought the extradition of the Respondents pursuant to diplomatic note in March of 2011.[7] At the conclusion of a committal hearing, Fitch J. (as he then was), the extradition judge, held that India's evidence in support of extradition was sufficient to order the Respondents' committal for conduct corresponding to the offences of murder and conspiracy to commit murder.[8] Fitch J. concluded that there was a substantial body of evidence that the Respondents harboured an intense hostility towards the victim and her husband, whose relationship brought, in their eyes, dishonour to their family.[9] Furthermore, Fitch J. found that a reasonable jury, properly instructed could find that the Respondents, enraged by the victim's defiance of their authority, hired the Indian perpetrators to commit the murder. The evidence included numerous death threats made by the Respondents to the victim and / or her husband, as well as records of calls made from the Respondent Badesha's phone in Maple Ridge, British Columbia, to the attackers in India at pertinent times.[10]

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[3] *Ibid*, AR, Vol. I, pp. 11-12 at paras. 33, 37 and pp. 20-22 at paras. 83 and 93.
[4] *Ibid*, AR, Vol. I, p. 28 at paras. 123-124.
[5] *Ibid*, AR, Vol. I, pp. 27-29 at paras. 119-124 and 129-132.
[6] *India v. Badesha*, 2016 BCCA 88, AR, Vol. I, p. 8 at para. 17 [*Badesha BCCA*].
[7] Minister's Surrender Reasons (Badesha), AR, Vol. I at p. 69; Minister's Surrender Reasons (Sidhu), AR, Vol. I at p. 86.
[8] Committal Order (Badesha); Committal Order (Sidhu), AR, Vol. II at pp. 2-3.
[9] *Badesha BCSC*, AR, Vol. I, pp. 39-46 at paras. 177-211 and pp. 53-64 at paras. 246-303.
[10] *Ibid*, AR, Vol. I, pp. 40-43 at paras. 183-191, 194-201, and pp. 53-59 at paras. 246-285.

8. The Respondents filed and later abandoned their appeals from the order of committal.[11] As observed by the Court of Appeal in its decision, the prosecution's case against the Respondents is strong.[12]

B. The Minister's Reasons for Surrender

9. The Respondents each provided written submissions to the Minister, emphasizing different factors in opposing their surrender to India. The Respondent Badesha focussed his submissions on issues surrounding the death penalty, whether India would provide him with a fair trial, the reliability of the evidence upon which he was committed, and concerns about his ability to get proper medical care in prison in India insofar as he suffered from degenerative arthritis and bladder pain syndrome for which he takes medications.[13] Relying on general human rights reports concerning India and the conditions in its prisons,[14] the Respondent Badesha argued that his advanced years and medical condition would make his surrender contrary to s. 7 of the *Charter* and s. 44(1)(a) of the *Extradition Act*.[15]

10. The Respondent Sidhu also raised multiple issues in arguing against surrender, including the reliability of the evidence upon which she was committed.[16] She made reference to the widespread use of torture and gender-based violence as described in a 2012 Human Rights Watch Report.[17] The primary focus of her submissions was on the reliability of any assurances provided by India that it would not impose the death penalty.[18] She also indicated that she had no family support in India, that she had experienced serious heart problems requiring the care of a cardiologist, and that she only had a grade 5 education which makes her ill-equipped to navigate a foreign judicial system.[19]

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[11] Order of Court of Appeal dismissing appeal as abandoned (Badesha), AR, Vol. II at p. 18; Order of Court of Appeal dismissing appeal as abandoned (Sidhu), AR, Vol. II at p. 22.
[12] *Badesha BCCA*, AR, Vol. I, p. 136 at para. 70.
[13] Badesha's Submissions to the Minister, AR, Vol. III at p. 46.
[14] *Ibid*, AR, Vol. III at p. 47.
[15] S.C. 1999, c. 18.
[16] Sidhu's Submissions to the Minister, AR, Vol. IV at pp. 95-102.
[17] *Ibid*, AR, Vol. IV at p. 94.
[18] *Ibid*, AR, Vol. IV at pp. 93-95.
[19] *Ibid*, AR, Vol. IV at p. 104.

11. On November 27, 2014, the Minister ordered the Respondents' surrender.[20] In reasons addressed to each of the Respondents respectively, the Minister concluded that their surrender would not "shock the conscience" or be "unjust or oppressive" contrary to s. 44(1)(a) of the *Extradition Act*. The Minister exercised his discretion to make his surrender orders conditional upon the receipt of formal diplomatic assurances from India that: (a) the Respondents will not face the death penalty if convicted; (b) the Respondents will receive the medical care they require and that every reasonable effort will be made to ensure their safety while in custody; (c) Canadian consular officials will have unrestricted access to the Respondents, and (d) Canadian consular officials will have access to the Indian court proceedings.[21]

12. The Minister concluded that India can be trusted to honour its death penalty assurances.[22] He observed that the Respondents had provided no evidence that India has ever failed to abide by diplomatic assurances given to Canada or any extradition partner.[23] The Minister noted that compliance with diplomatic assurances is a matter of public honour for the country concerned and that failure to comply with such assurances would have serious international repercussions.[24]

13. With respect to the fair trial concerns raised by the Respondent Badesha in his written submissions, the Minister acknowledged reports of corruption, some of which deal specifically with India's judicial system.[25] The Minister noted, however, that there is no evidence of corruption, intimidation or torture in India's investigation of the Respondents' co-accused or any suggestion that the Indian trial court had acted in an improper manner.[26] The Minister observed that Badesha's allegations of corruption were of a general nature relating to the Indian judicial system, and that he had not alleged any specific instances of coercion or corruption in the Indian investigation or trial of the co-accused, who by all indications received a fair trial.[27] Furthermore, the Minister also took into account the safeguards and guarantees of India's justice system, noting that India's constitution, like s. 7 of the *Charter*, guarantees the protection of life and personal

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[20] Order of Surrender (Badesha); Order of Surrender (Sidhu), AR, Vol. II, at pp. 9-12.
[21] *Ibid*, AR, Vol. II at p. 10 and p. 12.
[22] Minister's Surrender Reasons (Badesha); Minister's Surrender Reasons (Sidhu), AR, Vol. I at p. 74 and p. 89.
[23] *Ibid*, AR, Vol. I at p. 73 and pp. 89-90.
[24] Minister's Surrender Reasons (Badesha) AR, Vol. I at p. 74; Minister's Surrender Reasons (Sidhu), AR, Vol. I at p. 90.
[25] Minister's Surrender Reasons (Badesha), AR, Vol. I at p. 75.
[26] *Ibid*, AR, Vol. I at pp. 75 and 77.
[27] *Ibid*, AR, Vol. I at p. 75.

liberty.[28] In the absence of compelling information suggesting that Badesha would be subjected to unfair treatment, the Minister indicated that, as India is a treaty partner, he is entitled to assume that Badesha will receive a fair trial in relation to the serious allegations for which he is sought.[29]

14. Finally, the Minister addressed the arguments raised by the Respondents concerning Indian prison conditions and India's ability to provide for the Respondents' medical needs and safety while in custody.[30] The Minister also acknowledged the findings of human rights organizations concerning incidents of torture and violence in Indian prisons and the particular threat of mistreatment faced by women.[31]

15. In response to these submissions, the Minister sought additional information from the Indian government and the Canadian High Commission in India with respect to prison conditions in India and in particular with respect to the ability of the Indian prison system to provide adequate medical care to the Respondents.[32] The Minister advised the Respondents that according to information received from India's Ministry of External Affairs, medical officers in the Punjab region make frequent visits to the prisons, are on call 24 hours a day, and are required to take necessary measures to maintain the health of the inmates.[33] Furthermore, prisons in the Punjab region have modern medical equipment and access to medical specialists and specialized medical facilities.[34] The Canadian High Commission in India advised the Minister that prisons in the Punjab region have facilities to provide basic medical care and more specialized care is provided to inmates at local hospitals.[35]

16. As for the reports of violence and mistreatment in Indian prisons, the Minister took note of the following:

- India is a democracy, governed by the rule of law and its constitution guarantees the protection of life and personal liberty;[36]

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[28] *Ibid*, AR, Vol. I at p. 76.
[29] *Ibid*, AR, Vol. I at p. 77.
[30] Minister's Surrender Reasons (Badesha), AR, Vol. I, at pp. 78-80; Minister's Surrender Reasons (Sidhu), AR, Vol. I at pp. 99-100.
[31] Minister's Surrender Reasons (Badesha); Minister's Surrender Reasons (Sidhu), AR, Vol. I at p. 78 and pp. 92-93.
[32] Minister's Surrender Reasons (Badesha), AR, Vol. I at p. 78; Minister's Surrender Reasons (Sidhu), AR, Vol. I at p. 100.
[33] *Ibid*.
[34] *Ibid*.
[35] *Ibid*.
[36] Minister's Surrender Reasons (Badesha), AR, Vol. I at p. 76; (Minister's Surrender Reasons (Sidhu), AR, Vol. I at pp. 92-93.

- The Indian government has been making efforts to enact legislation under the *Prevention of Torture Bill*[37] which would permit ratification of the *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*;[38]

- India is a party to the *International Covenant on Civil and Political Rights*,[39] Article 7 of which prohibits the use of torture or cruel, inhuman or degrading treatment or punishment;[40]

- According to human rights reports provided to the Minister by the Respondent Sidhu, the Indian judiciary has condemned custodial violence and torture and "continued to play a significant role by ruling against torture and extrajudicial killings by law enforcement personnel";[41]

- According to recent press reports from the Times of India, efforts are being made by the Indian judiciary to address and condemn incidents of custodial violence;[42] and

- There is no information to suggest that any of the Respondents' co-accused had suffered torture or coercion at the hands of Indian authorities.[43]

17. In all the circumstances, the Minister was satisfied that India is committed to addressing the problems in Indian prisons.[44] Taking into account the information provided to him about the availability of health care in the prison system and considering the serious conduct for which the Respondents are sought, the Minister concluded that their health problems would not cause their surrender to be "unjust or oppressive" or contrary to section 7 of the *Charter*.[45] He made his surrender order conditional upon receiving assurances that the Respondents will be provided with any needed medical care and medications while in custody and that all reasonable steps will be taken to ensure their safety.[46] The Minister specifically turned his mind to the important role played by diplomatic assurances within extradition relationships and the grave implications for

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[37] Minister's Surrender Reasons (Sidhu), AR, Vol. I at p. 93.
[38] 1465 U.N.T.S. 85 ("*CAT*") (https://treaties.un.org/doc/Publication/UNTS/Volume%201465/volume-1465-I-24841-English.pdf).
[39] 999 U.N.T.S. 171 ("*ICCPR*") (https://treaties.un.org/doc/publication/unts/volume%20999/volume-999-i-14668-english.pdf).
[40] Minister's Surrender Reasons (Sidhu), AR, Vol. I at p. 93.
[41] *Ibid*.
[42] *Ibid*.
[43] Minister's Surrender Reasons (Badesha), AR, Vol. I at pp. 75-77.
[44] Minister's Surrender Reasons (Sidhu), AR, Vol. I at p. 93.
[45] Minister's Surrender Reasons (Badesha), AR, Vol. I at pp. 79; Minister's Surrender Reasons (Sidhu), AR, Vol. I at pp. 79 and 99.
[46] Minister's Surrender Reasons (Badesha), AR, Vol. I at p. 85; Minister's Surrender Reasons (Sidhu), AR, Vol. I at p. 105.

states that do not live up to their commitments.[47] He observed that the Respondents had provided no evidence that India has ever failed to abide by diplomatic assurances given to Canada or any other treaty partner.[48]

18. On January 18, 2015, the Minister advised the Respondents that India had provided assurances sufficient to meet the conditions of the surrender order. The Minister was satisfied that India would not jeopardize its treaty relationship with Canada by breaching the assurances and confirmed that surrender to India on the basis of these assurances would not be "unjust or oppressive" and would not "shock the conscience."[49]

C. The Reasons of the Court of Appeal

19. The Respondents raised three main issues in seeking judicial review of the Minister's surrender order: (a) whether India's death penalty assurances are reliable; (b) whether the Respondents will receive a fair trial; and (c) whether the Respondents' health and safety will be compromised in an Indian prison.[50] All three members of the Court of Appeal agreed that the first two issues did not serve as a basis for interfering with the Minister's order.[51]

20. With respect to the death penalty assurances, the Court of Appeal accepted that there exists a presumption that India, as Canada's treaty partner, will act in good faith and not conduct itself in a manner that would jeopardize its treaty relationship with Canada or other states.[52] The majority recognized that there is no evidence of conduct by the Indian authorities to rebut this presumption.[53] As for the fair trial concerns, the Court observed that the Respondents' trials will be public and can be observed by Canadian consular staff.[54] As there was no evidence of any

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[47] *Ibid*, AR, Vol. I, at pp. 73 and 91.
[48] Minister's Surrender Reasons (Badesha), AR, Vol. I at pp. 74; Minister's Surrender Reasons (Sidhu), AR, Vol. I at p. 90.
[49] Minister's letter confirming assurances (Badesha); Minister's letter confirming assurances (Sidhu), AR, Vol. I at pp. 106-111.
[50] *Badesha BCCA*, AR, Vol. I, p. 124 at paras. 31-32.
[51] *Ibid*, AR, Vol. I, p. 115 at para. 7 and p. 139, at para. 75.
[52] *Ibid*, AR, Vol. I, pp. 127-128 at paras. 44-45.
[53] *Ibid*.
[54] *Ibid*, AR, Vol. I, pp. 128-129 at paras. 47-49.

unfairness in the criminal proceedings involving the Respondents' co-accused in India, the Court concluded that it is unlikely that the Respondents face a real risk of an unfair trial.[55]

21. The Court of Appeal was divided on the reasonableness of the Minister's reliance on the health and safety assurances. Donald J.A., writing for the majority (Newbury J.A. concurring), concluded that the Minister's decision to rely on the Indian health and safety assurances was unreasonable and should be set aside. On the basis of evidence of human rights violations within India's prisons generally, the majority concluded that there is "a valid basis for concern that the applicants will be subjected to violence, torture and/or neglect if surrendered".[56] The majority also held that the fact that the Minister sought assurances supported that conclusion.[57] The Minister's decision to rely on the health and safety assurances should be set aside, the majority reasoned, because the Minister did not address India's capacity to fulfill the assurances.[58] In the majority's view, reports of mistreatment in India's prisons, despite the existence of domestic laws aimed at protecting human rights, raised questions about India's capacity to honour its commitments.[59]

22. Goepel J.A. dissented. He found that the Respondents' positions amounted to a "general indictment of India's criminal justice system and the condition of its prisons."[60] Citing the Court of Appeal's own jurisprudence, he observed that a high degree of deference must be shown to the Minister's exercise of discretion on matters relating to prison conditions.[61] In numerous instances, Goepel J.A. noted, the Court of Appeal has declined to condemn the general conditions of a treaty partner's prison system on the basis that it is an unsuitable task for an appellate court and would have profound implications for Canada's extradition relationships.[62]

23. With respect to India's capacity to honour the health and safety assurances, Goepel J.A. was of the view that the Minister appropriately turned his mind to the issue.[63] He noted that that the Minister acknowledged the human rights reports placed before him as well as the concerns raised in the Respondents' submissions, took into account evidence indicating that India is

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[55] *Ibid*, AR, Vol. I, p. 129 at para. 48.
[56] *Badesha BCCA*, AR, Vol. I, p. 129 at para. 50.
[57] *Ibid*, AR, Vol. I, p.129 at para. 51.
[58] *Ibid*, AR, Vol. I, p. 132 at para. 62.
[59] *Ibid*, AR, Vol. I, p. 132 at para. 61.
[60] *Ibid*, AR, Vol. I, p. 161, at para. 125.
[61] *Ibid*, AR, Vol. I, pp. 144-151 at paras. 90-108.
[62] *Ibid*.
[63] *Ibid*, AR, Vol. I, pp. 159-160 at para. 120.

committed to addressing the problem of violence and torture in its prisons, and considered the fact that India had diplomatic incentives to comply with the assurances due to the damaging repercussions for failing to do so.[64] Goepel J.A. concluded that the Minister was aware of the human rights issues associated with Indian prisons, considered all the relevant factors and reasonably determined that it would not "shock the conscience" to surrender the Respondents to India.[65]

[64] *Ibid*, AR, Vol. I, pp. 160-161 at paras. 121-123.
[65] *Ibid*, AR, Vol. I, p. 161 at para. 124.

PART II – QUESTIONS IN ISSUE

24. The issues on appeal may be stated as follows:

1. Did the Court of Appeal err in its review of the Minister's assessment of the Respondents' risk of mistreatment?
2. Did the Court of Appeal further err in reweighing the factors considered by the Minister and substituting its own view on whether the Respondents ought to be surrendered to India?

PART III - ARGUMENT

A. The Minister's Role in Determining Surrender

25. The Minister's surrender decision lies "at the extreme legislative end of the continuum of administrative decision-making" and is viewed as being largely political in nature.[66] In reaching a decision on surrender, the Minister is required to determine whether surrender would be contrary to the principles of fundamental justice under s. 7 of the *Charter* and thereby "shock the conscience" of Canadians.[67] In addition, s. 44(1)(a) of the *Extradition Act* requires the Minister to refuse surrender where extradition would be "unjust or oppressive" ["injuste ou tyrannique"]. Where surrender would be contrary to the principles of fundamental justice, it will also be unjust or oppressive.[68] These tests create a high threshold, which will only be met in the most exceptional cases.[69]

26. This Court has confirmed that a balancing process is the proper analytic approach to be used by the Minister in determining whether the circumstances of a particular case are such that extradition ought to be refused.[70] As explained by this Court in *Burns*, "the important inquiry is to determine what constitutes the applicable principles of fundamental justice in the extradition context."[71] Canadian conceptions of what constitutes a fair criminal law are relevant to the Minister's analysis, but must necessarily be tempered by other considerations including the seriousness of the offence for which extradition is sought and the protections that would be available to the individual in the requesting state.[72] The analysis remains generally informed by comity, reciprocity, the good faith of Canada in honouring its international obligations and the presumption that the person sought will receive a fair trial in the foreign jurisdiction.[73]

27. In reaching a conclusion on surrender, the Minister is required to weigh all of the relevant factors. The factors being balanced will differ according to the context and "the outcome

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[66] *Idziak v. Canada (Minister of Justice)*, [1992] 3 S.C.R. 631 at p. 659; *Dunsmuir v. New Brunswick*, 2008 SCC 9 at para. 136.
[67] *Lake v. Canada (Minister of Justice)*, 2008 SCC 23 at para. 31 [*Lake*].
[68] *Ibid*, at para. 24.
[69] *United States v. Burns*, 2001 SCC 7 at paras. 68-69 [*Burns*]; *M.M. v. United States of America*, 2015 SCC 62 at paras. 119, 152 [*M.M.*].
[70] *Burns* at paras. 32, 64-65 and 67; *Lake* at para. 32. See also *Canada (Justice) v. Fischbacher*, 2009 SCC 46 at paras. 37-39 [*Fischbacher*].
[71] *Burns* at para 68.
[72] *Kindler v. Canada (Minister of Justice)*, [1991] 2 SCR 779 at p. 844 [*Kindler*].
[73] *Kindler* at p. 844; *United States of America v. Anekwu*, 2009 SCC 41 at para. 27 [*Anekwu*]; *Lake* at para. 39.

may well vary from case to case".[74] In discussing the relationship between s. 44(1) of the *Extraditon Act* and s. 7 of the *Charter*, this Court noted in *Lake* that similar considerations often apply to both.[75] Some of these factors may include the representations made by the person sought opposing surrender; the conduct of the proceedings in the requesting country before and after the request for extradition; the potential punishment facing the individual if surrendered; humanitarian issues relating to the personal circumstances of the individual; the need to respect the constitutional rights of the person sought, and Canada's international obligations to its extradition partner as a responsible member of the international community.[76]

28. Critical to the Minister's analysis is the consideration of Canada's international treaty obligations and relationships with foreign governments.[77] In *Lake*, this Court explained that "the need to fulfill Canada's obligations in relation to extradition is always a crucial factor" precisely because of the important objectives of the extradition regime.[78] These objectives have been identified in numerous decisions of this Court and include: (a) national and international interests in the investigation, prosecution and suppression of crime;[79] (b) the proper determination of guilt or innocence of the accused;[80] (c) the desirability that accused persons should be prosecuted in the country where the crime was allegedly committed and where the persons and witnesses most interested in bringing the accused to trial may live;[81] and (d) preventing Canada from being used as a safe haven for criminals.[82]

29. As recently recognized by this Court, the principles of fundamental justice usually support surrender to the requesting state.[83] It is only where "a particular treatment in the requesting state...sufficiently violates our sense of fundamental justice that the balance will be tilted against extradition."[84] Examples of situations that can meet the threshold include surrender to face the death penalty without diplomatic assurances, surrender where there is a substantial risk

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[74] *Burns* at para. 65.
[75] *Lake* at para. 24.
[76] *Fischbacher* at para. 38.
[77] *Lake* at para. 27; *Fischbacher* at para. 38, *Nemeth v. Canada (Justice)*, 2010 SCC 56 at para. 64 [*Nemeth*]; *M.M.* at para. 150.
[78] *Lake* at para. 27; *Sriskandarajah v. United States of America*, 2012 SCC 70 at para. 10 [*Sriskandarajah*].
[79] *United States of America v. Cotroni*, [1989] 1 S.C.R. 1469 at pp. 1485-1486 [*Cotroni*]; *Burns* at para. 72; *Sriskandarajah* at para. 10.
[80] *Cotroni* at p. 1487; *Sriskandarajah* at para. 10.
[81] *Burns* at para. 72.
[82] *Lake* at para. 39; *Sriskandarajah* at para. 10.
[83] *Canada (Attorney General) v. Barnaby*, 2015 SCC 31 at para. 2 [*Barnaby*].
[84] *Barnaby* at para. 2; *Caplin v. Canada (Justice)*, 2015 SCC 32 at para. 1 [*Caplin*]; *Burns* at para. 69.

of torture or other serious human rights violations or factors specific to the individual including youth, insanity, mental disorders or pregnancy.[85]

B. The Standard of Review

30. In *Lake*, this Court held that the Minister's decision to order surrender, including the Minister's assessment of a person sought's *Charter* rights, is to be accorded deference by a reviewing court.[86] Owing to the vital importance of Canada's extradition relationships[87] and the executive's expertise in the area of foreign relations, reviewing courts must exercise "the utmost circumspection" in assessing the Minister's decision.[88] Provided the Minister applied the correct legal tests, her conclusions, including those under the *Extradition Act* and the *Charter*, are entitled to deference on review and are not to be interfered with by a reviewing court unless they are demonstrated to be unreasonable.[89] Such cases will be "exceptional cases of 'real substance.'"[90] The threshold to be met to justify appellate intervention is a high one.[91] The reviewing court is not to re-weigh the relevant factors and substitute its own views; rather the reviewing court's task is to determine whether the Minister considered the relevant facts and reached a defensible conclusion that falls within a range of reasonable outcomes.[92]

C. The Assessment of Risk in the Extradition Context

31. While it is the role of the Minister to balance the factors for and against extradition and to have a wide measure of appreciation of the circumstances that would "shock the conscience" or be "unjust or oppressive", this Court recognized in *Nemeth* that "it is the person sought for extradition who bears the burden of demonstrating that such circumstances exist."[93] Appellate jurisprudence has consistently recognized that, in determining whether surrender will be contrary to s. 7 of the *Charter* or s. 44(1)(a) of the *Extradition Act*, the Minister's assessment of risk to the person sought involves a two-step analysis:

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[85] *Burns* at paras. 65 and 68; *Canada v. Schmidt*, [1987] 1 S.C.R. 500 at p. 522 [*Schmidt*].
[86] *Lake* at para. 34.
[87] *Cotroni* at p. 1486.
[88] *Kindler* at p. 837; *Argentina (Republic) v. Mellino*, [1987] 1 S.C.R. 536 at pp. 557-58 [*Mellino*].
[89] *Lake* at paras. 3, 26, 34 and 41.
[90] *Lake* at para. 34; *Barnaby* at para. 12.
[91] *M.M.* at paras. 119 and 152.
[92] *Lake* at para. 41.
[93] *Nemeth* at para. 72.

(a) First, when surrender is opposed on the basis that there is a risk of mistreatment at the hands of foreign authorities, it is the person sought who must demonstrate the existence of a substantial risk of mistreatment, such that his or her surrender would "shock the conscience" or be "unjust or oppressive".[94]

(b) Second, where the person sought meets this initial burden, it is for the Minister to determine, on the basis of all the information available, including any assurances that have been provided by the requesting state, the extent of the risk and whether it has been subsequently attenuated, so that surrender would not "shock the conscience" or be "unjust or oppressive".[95]

32. In the extradition context, appellate courts in Quebec, Ontario and British Columbia have consistently held that the person sought must establish a substantial risk of serious mistreatment on a balance of probabilities standard.[96] This is also the standard that has been applied by the Federal Court of Appeal in assessing whether a person is at risk of torture if deported pursuant to the *Immigration and Refugee Protection Act*.[97]

33. In opposing surrender, an applicant seeks a *Charter*-based remedy. As recognized by McMurtry C.J.O. in *Hurley*, the balance of probabilities standard is the appropriate threshold to be met by an applicant asserting a breach of his or her *Charter* rights. [98]

34. Furthermore, in the extradition context, allegations that a treaty partner will engage in human rights violations are particularly serious and directly engage the principles of comity, mutual trust, good faith and respect for extradition partners unique to the extradition relationship.[99] Canada only enters into extradition agreements with states having justice systems deemed by the

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[94] *Mendez Suarez c. Canada (Minister of Justice) (United States of Mexico)*, 2014 QCCA 281 at paras. 3, 14, leave to appeal dismissed, [2014] C.S.C.R. No. 128 [*Mendez Suarez*]; *Reinales c. Canada (Minister of Justice)*, 2012 QCCA 836 at para. 20, leave to appeal dismissed, [2012] C.S.C.R. No. 292 [*Reinales*]; *United States of America v. Pannell*, 2007 ONCA 786 at paras. 30-38, leave to appeal discontinued, [2008] S.C.C.A. No. 21; *Hungary v. Horvath*, 2007 ONCA 734 at para. 28, leave to appeal dismissed, [2007] S.C.C.A. No. 604; *Maydak v. United States of America*, 2004 BCCA 478 at para. 75, leave to appeal discontinued, [2005] S.C.C.A. No. 151; *Pacificador v. Canada (Minister of Justice)* (2002), 166 C.C.C. (3d) 321 at para. 55, leave to appeal dismissed, [2002] S.C.C.A. No. 390 [*Pacificador*]; *United States of Mexico v. Hurley* (1997), 116 C.C.C. (3d) 414 at paras. 55-58, leave to appeal discontinued, [1997] S.C.C.A. No. 45 [*Hurley*].

[95] See for example *Pacificador* at paras. 53-54; *Saxena v. Canada*, 2009 BCCA 223 at para. 23, leave to appeal dismissed, [2009] S.C.C.A. No. 301 [*Saxena 2009*].

[96] See note 94.

[97] S.C. 2001, c. 27; *Li v. Canada (Minister of Citizenship and Immigration*), 2005 FCA 1 at paras. 27-29, leave to appeal dismissed, [2005] S.C.C.A. No. 119.

[98] *Hurley* at para 58.

[99] *United States of America v. Ferras*, 2006 SCC 33 at para. 33; *Cotroni* at p. 1495.

executive to be fair.[100] It is the executive that determines, after assessing the compatibility of foreign justice systems with our own, the states with which Canada will enter into an extradition relationship.[101] As stated by this Court in *Schmidt* "this is an area where the executive is likely to be far better informed than the courts, and where the courts must be extremely circumspect so as to avoid interfering unduly in decisions that involve the good faith and honour of this country in its relations with other states."[102] Accordingly, when Canada agrees to proceed with an extradition request from a treaty partner, the executive has already conducted an initial assessment of that state's legal system, including the substantive and procedural protections offered to an accused person and the correctional system to which the accused would be subjected upon conviction. This assessment by the executive serves as the foundation for the conclusion that the requesting state is a suitable extradition partner.

35. For these reasons, as observed by the British Columbia Court of Appeal in *Saxena (2009)*, allegations that foreign authorities are going to misconduct themselves in relation to the person sought should not be given credence in the absence of evidence.[103] The unique features of the extradition relationship demand that such claims be established to a reasonably high evidentiary standard.

36. Like domestic authorities, international jurisprudence also consistently imposes an evidentiary burden on the person sought when alleging that foreign authorities will engage in torture or other human rights violations. International authorities, however, are not consistent on the question of the onus to be met. For example, while U.S. law imposes a "more likely than not" standard on the person sought,[104] the European Court of Human Rights requires "substantial grounds" of a "real risk", which is recognized as more than a mere possibility of mistreatment, but less than a balance of probabilities.[105] Appellate courts in Great Britain also require the person sought to establish a "real risk", the establishment of which requires "strong grounds for believing" that he or she will face serious mistreatment at the hands of foreign authorities.[106] This

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[100] *Burns* at para. 73; *M.M.* at para. 120.
[101] *Schmidt* at p. 523; *Kindler* at p. 845; *Burns* at para. 73.
[102] *Schmidt* at p. 523.
[103] *Saxena 2009* at para. 23 citing *United States of America v. Freimuth*, 2004 BCSC 154 at para. 56.
[104] *Trinidad y Garcia v. Thomas*, 683 F. 3d 952, 9th Circuit (2012) at para. 9.
[105] *Saadi v. Italy*, [2008] ECHR 179 at para. 140; *Rakhimov v. Russia*, [2014] ECHR 749 at para. 85.
[106] *R (Ullah) v Special Adjudicator*, [2004] UKHL 26 at para. 24.

onus is treated by the British courts as a "relatively high threshold".[107] Finally, in assessing allegations that a person faces torture in violation of Article 3 of the *CAT*, the Committee Against Torture considers whether an applicant has demonstrated a "foreseeable, real and personal risk",[108] one that goes beyond mere theory or suspicion but does not have to be "highly probable."[109]

37. Irrespective of the threshold to be applied at the first stage of the analysis, in this case, the majority of the Court of Appeal erred by failing to meaningfully assess whether the Respondents had met any onus at all. Both Canadian and international jurisprudence consistently require the person sought to establish a risk of serious mistreatment that is more than speculative. Instead, the majority concluded that there was a "*valid basis for concern*"[110] that the Respondents will be mistreated based on: (a) general reports on human rights conditions in India, and (b) the mere fact that the Minister sought diplomatic assurances on health and safety.

D. The Majority Erred in its Review of the Minister's Assessment of Risk

38. The majority of the Court of Appeal erred in setting aside the Minister's decision that the Respondents could be safely surrendered to India on the basis of general information concerning India's correctional system, unrelated to the specific circumstances of the Respondents. There was no evidence before the Minister that the Respondents have been the subject of threats from officials of the requesting state, have previously suffered abuse at the hands of foreign officials, are members of a class or group persecuted within the requesting state or that their co-accused were mistreated by Indian authorities in any way.

39. Rather than considering whether the extradition of the Respondents to India "shocks the conscience", the majority took the unprecedented step of reviewing and condemning a fundamental component of a treaty's partner's justice system, not as it relates to a specific prison or even a specific region, but for the Republic of India as a whole. The majority compounded this error by considering the mere fact that the Minister sought an assurance from India with respect to

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[107] *Aleksynas & Others v Lithuania*, [2014] EWHC 437 (Admin) at para. 98; *Richards v. Govt. of Ghana*, [2013] EWHC 1254 (Admin) at para. 58; *Herdman & Ors v. City of Westminster Magistrates Court*, [2010] EWHC 1533 (Admin) at paras. 42, 43, 46.
[108] *L.J.R. v. Australia*, Communication No. 316/2007 (November 10, 2008) at para. 8 [*L.J.R. v. Australia*].
[109] UN Committee Against Torture, *General Comment No. 1: Implementation of Article 3 of the Convention in the Context of Article 22 (Refoulement and Communications)*, 21 November 1997, A/53/44, annexIX [*General Comment No. 1*].
[110] *Badesha BCCA*, AR, Vol. I, p. 129 at para. 50.

health and safety, as support for its conclusion that the Respondents face a substantial risk of serious mistreatment in the requesting state.

1. Generic Evidence of Human Rights Conditions is Insufficient to Establish a Substantial Risk of Mistreatment

40. While generic evidence of human rights conditions, such as is often found in human rights reports, can be an important component in the Minister's assessment of whether surrender will "shock the conscience" or be "unjust and oppressive", it cannot, on its own, establish that the person sought faces a substantial risk. A substantial risk of serious mistreatment must be based on evidence of personalized risk, unique to the person sought.

41. Human rights reports have important limitations. They do not comprehensively assess conditions throughout a state and for all segments of the population within that state. The conclusions reached may be based on conditions in a particular region or for an identifiable segment of the population to which the Respondents do not belong. For example, reports that foreign authorities have engaged in abuses in relation to political dissidents have little or no connection to the circumstances of persons charged with non-political offences, such as the Respondents.[111] Such reports will often be so general and vague as to the nature and extent of the alleged human rights abuses that they cannot, without more, meet the appropriately high balance of probabilities threshold to establish the existence of a substantial risk of serious mistreatment.

42. Moreover, a refusal to surrender on the basis of generic evidence of risk would not be in keeping with Canada's international treaty obligations. As recently observed by this Court, "[a] refusal of surrender is deeply inconsistent with the principles of international cooperation that are the foundation of an extradition treaty."[112] Such a decision, which could have far-reaching consequences for Canada's international relations, must be based on concrete evidence that the person sought faces a risk that is personalized and specific. As stated by the Ontario Court of Appeal in assessing the risk of prosecution on the basis of torture-derived evidence, "[w]ere it not so, the mere involvement of a state with a questionable human rights record would be enough to trigger the Minister's obligations to satisfy himself or herself – a standard that would not give sufficient weight to Canada's international comity and treaty obligations regarding extradition."[113]

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[111] For example, see *Saxena 2009* at para. 23.
[112] *Barnaby* at para. 6.
[113] *France v. Diab*, 2014 ONCA 374 at para. 242, leave to appeal dismissed, [2014] S.C.C.A. No. 317.

43. In this case, by relying on generic evidence of country conditions, in the absence of evidence of personalized risk, the majority took an approach to the question of surrender that has been rejected by both Canadian and international jurisprudence and constitutes a fundamental error in law.

a) The Majority's Reliance on Generic Human Rights Evidence

44. A review of the evidence cited by the majority of the Court of Appeal regarding India's treatment of prisoners demonstrates its limited evidentiary value in assessing the risks faced by the Respondents. The majority relied heavily on a report entitled "*Torture in India 2011*"[114]. According to the 2011 Report, between 2001 and 2010, 12,727 individuals died while in Indian police and judicial custody.[115] The 2011 Report states that many of these deaths are a direct result of torture.[116] The author's methodology in reaching these conclusions is not specified. As for the State of Punjab, the region in which the Respondents would face trial, the 2011 Report states that 739 individuals died in judicial custody during the nine year period that was studied.[117] There is no indication in the report of how many of these individuals died as a result of torture or other mistreatment, rather than as a result of natural causes. Of the thirty-four specific cases of alleged torture of individuals while in Indian judicial custody described in the 2011 Report, only five of those cases originate from the Punjab.[118] In only one of those five cases was any sort of misconduct on the part of Indian officials substantiated.[119]

45. The majority also cited a specific passage of the 2011 Report to support a concern about the vulnerability of women and sexual violence in Indian custody.[120] In accepting this assertion, however, the majority referred to a section of the 2011 Report dealing with torture in *police* custody, rather than *judicial* custody.[121] Such concerns do not relate to the specific circumstances of the Respondents, whose submissions to the Minister centered on the availability of medical care in Indian judicial custody.

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[114] *Torture in India*, Asian Centre for Human Rights ("2011 Report"), AR, Vol. V, at pp. 3-109.
[115] *Ibid*, AR, Vol. V, at p. 8.
[116] *Ibid*.
[117] *Ibid*, AR, Vol. V, at p. 11.
[118] *Ibid*, AR, Vol. V, at pp. 66-72.
[119] *Ibid*, AR, Vol. V, pp. 72.
[120] *Badesha BCCA*, AR, Vol. I, p. 121, at para. 23.
[121] 2011 Report, AR, Vol. V, at p. 42.

46. Finally, the majority cited sections of the 2011 Report in support of the assertion that Indian prisoners place themselves at risk in complaining about custodial conditions and that law enforcement enjoys virtual impunity for human rights violations.[122] However, the 2011 Report provides no data as to how many such cases occurred in the state of Punjab and describes only a single incident arising from a prison in Punjab in which a prison official was suspended after allegations of torture and mistreatment were substantiated.[123] As for the reports relating to the impunity of law enforcement referred to by the majority, those claims also come from a section of the 2011 Report dealing with torture in police custody.[124] Considering that the Respondents' submissions to the Minister dealt exclusively with concerns about judicial custody and the fact that there is no reason to believe that the Respondents would have anything but minimal contact with law enforcement if surrendered to India, the majority's conclusion in this regard has little connection to the actual circumstances of the Respondents.

47. In addition, the majority placed substantial weight on the U.S. Department of State's *Country Reports on Human Rights Practices for 2013* concerning India.[125] The 2013 Report globally considers the human rights situation in India's twenty-eight states and seven union territories,[126] including areas in which there is armed conflict between the government and dissident groups.[127] While the 2013 Report states that human rights problems in India include poor prison conditions that were frequently life threatening, the 2013 Report does not discuss or account for any variation in the conditions of India's 1394 prisons, or the status of prisons in the Punjab.[128] The Punjab is not mentioned in a list of particular Indian states singled out for problems with prison overcrowding and prison administration.[129] In fact, in its sixty-eight pages, the 2013 Report makes only four references to the Punjab, none of which relate to prisons or

[122] *Badesha BCCA*, AR, Vol. I, p. 121, at paras. 25 and 26.
[123] 2011 Report, AR, Vol. V, at p. 72.
[124] *Ibid*, AR, Vol. V, at p. 52.
[125] *Country Reports on Human Rights Practices for 2013 India*, United States Department of State ("2013 Report"), AR, Vol. IV, at pp. 17-84; *Badesha BCCA*, AR, Vol. I, pp. 122-123, at para. 29.
[126] 2013 Report, AR, Vol. IV, at p. 17.
[127] *Ibid*, AR, Vol. IV, at p. 21.
[128] *Ibid*, AR, Vol. IV, at pp. 25-27.
[129] *Ibid*, AR, Vol. IV, at p. 25.

human rights violations perpetrated by the State.[130] To the extent the 2013 Report singles out the Punjab, it is in relation to the high incidence of honour killings perpetrated against women.[131]

48. In sum, the majority of the Court of Appeal extrapolated from general human rights reports on India to make specific findings about the conditions that will be faced by the Respondents in the State of Punjab. The majority effectively condemned India's correctional system as a whole, a fundamental component of a justice system deemed sufficiently compatible by the Canadian executive branch in signing an extradition treaty.

b) Canadian Jurisprudence Consistently Concludes that a Risk of Serious Mistreatment Must be Personalized

49. Courts of appeal have consistently held that the onus to establish a substantial risk of serious mistreatment cannot be met on the basis of evidence that is not specific to the circumstances of the person sought. These courts, including the British Columbia Court of Appeal, have consistently held that there must be a nexus between evidence or allegations of serious mistreatment engaged in by a foreign state and the particular circumstances of the person sought to justify interference in the Minister's surrender order.

50. The Quebec Court of Appeal's decisions in *Plagaro-Perez De Arrilucea v. Kingdom of Spain*[132] and *Manolopoulos v. Canada (Minister of Justice)*[133] are instructive. In the former case, the persons sought were wanted by Spain to serve a sentence following a conviction for a series of arsons in the Basque region that, according to Spanish authorities, were connected to the long-standing conflict between Spain and Basque nationalist groups.[134] In opposing surrender, the persons sought relied on human rights reports, and other evidence, describing acts of torture perpetrated by Spanish authorities against those of Basque ethnicity.[135] The Court of Appeal concluded that such evidence only invited speculation as to the circumstances of the person sought and did not serve as a concrete basis for finding a substantial risk of torture.[136]

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[130] *Ibid,* AR, Vol. IV, at pp. 32 and 60.
[131] *Ibid,* AR, Vol. IV, at p. 32.
[132] (2004), 195 C.C.C. (3d) 55, leave to appeal dismissed, 2005 C.S.C.R. No. 68 [*Arrilucea*].
[133] [2006] A.Q. No. 10858 (C.A.) [*Manolopoulos*].
[134] *Arrilucea* at paras. 84; 91-92.
[135] *Ibid,* at paras. 124, 159.
[136] *Ibid,* at paras. 124, 128-132, 134, 159.

51. In *Manolopoulos,* the person sought opposed surrender on the basis of the poor detention conditions that prevail in U.S. prisons. The Quebec Court of Appeal rejected this argument as a basis for finding that the person sought faced a substantial risk of mistreatment, pointing out that the corollary of the person sought's argument would be a ban on extradition to the United States, an argument it found to be "indéfendable".[137]

52. More recently, the Quebec Court of Appeal affirmed the reasoning in the above-noted decisions, including the onus on the person sought to establish a personalized risk on a balance of probabilities and the insufficiency of general evidence of prison conditions as a basis for finding that surrender "shocks the conscience."[138]

53. The decisions of the Ontario Court of Appeal are consistent with the Quebec approach. In *Pacificador,* the person sought was wanted by the Philippines for offences arising out of the assassination of a prominent political figure. The Minister ordered surrender on the basis of assurances that the death penalty would not be imposed and that the Philippines would exert its best efforts to ensure that the person sought's trial would be completed within one year from the date of his conveyance. The Court of Appeal, however, set aside the surrender order, on the basis of evidence of a "shocking and unacceptable delay" of more than a decade in bringing the person sought's co-accused, who were in custody, to trial.[139] Sharpe J.A. explained that the conclusion was based not on "an abstract assessment of the Philippine justice system", but on "concrete evidence [from] this very prosecution".[140]

54. The distinction between specific and general evidence was again emphasized by the Ontario Court of Appeal in *Saad v. United States of America*.[141] In that case, the person sought opposed his surrender on the basis that as an Arab Muslim, he could expect to be held in custody by U.S. authorities indefinitely or deported to a state where he would be persecuted.[142] The Ontario Court of Appeal considered human rights reports documenting the treatment of Arab Muslims in the United States in the aftermath of the September 11, 2001 attacks.[143] The Court of

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[137] *Manolopoulos* at para 7.
[138] *Mendez Suarez* at paras. 9-14; *Reinales* at paras. 20-23.
[139] *Pacificador* at para 50.
[140] *Ibid, at* para 54.
[141] (2004), 183 C.C.C. (3d) 97 (Ont. C.A.) [*Saad*].
[142] *Saad* at paras. 49, 51.
[143] *Ibid,* at para. 53.

Appeal held, however, that the person sought had failed to meet the onus upon him due to the absence of an evidentiary link to the treatment he could be expected to receive upon surrender.[144]

55. Prior to the decision under appeal, jurisprudence from British Columbia consistently rejected general evidence of prison conditions as a basis for concluding that extradition would "shock the conscience". In *Gwynne v. Canada (Minister of Justice)*,[145] a case centering on prison conditions in the State of Alabama, Goldie J.A., writing for the majority, found the circumstances in Alabama's prisons were "subjectively abhorrent"[146] and "subjectively shocking."[147] However, the majority was not prepared to conclude that surrender would violate the principles of fundamental justice or that a general review of Alabama's justice system was an appropriate task for an appellate court under s. 7 of the *Charter*.[148]

56. Following *Gwynne*, the Court of Appeal in *United States of America v. Reuma*yr[149] again refused to quash the Minister's surrender order on the basis of general arguments that prison conditions in the United States fall well below Canadian constitutional standards. Although the Court of Appeal ultimately set aside the surrender order on other grounds, the Court was unanimous in its rejection of an invitation to condemn the U.S. prison system. After considering the Court's decision in *Gwynne*, Mackenzie J.A. held that submissions generally condemning the American prison system were not sufficient to justify a conclusion that surrender would be unjust or oppressive.[150] The decisions in *Gwynne* and *Reumayr* were applied as well by the same court in *United States of America v. Johnstone*.[151]

c) International Jurisprudence Supports the View that Risk Must be Personalized

57. Like Canadian appellate jurisprudence, international jurisprudence has also consistently rejected generalized evidence of human rights conditions as a basis for refusing extradition.

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[144] *Ibid*, at paras. 53-54.
[145] (1998), 103 B.C.A.C. 1, leave to appeal dismissed, [1998] S.C.C.A. No. 95 [*Gwynne*].
[146] *Ibid* at para. 39.
[147] *Ibid* at para. 53-54.
[148] *Ibid* at paras. 47 and 51.
[149] 2003 BCCA 375 [*Reumayr*].
[150] *Reumayr* at para. 29.
[151] 2013 BCCA 2 at paras 13, 47-53.

European Court of Human Rights

58. The European Court of Human Rights (ECHR) adjudicates alleged human rights violations under the *Convention for the Protection of Human Rights and Fundamental Freedoms*[152] in relation to forty-seven Council of Europe member states. In a vast body of jurisprudence, the ECHR has frequently considered whether extradition should be prohibited from member states on the basis of allegations of a risk of torture or inhuman or degrading treatment, contrary to Article 3. To establish a real risk, the ECHR has held that an applicant must put forward specific evidence with reference to individual circumstances substantiating the applicant's fears of ill-treatment. The ECHR has stated that it will insist on such corroboration in all but extreme cases. Generalized evidence of country conditions will not, without more, suffice to bar extradition.[153]

59. These principles were articulated by the ECHR in *Mamatkulov and Askarov v. Turkey*[154] in which two suspected terrorists sought for extradition by Uzbekistan argued that their surrender would violate Article 3 of the *European Convention* as a result of the risk of mistreatment in prison. In support of their argument, they relied on international human rights reports that described "conditions […] so poor as to amount to cruel, inhuman and degrading treatment" and "ill-treatment and torture by law enforcement officials of alleged supporters of banned Islamist opposition parties [which]…continued unabated".[155] In dismissing their application, the ECHR concluded that the applicants had not established a real risk of serious mistreatment. While human rights reports indicated that torture was practiced in Uzbekistan, these findings "describe the general situation in Uzbekistan" and did not "support the specific allegations made by the applicants in the instant case and require corroboration by other evidence."[156]

60. On the other hand, where the risk of mistreatment is personalized, and there are no other factors mitigating that risk, the ECHR has intervened. Such was the case in *Savriddin Dzhurayev v. Russia*,[157] in which the Court considered the arguments of an applicant who claimed that his

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[152] 213 U.N.T.S. 221 [*European Convention*].
[153] See *Dzhaksybergenov v Ukraine* (No 12343/10), 10 February 2011 at para 35; *K. v. Russia*, [2013] ECHR 451 at paras. 66-73 [*K v. Russia*]; *Kamyshev v. Ukraine*, [2010] ECHR 696 at paras. 43-45; *Yefimova v. Russia*, [2013] ECHR 158 at paras. 200-213 [*Yefimova*]; *Bakoyev v. Russia*, [2013] ECHR 114 at paras. 113-121 [*Bakoyev*].
[154] (2005), ECHR 64 [*Mamatkulov*].
[155] *Mamatkulov* at paras 54-55.
[156] *Mamatkulov* at paras 71-73, 77.
[157] [2013] ECHR 375 [*S. Dzhurayev*].

extradition from Russia to Tajikistan to face charges relating to his alleged involvement in a criminal organization and banned Islamic group would violate his Article 3 rights. Following the initiation of extradition proceedings by Russian authorities, the applicant was abducted in Moscow, detained and tortured in a mini-van, and then forcibly transferred to Tajikistan where he was tried and convicted.[158] The Court concluded that these personal circumstances, coupled with the general human rights situation in Tajikistan, provided a substantial basis upon which to conclude that the applicant faced a real risk of torture in his home country.[159]

61. Similarly, the ECHR has held that risk will be established where there are substantial grounds to believe that the person sought is a member of a vulnerable group,[160] that co-defendants in the same proceedings have been mistreated,[161] or where the person sought has already suffered mistreatment at the hands of the requesting state's officials.[162]

Committee Against Torture

62. Like the ECHR, the Committee Against Torture, which may consider individual complaints alleging violations of the rights set out in the *CAT,* has also distinguished between general and specific evidence of risk.[163] The Committee has repeatedly stated in its consideration of individual cases alleging violations of a state's *non-refoulement* obligations under Article 3 of the *CAT* that an individual complainant must demonstrate a "foreseeable, real and personal risk" of being subjected to torture.

63. For example, in *L.J.R. v. Australia*, the applicant alleged that he would face torture in the prison system of the United States on the basis of his Hispanic ethnicity and Muslim religion.[164] The Committee noted the existence of reports concerning brutality and the use of excessive force by law-enforcement personnel, numerous allegations of mistreatment of racial minorities and complaints of sexual violence within the prison system[165] but concluded that "the

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[158] *S. Dzhurayev* at paras. 19, 38-39.
[159] *Ibid* at para. 140, 170-172-173.
[160] *Tadzhibayev v. Russia,* [2015] ECHR 1053 at para. 43; *Mamadaliyev v. Russia*, [2014] ECHR 842 at para. 62; *Zokhidov v. Russia*, [2013] ECHR 110 at paras. 135, 138; *Khamrakulov v. Russia,* [2015] ECHR 385 at para. 66.
[161] *Nizomkhon Dzhurayev v. Russia,* [2013] ECHR 909 at paras. 20, 34, 126, 130 [*N. Dzhurayev*]; *Azimov v. Russia*, [2013] ECHR 342 at para. 142.
[162] *Koktysh v. Ukraine*, [2009] ECHR 2054 at para. 64.
[163] See *General Comment No. 1.*
[164] *L.J.R. v. Australia* at para. 2.3.
[165] *Ibid,* at para. 7.5.

existence of a consistent pattern of gross, flagrant or mass violations of human rights in a country" is insufficient to establish that an individual would be personally at risk.[166]

64. Conversely, in another case, the Committee identified a violation of Article 3 rights where there was evidence of widespread abuse by Tunisian police *and* information that two of the applicant's co-defendants had given confessions under torture.[167] In these circumstances, the Committee concluded that extradition created a "foreseeable, real and personal risk".[168]

Courts in the United Kingdom

65. Relying on the jurisprudence from the ECHR, British appellate courts have also refused to interfere in surrender orders on the basis of general country conditions described in human rights reports. Examples can be found in recent decisions of the England and Wales High Court,[169] and Scotland's High Court of Justiciary Appeal Court,[170] both of which have held that purely general evidence of human rights conditions will not ordinarily suffice to stop an extradition, except in extreme circumstances.

2. The Seeking of Assurances Does Not Constitute Proof of Risk

66. In assessing whether there was a substantial risk of serious mistreatment if the Respondents were surrendered to India, the majority erred in assuming that the Minister had already conceded the existence of the risk by seeking health and safety assurances.[171] The seeking of assurances does not, in itself, provide evidence that the person sought for extradition faces a substantial risk if surrendered. An automatic presumption that the seeking of assurances is an acknowledgment of a substantial risk would serve as a disincentive for any government to seek assurances or for treaty partners to grant them. Indeed, in these circumstances, the Minister exceeded what was legally required by seeking health and safety assurances after having been advised by India that the Respondents' medical needs would be met while in custody. He was

[166] *Ibid*, at paras. 7.2, 8.
[167] *Abichou v. Germany*, Communication No. 430/2010 (May 21, 2013) at paras. 11.6-11.7 [*Abichou*].
[168] *Abichou* at para. 11.7. See also *Boily v. Canada*, Communication No. 327/2007 (November 14, 2011).
[169] *Sadushi v. Government of Albania*, [2014] EWHC 2756 (Admin) at paras. 13, 25.
[170] *Kapri v. Her Majesty's Advocate (for the Republic of Albania)*, [2014] HCJAC 33 at paras. 122-123.
[171] *Badesha BCCA*, AR, Vol. I, pp. 129-130 at paras. 51, and p. 132 at para. 61.

entitled to accept this information provided to him by a treaty partner without formal assurances, in the absence of compelling evidence of a substantial risk of mistreatment.[172]

67. The Respondent Badesha raised concerns in his submissions to the Minister about his medical care while in custody in India. Accordingly, the Minister obtained information from India and the Canadian Department of Foreign Affairs about the medical care available to inmates in the Punjab. In addition, out of an abundance of caution, he sought an assurance which specifically addressed medical care. While the Minister acknowledged the serious concerns identified in the human rights reports concerning the general conditions in Indian jails, the Minister was not satisfied that the Respondent Badesha is personally at risk of mistreatment. In surrendering Badesha the Minister wrote:

> …I note that you have not alleged any specific coercion or corruption in the Indian investigation of Mr. Badesha or in the context of the trial of eleven of the co-accused persons in this case.
>
> …I am satisfied that, while there are ongoing concerns with respect to corruption and human rights violations in India, there is no compelling information before me to suggest that Mr. Badesha would be subjected to such abuses. Indeed, as I noted previously, there is an absence of any information before me to suggest that coercion, torture and / or corruption were involved in the investigation that gives rise to the extradition request from India.[173]

68. In the case of the Respondent Sidhu, although she raised concerns about general reports with respect to torture, she did not argue that she had a personalized risk of torture. The Minister identified a series of factors that satisfied him that Sidhu was not personally at risk of mistreatment, only one of which was the assurances he anticipated receiving from India. Other factors noted by the Minister included the fact that India is a democracy with a constitution that guarantees the protection of life and personal liberty; India is state party to the *ICCPR* which prohibits torture and cruel, inhuman or degrading treatment or punishment; and India's judiciary has made efforts to address incidents of custodial violence and mistreatment.[174]

69. The majority's approach in assuming that, by seeking assurances, the Minister had relieved the Respondents of the necessity of establishing a personalized risk of mistreatment, is

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[172] *Thailand v. Saxena*, 2006 BCCA 98 at paras. 56-57 [*Saxena 2006*].
[173] Minister's Surrender Reasons (Badesha), AR, Vol. I, at pp. 75-77.
[174] Minister's Surrender Reasons (Sidhu), AR, Vol. I, at pp. 92-93.

contrary to decisions of the courts of appeal in Quebec,[175] Ontario[176] and British Columbia.[177] The decisions of the ECHR provide further support for the principle that the mere fact that health and safety assurances have been sought does not in itself amount to proof of a real risk of torture or other mistreatment. The ECHR has, in numerous cases, dismissed Article 3 arguments where such assurances have been provided, even where serious concerns have been expressed in human rights reports about the prevalence of torture and other human rights abuses in the requesting state.[178] Similarly, even where an applicant has met the threshold of establishing a real risk of mistreatment, the ECHR has, as a second step, gone on to consider whether that risk is attenuated by any assurances provided.[179]

70. While the human rights record of a state giving assurances is a factor in assessing reliability,[180] as observed by Lord Phillips in a decision of the House of Lords, a "Catch-22" problem is created if the very fact of having to seek assurances means that they cannot be relied upon.[181]

E. The Majority Erred in Re-weighing the Factors Relevant to the Surrender Analysis

71. In *Lake*, this Court emphasized that in reviewing the Minister's surrender decision, an appellate court's role is not to re-assess the relevant factors and substitute its own view on surrender. Recognizing that a deferential standard of review of the Minister's decision allows for more than one possible conclusion on surrender, this Court held that an appellate court must determine whether the Minister's decision falls within a reasonable range of outcomes. Where the Minister has applied the correct test to the question of surrender, an appellate court must "ask whether the Minister considered the relevant facts and reached a defensible conclusion based on those facts."[182]

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[175] *Mendez Suarez* at paras. 2; 10-14.
[176] *Hurley* at paras. 24-25, 64.
[177] *Saxena 2006* at paras. 24; 54-55; *Saxena 2009* at para. 23.
[178] *K. v. Russia* at paras. 63-64, 73; *Yefimova* at paras. 201-202, 213; *Bakoyev* at paras. 37, 114-115, 120.
[179] *S. Dzhurayev v. Russia* at paras. 173-174; *N. Dzhurayev v. Russia* at paras. 130-131; *Kadirzhanov and Mamashev* [2014] ECHR 793 at paras. 91-95 and 99.
[180] *Suresh v. Canada*, 2002 SCC 1 at para. 125 [*Suresh*].
[181] *RB (Algeria) v. Secretary of State for the Home Department*, [2009] UKHL 10 at para. 115.
[182] *Lake* at para 41.

72. The majority of the Court of Appeal took the course it was cautioned against by this Court in *Lake*. The majority concluded that the Minister did not consider India's capacity to honour its assurances, failing to recognize, as pointed out by Goepel J.A., that the Minister specifically addressed the issue.[183] In reference to the assurances, the Minister stated that "[b]ased on information from the [Indian Ministry of External Affairs] I am satisfied that India would have the ability to comply with the said assurances."[184] In its reasons, the majority made no mention of the Minister's explicit consideration of India's capacity to comply.

73. Indeed, the Minister considered and weighed all of the relevant factors for and against surrender, including the following:

- the Respondents' submissions on their specific medical problems and concerns over their general safety;[185]
- the fact that India is a democracy, governed by the rule of law and its constitution guarantees the protection of life and personal liberty. India is also a party to international human rights instruments, including the *ICCPR*;[186]
- human rights reports setting out criticisms of India's prison conditions including problems of overcrowding, the safety of women, inadequate medical care and custodial violence;[187]
- reports confirming that the Indian judiciary has condemned custodial violence and torture and "continued to play a significant role by ruling against torture and extrajudicial killings by law enforcement personnel";[188]
- the absence of evidence that the Respondents have been mistreated by Indian authorities or that their co-accused, presently serving sentences in India, have suffered mistreatment;[189]
- information from India and the Canadian Department of Foreign Affairs confirming that India is able to provide basic and specialized medical care for inmates in the Punjab region;[190]

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[183] *Badesha BCCA*, AR, Vol. I, pp. 159-160, at para. 120.
[184] Minister's Surrender Reasons (Sidhu), AR, Vol. I, at p. 83.
[185] Minister's Surrender Reasons (Badesha), AR, Vol. I, at p. 78; Minister's Surrender Reasons (Sidhu), AR, Vol. I, at pp. 92-99.
[186] Minister's Surrender Reasons (Badesha), AR, Vol. I, at p. 76; Minister's Surrender Reasons (Sidhu), AR, Vol. I, at pp. 92-93.
[187] Minister's Surrender Reasons (Badesha), AR, Vol. I, at pp. 78-79; Minister's Surrender Reasons (Sidhu), AR, Vol. I, at p. 92.
[188] Minister's Surrender Reasons (Sidhu), AR, Vol. I, at p. 76.
[189] Minister's Surrender Reasons (Badesha), AR, Vol. I, at pp. 75 and 77.
[190] Minister's Surrender Reasons (Badesha), AR, Vol. I, at p. 79; Minister's Surrender Reasons (Sidhu), AR, Vol. I, at p. 100.

- the fact that a breach of a diplomatic assurance is a serious matter which could jeopardize India's treaty relationship with Canada and other countries and that India, therefore, has an incentive to honour its assurances;[191]

- the absence of evidence that India has a history of ignoring formal assurances given to its treaty partners;[192]

- information from the Canadian Department of Foreign Affairs that consular officials will have regular access to the Respondents, inquire into the progress of their trial, and may attend some of their court proceedings;[193]

- the fact that the Attorney General of British Columbia concluded that prosecution of the Respondents in Canada is not a realistic option;[194]

- the fact that the Respondents are sought for prosecution of criminal conduct of the most serious nature and that India has a strong interest in prosecuting a murder that took place within its borders;[195] and

- the assurances provided by India, including guarantees that all reasonable steps will be taken to ensure the Respondents' health and safety, and that Canadian consular access will be provided pursuant to India's obligations under the *Vienna Convention on Consular Relations*.[196]

74. The majority erred in failing to take note of the many key factors set out above supporting the reasonableness of the Minister's decision. Instead, the majority focused exclusively on the weight to be given to India's diplomatic assurances. It was not, however, the assurances alone that satisfied the Minister that the Respondents' surrender would not "shock the conscience" or be "unjust and oppressive". Rather, the assurances from India formed part of the factual matrix considered by the Minister that, examined as a whole, caused him to be satisfied that the Respondents surrender to India would not be "unjust or oppressive" or "shock the conscience of Canadians".

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[191] Minister's Surrender Reasons (Badesha), AR, Vol. I, at pp. 74 and 79-80; Minister's Surrender Reasons (Sidhu), AR, Vol. I, at p. 91.
[192] Minister's Surrender Reasons (Badesha), AR, Vol. I, at p. 73; Minister's Surrender Reasons (Sidhu), AR, Vol. I, at p. 91.
[193] Minister's Surrender Reasons (Badesha), AR, Vol. I, at pp. 77-78; Minister's Surrender Reasons (Sidhu), AR, Vol. I, at p. 93.
[194] Minister's Surrender Reasons (Badesha), AR, Vol. I, at p. 84; Minister's Surrender Reasons (Sidhu), AR, Vol. I, at p. 104.
[195] Minister's Surrender Reasons (Badesha), AR, Vol. I, at pp. 79 and 84-85; Minister's Surrender Reasons (Sidhu), AR, Vol. I, at pp. 99 and 104-105.
[196] Minister's letter confirming assurances (Badesha), AR, Vol. I, at pp. 106-108; Minister's letter confirming assurances (Sidhu), AR, Vol. I, at pp. 109-111.

75. Therefore, the majority effectively re-weighed the Minister's decision by isolating one factor in the global risk assessment and subjecting it to close scrutiny. In doing so, the majority failed to treat the Minister's decision with appropriate deference, and failed to pay sufficient attention to the ultimate question: whether the Minister had a reasonable basis to conclude that the surrender of the Respondents would not expose them to a substantial risk of torture or other serious mistreatment that would "shock the conscience" of Canadians.

1. Diplomatic Assurances Are One of Many Factors to be Considered in Assessing Risk

76. Canadian and international jurisprudence recognize that diplomatic assurances can be a reliable tool in attenuating the risk of mistreatment of a person surrendered between extradition partners and that such assurances are one of many relevant factors in assessing the level of risk that surrender presents. As noted by the Minister, compliance with assurances is vital to the maintenance of international relations and consistent with the principle of international cooperation that underlies extradition agreements. Appellate courts have recognized that Canada's extradition treaty partners have powerful incentives to comply with diplomatic assurances considering that the breach of a given assurance would jeopardize that treaty partner's extradition relationship with Canada as well as with other countries.[197]

77. This Court held in *Mellino* that an appellate court reviewing the Minister's reliance on assurances "should be extremely circumspect in taking such a course. It should not lightly assume that the executive has ignored its undoubted duty to ensure that its actions conform to constitutional requirements or that a foreign country would not act in good faith in complying with such assurances."[198] The U.S. Supreme Court echoed the need for judicial deference to the executive's assessment of assurances in *Munaf v. Geren*, in which the Court stated "[t]he Judiciary is not suited to second guess such determinations – determinations that would require federal courts to pass judgment on foreign justice systems and undermine the Government's ability to speak with one voice in this area."[199] Even in the deportation context, where bilateral extradition

[197] *Hurley* at para. 31; *Saxena 2006* at para. 56; *Gervasoni v. Canada (Minister of Justice)* (1996), 72 B.C.A.C. 141 at paras. 27-28.
[198] *Mellino* at pp. 558-559. See also *Saxena 2006* at paras. 49-52.
[199] 128 S. Ct. 2207 (2008) at 2226.

treaty relationships are not at stake, courts have demonstrated restraint in interfering with the executive's assessment of diplomatic assurances.[200]

78. The majority of the Court of Appeal acknowledged the valid reasons to believe that a treaty partner will comply with its assurances and not place its treaty relationship with Canada at risk.[201] The Respondents provided no evidence of personalized risk and as such, the assurances sought in their case, like the submissions of the Respondents, were general in their language. In the absence of evidence that India had previously failed to abide by diplomatic assurances to Canada,[202] and in the absence of evidence of personalized risk, it was reasonable for the Minister to conclude that the assurances would be a reliable measure to enhance the safety of the Respondents post-surrender.

79. A state's record of compliance was identified by this Court in *Suresh* as a key factor in assessing the reliability of an assurance.[203] In assessing the risk to the Respondents and the value of the assurances, the Minister was entitled to consider that India has been Canada's extradition partner for nearly 30 years.[204] Both states have relied on their extradition treaty to seek the return of fugitives.[205] They have strong ties to one another, as evidenced by the twenty-two bilateral treaties presently in force between them.[206] India maintains extradition relationships with many of Canada's extradition treaty partners, including the United States, the United Kingdom, Australia and Germany[207] and its assurances in extradition cases have been found to be reliable.[208] In light of all of these circumstances, the Minister had good reason to conclude that India would not treat

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[200] *Sing v. Canada (Citizenship and Immigration)*, 2011 FC 915 at paras. 40 ad 80 [*Sing*]; *Mugesera v. Canada (Citizenship and Immigration)*, 2012 FC 32 at paras. 49-57.
[201] *Badesha BCCA*, AR, Vol. I, pp. 127-128 at para. 44.
[202] Minister's Surrender Reasons (Badesha), AR, Vol. I at p. 73; Minister's Surrender Reasons (Sidhu), AR, Vol. I at p. 91.
[203] *Suresh* at para. 125.
[204] *Extradition Treaty between the Government of Canada and the Government of India*, Canada Treaty Series 1987/14 (entry into force February 10, 1987).
[205] *Republic of India v. Singh*, 2007 BCCA 157; *R. v. MacIntosh*, 2011 NSCA 111; affirmed *R. v. MacIntosh*, 2013 SCC 23.
[206] See Global Affairs Canada, Treaty List, Bilateral (http://treaty-accord.gc.ca/search-recherche.aspx?type=1&page=TLB&lang=eng).
[207] See Ministry of External Affairs, Government of India, Countries With Which India Has Extradition Treaties/ Arrangements (http://www.mea.gov.in/leta.htm).
[208] *Patel v. Government of India & Anor*, [2013] EWHC 819 (Admin) at paras. 83-85; *Shankaran v. Government of India*, [2014] EWHC 957 (Admin) at paras. 19, 65-67.

the Respondents in a manner that would place its relationship with Canada, and other states, at risk.

80. As noted by the ECHR in *Othman v. United Kingdom*, a case involving a deportation from the United Kingdom to Jordan, it will only be in rare cases that the general human rights situation in a country will mean that no weight at all can be given to its health and safety assurances.[209] The complete rejection of a diplomatic assurance from an extradition treaty partner, in the absence of evidence of a personalized risk of serious mistreatment and without compelling evidence that the assurance is unreliable, is in fundamental conflict with the principle of comity on which extradition is based.

81. The Minister reasonably concluded that the assurances provided were sufficient in the circumstances. This conclusion was but one factor supporting the Minister's overall conclusion that the surrender of the Respondents would not expose them to such a risk as to "shock the conscience" of Canadians. In the absence of evidence of personalized risk, it cannot be said that the Minister failed to obtain assurances mitigating a specific danger. Thus, the assurances obtained from India were appropriate and consistent with assurances described in Canadian appellate jurisprudence. Indeed, the assurances provided by India are virtually identical in scope to those affirmed by the Quebec Court of Appeal[210] and by the British Columbia Court of Appeal.[211]

82. Canada depends upon the help of the international community in fighting serious crime within our borders.[212] In *Burns*, this Court pointed out that a "state seeking Canadian cooperation today may be asked to yield up a fugitive tomorrow."[213] However, Canada cannot depend on reciprocity if the good word of its extradition partners is rejected without good cause.

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[209] *Othman v. United Kingdom*, [2012] ECHR 56 at para. 188.
[210] *Mendez Suarez* at para. 2.
[211] *Saxena 2006* at para. 24; *Saxena 2009* at para. 23.
[212] *Burns* at para. 73.
[213] *Ibid*.

2. Access to Consular Services is a Valid Consideration Weighing Against a Finding of Risk

83. The majority failed to recognize the importance of access to Canadian consular officials that will be afforded to the Respondents as Canadian citizens. There was no evidence before the Minister or the Court of Appeal that Canadian consular staff in India would not take adequate steps to monitor the Respondents' health and safety. In fact, the Minister noted the information provided by the Canadian Department of Foreign Affairs, confirming that through "regular consular visits" they will "inquire into the progress of [the] trial."[214] The Minister was satisfied that India, as a party to the *Vienna Convention on Consular Relations*[215] "will be under a legal obligation to allow Canadian consular officials to monitor [Mr. Badesha's] treatment while he is in India."[216] As recognized by the Federal Court of Appeal in discussing similar assurances given in the context of a deportation, cell visits by consular staff do "diminish the risk of torture recognizing the word, honour and face of the [foreign] Government is on the line."[217]

3. Deference Must be Afforded to the Exercise of Both Ministerial and Prosecutorial Discretion

84. Rather than determining whether the Minister's decision fell within a reasonable range of outcomes, the decision of the majority of the Court of Appeal amounts to a second-guessing of the Minister's surrender order, contrary to the deferential standard of review repeatedly enunciated by this Court.[218] The Court of Appeal re-weighed the factors, focused solely on India's assurances, and substituted the Minister's conclusions with its own. On the other hand, the dissenting judge, Goepel J.A, properly recognized the error in the majority's approach and its inconsistency with previous cases. [219]

85. The majority's failure to show proper deference to the Minister's decision to surrender was only amplified by its failure to respect the prosecutorial discretion of the Attorney General of British Columbia who had concluded that a prosecution of the Respondents in Canada for murder

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[214] Minister's Surrender Reasons (Badesha), AR, Vol. I at pp. 77-78; Minister's Surrender Reasons (Sidhu), AR, Vol. I at p. 93.
[215] 500 U.N.T.S. 95 (http://legal.un.org/ilc/texts/instruments/english/conventions/9_1_1961.pdf).
[216] Minister's Surrender Reasons (Badesha), AR, Vol. I at p. 77; Minister's Surrender Reasons (Sidhu), AR, Vol. I at p. 93.
[217] *Sing* at paras. 52-54.
[218] *Lake* at paras. 34, 37-41; *Nemeth* at para. 10.
[219] *Badesha BCCA*, AR, Vol. I, p. 161, at para. 123.

was not a reasonable option. This Court has unequivocally stated that the exercise of prosecutorial discretion will be interfered with in only the clearest of cases, such as where there is evidence of bad faith or improper motives.[220] However, in support of the majority's finding that the setting aside of the Minister's decision would not result in impunity, Donald J.A. concluded that, "I do not think it can be said that the applicants could not be tried in Canada".[221] Such a conclusion, in the absence of any evidence of prosecutorial impropriety, lies well outside the purview of a reviewing court.

F. Conclusion

86. The Court of Appeal's unwarranted interference with the Minister's surrender order on the basis of general criticism of prison conditions places at risk Canada's ability to meet its obligations to its extradition partners. The prison conditions of numerous countries have been criticized by human rights advocates, including Canadian pre-trial conditions.[222] Should such criticisms, in the absence of proof of serious risk to the particular individual and in the face of assurances from treaty partners, serve as a basis for setting aside surrender orders, Canada's ability to extradite will be severely compromised, and its ability to rely on reciprocity from its treaty partners will be cast in doubt.

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[220] *Lake* at para. 30.
[221] *Badesha BCCA*, AR, Vol. I, p. 138, at para 73.
[222] *Bacon v. Surrey Pretrial Services Centre (Warden)*, 2010 BCSC 805 at para. 342, citing M. Rosenberg, *The Attorney General and the Administration of Criminal Justice"* (2009) 34 Queens L.J. 813-862.

PART IV – COSTS

87. The Appellant does not seek costs.

PART V - ORDER SOUGHT

88. The Appellant seeks an order setting aside the order of the British Columbia Court of Appeal, and reinstating the orders surrendering the Respondents to the Republic of India to face prosecution for one count of conspiracy to commit murder contrary to the Indian Penal Code.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

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Janet Henchey
Diba B. Majzub

Counsel for the Appellant

PART VI – TABLE OF AUTHORITIES

Other Sources Cited	**Paragraphs**
Extradition Treaty between the Government of Canada and the Government of India, Canada Treaty Series 1987/14 (entry into force February 10, 1987)	79
L.J.R. v. Australia, Communication No. 316/2007 (November 10, 2008)	36, 63
UN Committee Against Torture, General Comment No. 1: Implementation of Article 3 of the Convention in the Context of Article 22 (Refoulement and Communications), 21 November 1997, A/53/44, annex IX	36, 62

PART VII – STATUTORY PROVISIONS

Canadian Charter of Rights and Freedoms	***Charte Canadienne des droits et libertés***
Life, liberty and security of person 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.	Vie, liberté et sécurité **7.** Chacun a droit à la vie, à la liberté et à la sécurité de sa personne; il ne peut être porté atteinte à ce droit qu'en conformité avec les principes de justice fondamentale.
Extradition Act (S.C. 1999, c. 18) **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.	***Loi sur l'extradition*** (L.C. 1999, ch. 18) **44 (1)** Le ministre refuse l'extradition s'il est convaincu que : **a)** soit l'extradition serait injuste ou tyrannique compte tenu de toutes les circonstances; **b)** soit la demande d'extradition est présentée dans le but de poursuivre ou de punir l'intéressé pour des motifs fondés sur la race, la nationalité, l'origine ethnique, la langue, la couleur, la religion, les convictions politiques, le sexe, l'orientation sexuelle, l'âge, le handicap physique ou mental ou le statut de l'intéressé, ou il pourrait être porté atteinte à sa situation pour l'un de ces motifs.