

May 22, 2020

The Honourable David Lametti
Minister of Justice and Attorney General of Canada
Department of Justice
284 Wellington Street
Ottawa, Ontario
K1A 0H8

Dear Mr. Minister:

Re: In the Matter of the United States of America and Meng Wanzhou

We have been requested on behalf of a group of concerned Canadians which includes former office holders and Vina Nadjibulla, the spouse of Michael Kovrig, to express our opinion with respect to the continuation of the extradition proceedings currently pending in Vancouver, British Columbia in relation to Meng Wanzhou and to assess the feasibility of your timely intervention.

Our firm has no solicitor-client relationship with Ms. Meng, her representatives or Huawei nor have we been consulted in any capacity by counsel on her behalf. Our opinion has been sought as a result of our extensive experience in extradition proceedings¹ and our continued involvement in extraterritorial and cross-border criminal issues. In our respectful submission, there are compelling reasons for your intervention at this stage of the proceeding in order to preserve, if not enhance Canada's longstanding commitment both to comity and our adherence to principles of fundamental justice in the international arena.

¹ See U.S.A. v Smith (1983) 6 C.C.C.(3d) 419 (Ont. H.C.); (1984) 10 C.C.C.(3d) 540 (Ont. C.A.); U.S.A. v Langlois (1989) 50 C.C.C.(3d) 445 (Ont. C.A.); U.S.A. v Grossman (1997) 11 C.R. 5th 310 (Ont. Gen. Div.); (1999) 139 C.C.C.(3d) 283 (Ont. C.A.); (2001) 152 C.C.C. (3d) 270 (S.C.C.); Federal Republic of Germany v Krapohl (1998) 110 O.A.C. 129 (Ont. C.A.); U.S.A. v Comisso et al ((2000) 143 C.C.C.(3d) 158 (Ont. C.A.); U.S.A. v Chan (2000) 144 C.C.C.(3d) 93 (Ont. C.A.); U.S.A. v K.(J.H.) (2002) 165 C.C.C.(3d) 449 (Ont. C.A.); U.S.A. v Ferras (2004) 183 C.C.C.(3d) 119 (Ont. C.A.); (2006) 209 C.C.C.(3d) 353 (S.C.C.); U.S.A. v Thomlison (2007) 216 C.C.C.(3d) 97 (Ont. C.A.); Re Schreiber and Federal Republic of Germany (2007) 220 C.C.C.(3d) 48 (Ont. C.A.); U.S.A. v Barbu (2010) 265 C.C.C.(3d) 244 (Ont. C.A.); Republic of Korea v Lee, 2012 ONSC 815; 2013 ONCA 192; U.S.A. v Logan (2014) 420 N.B.R.(2d) 349 (N.B.Q.B.); (2015) 329 C.C.C.(3d) 254 (N.B.C.A.); U.S.A. v Whyte (2016) 352 O.A.C. 45 (Ont. C.A.); our partner Seth Weinstein is co-author with (Justice) Nancy L. Dennison of "Prosecuting and Defending Extradition Cases; Practitioners Handbook" Emond 2017.

Overview

In our view, there are at least five reasons why it is legally appropriate for the Minister of Justice to withdraw the Authority to Proceed before the matter reaches the ministerial phase of the extradition proceeding.

First, it is a mischaracterization to conceive of the judicial phase of an extradition proceeding as a prosecution, or to analogize an Authority to Proceed to a criminal indictment. Extradition is a matter of international relations and diplomacy, not domestic criminal law.

Second, since extradition is fundamentally an executive determination, the exercise of ministerial discretion to issue, amend, or withdraw an Authority to Proceed is properly guided by governmental considerations.

Third, the fact that certain practical aspects of ministerial authority, such as the initial issuance of the Authority to Proceed, are traditionally delegated to the International Assistance Group in the Department of Justice, neither detracts from nor diminishes the Minister's unfettered exercise of his or her discretionary authority to subsequently withdraw the Authority to Proceed.

Fourth, although neither the provisions of the *Extradition Act* nor the treaty between Canada and the United States give expression to those circumstances which may affect the Minister's exercise of discretion, the role of the Minister of Justice in extradition clearly includes a consideration of Canada's national interest and its international reputation or its commitment to fundamental principles of justice in a determination as to whether an Authority to Proceed should be withdrawn.

Fifth and finally, there is a practical advantage to be gained by exercising ministerial discretion to withdraw the Authority to Proceed prior to committal being ordered, as the exercise of ministerial discretion at this stage is virtually unreviewable. If Canada's national interest dictated that Ms. Meng ought not to be extradited, the withdrawal of the Authority to Proceed would provide to the public and the international community a clear and transparent decision, without the necessity of expressing reasons to decline surrender in accordance with the specific considerations set out in the *Extradition Act*.

History of Section 23(3) of the *Extradition Act*

The Minister's discretion to intervene in an extradition proceeding before the conclusion of the judicial phase is expressly codified in s. 23 of the *Extradition Act*.

Prior to 1999, the *Extradition Act* did not contain a codified power for the Minister to intervene in an extradition proceeding or exercise any powers prior to the conclusion of the judicial phase when decision making was then passed to executive authority. The mandate and, indeed the obligation of the Minister of Justice was fundamentally and expressly altered when Parliament overhauled the *Extradition Act*. The new provisions expanded the supervisory authority of the Minister and reinforced executive control of the extradition process. The 1999 legislation contained the following provision:

23 (1) The Minister may substitute another authority to proceed at any time before the extradition hearing begins. All documents issued and orders made by the court apply in respect of the new authority to proceed, unless the court, on application of the person or the Attorney General, orders otherwise.

(1.1) Where the Minister substitutes another authority to proceed under subsection (1) and the person applies for another date to be set for the beginning of the extradition hearing in order to give the person an opportunity to examine the new authority, the judge may set another date for the hearing.

(2) The judge may, on application of the Attorney General, amend the authority to proceed after the hearing has begun in accordance with the evidence that is produced during the hearing.

(3) **The Minister may at any time withdraw the authority to proceed and, if the Minister does so, the court shall discharge the person and set aside any order made respecting their judicial interim release or detention.** (Emphasis added)

Section 23 of the *Extradition Act* invests the Minister with a broad and unfettered discretion to amend or withdraw the Authority to Proceed at any time. One of the purposes of this provision was articulated before the Standing Committee in the debates leading to the enactment of the *Extradition Act* in 1999: it was to provide a safeguard to persons subject to extradition by ensuring that the Minister was able to intervene at any point if the Minister determined that the evidence was either not sufficient to justify extradition or if the Minister determined that the individual ought not to be surrendered even if the evidence was sufficient to support extradition.² This is consistent with the overall purpose of the *Extradition Act*, which is to expedite the extradition process while ensuring full fairness and procedural protection to persons sought by our treaty partners.³

Parliament intended that the new *Extradition Act* clearly delineate the limited role exercised by the extradition judge and the broad powers and discretion granted to the Minister in extradition proceedings. As Donald Piragoff, General Counsel, Criminal Law Policy Section, Department of Justice, explained before the Standing Committee on Justice and Legal Affairs:

Extradition is primarily an executive act under international law, but there is a role for the judiciary to play. And for a number of years it was uncertain exactly what the role of the judiciary was, so a lot of the court litigation was sparked by the courts trying to understand exactly what their role was. This bill would make it clear exactly what the minister's responsibilities are and what the court's responsibilities are. And that clarity should also help to expedite the process because the rules are now clear.⁴

Indeed, it is the final vesting of authority with the Minister that ensures that the *Extradition Act* complies with international law. In that same testimony before the Standing Committee on Justice and Legal Affairs, Mr. Piragoff further stated:

From the Department's point of view and from a policy point of view, the ability for the executive to have the final say is what makes this in accord with international law: that extradition is basically a relationship between two sovereign states and it is an executive decision, and if decisions have to be made with respect to the judicial or the political system of another country, those are really

² Canada, Parliament, House of Commons, Standing Committee on Justice and Legal Affairs, *Minutes of Proceedings and Evidence*, 36th Parl., 1st Sess. (November 3, 1998) at 0945.

³ See *ibid* at 0920.

⁴ *Ibid*.

questions that Canada as a sovereign state, as a political state, should be making, not a judge who is not aware or attuned to exactly what may be occurring within a foreign state.⁵

Since the Minister has expansive and virtually unreviewable authority to withdraw the Authority to Proceed, there is little jurisprudence shedding light on the circumstances in which an Authority to Proceed has been or should be withdrawn.⁶ There are no authorities which address the unique circumstances presented in this case, nor is there reason to “read down” s. 23(3), particularly where there are compelling reasons of public policy to broadly interpret the section.

The Authority to Proceed in this matter was issued by the International Assistance Group without consideration of the political and international ramifications of the issuance of the Authority to Proceed. Section 23(3) mandates the Minister of Justice in his or her role as policy advisor to the Cabinet on justice issues to consider and, if necessary, reconsider the propriety of an Authority to Proceed having regard to either material changes in circumstances or the dynamics of Canada’s international relations.

Extradition as an Executive Act

Parliament has recognized that extradition is, ultimately, an executive decision. While there is a limited judicial role in the process, and while certain legal principles must guide the Minister’s decision-making, the Minister is otherwise entitled to base extradition decisions on political and diplomatic considerations.⁷ As Justice La Forest stated in *Canada v. Schmidt*, the judiciary refrains from substantive review of ministerial decisions in the extradition context “so as to avoid interfering unduly in decisions that involve the good faith and honour of this country in its relations with other states”.⁸ Because courts have a limited and circumscribed role in the extradition process, and because extradition is fundamentally an executive decision driven by political considerations, though constrained by legal principles, the Minister of Justice can intervene in the extradition process at any time. Section 23 of the *Extradition Act* unequivocally provides the Minister of Justice that unfettered power and responsibility.

It is a mischaracterization to classify extradition as a matter of criminal law.⁹ Extradition is, at its core, a matter of diplomacy and international relations. Justice La Forest explained this point in *Canada v. Schmidt* as follows:

Extradition is the surrender by one state to another, on request, a person accused or convicted of committing a crime in the state seeking surrender. This is ordinarily done pursuant to a treaty or other arrangement between these states acting in their sovereign capacity and obviously engages honour and good faith. A surrender under these treaties is primarily an executive act. *Charter* considerations

⁵ *Ibid* at 0945.

⁶ See, e.g., *United States of America v. Nuradin*, 2015 ONSC 6032, where an Authority to Proceed had been withdrawn and reissued; and *United States of America v. Ritter*, 2005 ABQB 854, where the accused sought to have an Authority to Proceed be reconsidered after he had been charged for similar offences in Canada.

⁷ *Idziak v. Canada (Minister of Justice)*, [1992] 3 S.C.R. 631 at 659, describing the Minister’s decision in an extradition proceeding as “primarily political”.

⁸ *Canada v. Schmidt*, [1987] 1 S.C.R. 500 at 523.

⁹ Joanna Harrington, “The Role for Human Rights Obligations in Canadian Extradition Law” (2005) 43 Can. Y.B. Int’l. L. 43 at 43-44.

and international implications apart, it is under domestic law in the discretion of the executive to surrender or not to surrender a fugitive requested by another state.¹⁰

The principled distinction between an extradition proceeding and a criminal law prosecution matters when assessing the proper scope of the ministerial role in the extradition process. The administration of criminal justice in Canada must be free from partisan considerations and political pressures because the rule of law requires the impartial, objective application of criminal law to all persons. Any political or partisan interference in a prosecution erodes the rule of law by tinging the proceeding with an air of partiality, regardless of whether the interference benefits or hinders the individual accused. Extradition is not a prosecution, nor is it an application of Canada's criminal law. It is a function of international relations. Rule of law considerations matter, as both domestic and international law must be complied with, but in international relations states are entitled to, and indeed expected to, advance their own national interests and priorities in their treaty and diplomatic relations with each other.

When an Authority to Proceed is issued, it is issued by the Minister of Justice, or delegate, in his or her capacity as a Minister, not as the Attorney General.¹¹ In fact, the Authority to Proceed issued by the Minister of Justice in this case authorizes the Attorney General to proceed and to seek an order of committal from a provincial superior court.¹² As it is the Minister who exercises the unfettered executive authority to authorize the commencement of the proceeding, equally it is within the unfettered discretion of the Minister of Justice to withdraw the Authority to Proceed at any time prior to committal.¹³ The Attorney General has no statutory authority to withdraw the Authority to Proceed or abandon an extradition hearing, as an extradition judge is compelled to hold a hearing once an Authority to Proceed is filed.¹⁴

While an Authority to Proceed is occasionally analogized to an indictment in a criminal proceeding,¹⁵ the rules governing indictments are not applicable to an Authority to Proceed. The crafting, filing, and amending of an indictment is exclusively a matter of prosecutorial discretion. It is, of course, a principle of fundamental justice that the Attorney General must act independently of partisan concerns when supervising prosecutorial decisions, and that the Attorney General's exercise of prosecutorial authority must be free from political and judicial interference.¹⁶ However, the fact that an Authority to Proceed may contain some analogies to an indictment does not make the reverse true: the principles of prosecutorial independence that apply to the Attorney General bringing an indictment are not applicable to an Authority to Proceed issued by the Minister of Justice in the extradition context. The fact that, as in this case, the Attorney General and the Minister of Justice are the same person, should not obscure or confuse the very different roles that each must play in the process. The clear and distinct responsibilities exercised pursuant to the *Extradition Act* are consistent with the recommendations advanced by the Honourable Anne McLellan in her review of the role and structure of the Minister of Justice and the Attorney General of Canada. Central to her conclusion that a single office holder continue to be responsible for promoting and protecting the rule of law while occupying both positions was the separate and distinct dichotomy between the two functions.¹⁷

¹⁰ *Schmidt, supra* at 514.

¹¹ *Extradition Act*, ss. 7, 11, 15.

¹² *Ibid*, s. 15(1).

¹³ *Ibid*, s. 23(3).

¹⁴ *Ibid*, s. 24.

¹⁵ See, e.g., *Canada (Justice) v. Fischbacher*, 2009 SCC 46 at para. 32.

¹⁶ *Krieger v. Law Society of Alberta*, 2002 SCC 65 at paras. 30-31.

¹⁷ The Honourable Anne McLellan, *Review of the Roles of the Minister of Justice and Attorney General of Canada* (June 28, 2019), online: < <https://pm.gc.ca/en/news/backgrounders/2019/08/14/review-roles-minister-justice-and-attorney-general-canada> >

The Minister's role in the extradition process is a political one.¹⁸ As Justices Iacobucci and Major, on behalf of a unanimous Supreme Court recognized in *Krieger v. Law Society of Alberta*, while the Attorney General must be free from political and partisan concerns, the Minister of Justice "holds a position with partisan political aspects".¹⁹ The issuance of an Authority to Proceed, decisions regarding the withdrawal of that document, and the ultimate decision to surrender in an extradition proceeding are all decisions made by the Minister of Justice in his or her ministerial role. When issuing the Authority to Proceed, the Minister is making a political determination that Canada act on an extradition request received from a foreign state, having determined that the foreign state is one with which Canada has an extradition treaty, that the base requirements of the treaty are satisfied, and that there are no preliminary reasons why extradition ought to be refused.²⁰ These decisions are, therefore, properly subject to political considerations.

The Attorney General's involvement in the extradition process does not depoliticize the proceeding during the judicial phase nor import notions of prosecutorial independence. The Attorney General represents and acts as agent for the requesting state in an extradition hearing – in this case, the United States. Where the interests of the requesting state and the interests of Canada conflict in an extradition proceeding, the responsibility to resolve that conflict lies exclusively with the Minister of Justice.

The Minister Must Give Effect to Political Considerations

While there is a limited judicial role in assessing whether a person ought to be extradited, that judicial role is generally limited to ensuring the identity of the person sought and protecting that person from being surrendered for conduct that Canada would not recognize as criminal.²¹ Because the judicial role is limited, the primary responsibility for ensuring that extradition of persons within Canadian jurisdiction is fair and legal falls to the Minister, not the courts.

Unlike a criminal prosecution, the Minister of Justice is not required to remain independent of an extradition proceeding. Aside from the initial authorization for the Attorney General to proceed to the Superior Court of the province, the Minister does not direct the Attorney General in the judicial phase of the hearing, as the Attorney General is representing the foreign state during the judicial phase. Instead, the Minister retains his discretionary authority throughout the judicial and ministerial phase to halt the extradition if it is in Canada's national interests to do so.

To suggest that the Minister must wait for the surrender stage before exercising this discretion is to read s. 23(3) out of existence. It is only the Minister who may withdraw an Authority to Proceed once it has been issued and s. 23(3) requires that the withdrawal take place during the currency of the judicial phase. This overarching authority codified the ability of the Government of Canada to consider throughout the judicial stage the desirability of continuing to proceed with the extradition request and, if it concludes that it is no longer in Canada's best interests, to abrogate the committal hearing.

¹⁸ *Idziak v. Canada (Minister of Justice)*, [1992] 3 S.C.R. 631 at 658 ("by contrast, the second decision-making process is political in nature. The Minister must weigh the representatives of the fugitive against Canada's international treaty obligations").

¹⁹ *Krieger v. Law Society of Alberta*, 2002 SCC 65 at para. 29.

²⁰ *Fischbacher*, *supra* at para. 30.

²¹ *United States of America v. Yang* (2001), 203 D.L.R. (4th) 337 at para. 47.

The Minister may Personally Exercise Discretionary Authority under s. 23(3) before the Conclusion of the Judicial Phase

A Minister, like any other person who was been statutorily entrusted with the exercise of public power, cannot rely on the delegation of that authority to abdicate responsibility for the ultimate exercise of that power. The delegation of authority to the International Assistance Group to exercise some aspects of the Minister's administrative authority under the *Extradition Act* is very different from the delegation of prosecutorial authority from the Attorney General to Crown prosecutors. The delegation of prosecutorial authority, at least with respect to non-*Criminal Code* offences, is governed by the *Director of Public Prosecutions Act*. The purpose of this *Act* was to separate the independent prosecutorial duties of the Attorney General from the partisan and political duties of the Minister of Justice.²² It applies to all prosecutions conducted by the agents of the Attorney General, and prescribes the procedure by which the Attorney General may assume carriage of an ongoing prosecution.²³

The Government of Canada has the right to consider Canada's national interests in deciding whether to proceed with an extradition request. This determination includes not only Canada's relationship with the requesting state having regard to the terms of the governing treaty, but a wide range of other domestic and international considerations which cumulatively inform the government's appreciation of Canada's national interest. This may include the need to maintain or develop positive relations with other states, such as in this case China; and the need to promote international peace and security, such as, in this case, supporting, along with other international partners, nuclear disarmament in Iran. These considerations would also include whether the extradition could have an adverse impact on Canada's economic interest and on the safety and security of Canadian citizens.

Should those considerations conflict with the United States' interest in prosecuting Ms. Meng for allegedly causing several banks to potentially risk violating unique American sanctions on Iran, not shared by Canada, it is only the Minister of Justice who has been provided with the legislative authority to act if, in the view of the government, broader interests of public policy and foreign relations militate in favour of withdrawal. The Minister's exclusive control over the Authority to Proceed and, later, his or her discretion on the question of surrender are the avenues through which political considerations of national and international interests are given effect in the extradition process.

Relevant Factors Guiding the Exercise of Ministerial Discretion

As the Supreme Court stated in *Sriskandarajah v. United States of America*, "the decision to extradite is a complex matter, involving numerous factual, geopolitical, diplomatic, and financial considerations".²⁴ In the earlier decision of *Idziak v. Canada (Minister of Justice)*, Justice Cory noted that the Minister must consider "the good faith and honour of this country in its relations with other states".²⁵ Because the Minister has "expert knowledge of the political ramifications of an extradition decision", courts are highly deferential to the Minister's decisions in the extradition process.

²² See, e.g., the testimony of Senior Counsel, Legal Services, Treasury Board Portfolio, where he testified that the enactment of the *Director of Public Prosecutions Act* was a "policy choice" to "symbolically show that the Director of Public Prosecutions is operating independently in a separate, distinct office from the Minister of Justice". See Canada, Parliament, House of Commons, Legislative Committee on Bill C-2, *Minutes of Proceedings and Evidence*, 39th Parl., 1st Sess. (May 4, 2006) at 1020.

²³ See *Director of Public Prosecutions Act* S.C. 2006, c. 9, s. 121, ss. 3, 10, 15.

²⁴ *Sriskandarajah v. United States*, 2012 SCC 70 at para. 22.

²⁵ *Idziak*, *supra* at 659.

This deference presupposes that the Minister is considering more than simply the interests of the individual in procedural protections and the interests of the requesting state in prosecuting the individual. Those legal and procedural interests are already weighed by the court when determining at the judicial phase whether committal ought to be ordered. The Minister's role is not to "rubber stamp" the committal decision and surrender the individual. It is a nuanced decision involving a mix of legal, political, and diplomatic considerations.

That decision is not limited to an exercise of discretion constrained by the factors set out in s. 44 to 46 of the *Extradition Act*. In accordance with those provisions, the Minister must ensure that the person is being sought for conduct that would be a crime in Canada;²⁶ that the foreign state will not prosecute the person in a manner inconsistent with the *Charter of Rights and Freedoms* – for example, by prosecuting the person for discriminatory reasons or by subjecting the person to the death penalty;²⁷ and that the foreign state is not seeking to prosecute the person for political reasons.²⁸

However, the considerations listed in the *Extradition Act* are not an exhaustive codification of the factors that the Minister may consider in exercising his or her discretion. Because the Minister's decision is an executive one, the Minister is entitled to seek consultations and input from other ministers, such as Global Affairs Canada.²⁹ Indeed, in some contexts the Minister is required to consult with other ministers in the exercise of his or her discretion under the *Extradition Act*.³⁰

When exercising his or her discretion under the *Extradition Act*, the Minister must also consider Canada's own foreign policy and diplomatic interests where relevant. In the vast majority of cases, Canada's foreign policy and diplomatic interests will align with the interest in complying with the extradition request, as the interest in promoting adherence to treaty obligations and combating transnational crime will be the only foreign policy interest at stake. However, the norm ought not to be elevated to an unrelenting rule. In unique cases raising multifaceted foreign policy concerns, there is no reason why the Minister of Justice should remain myopically focused on the interests of the requesting state in determining whether extradition ought to be granted, to the detriment of Canada's interests as a whole.

Indeed, as Justice Cromwell stated in *Németh v. Canada (Justice)*, the Minister's decision "must weigh the political and international ramifications of the decision whether or not to surrender".³¹ This necessarily implies that, in cases where the political and international interests at issue stretch beyond the relations between Canada and the requesting state, the Minister must consider these broader interests in exercising his or her discretion under the *Extradition Act*.

The Minister's decisions under the *Extradition Act* must, therefore, take into account those political and international ramifications, both in Canada's relations with the requesting state and with the international community more broadly. There is no reason why such considerations ought to be left to the surrender stage:

²⁶ *Extradition Act*, S.C. 1999, c. 18, s. 15.

²⁷ *Ibid.*, s. 44.

²⁸ *Ibid.*, s. 46(1)(a).

²⁹ This was described by Murray Segal in the *Independent Review of the Extradition of Dr. Hassan Diab*, Part C.2.e, as part of the suite of options available to the Minister in making the decision to surrender.

³⁰ See, e.g., *Németh v. Canada (Justice)*, 2010 SCC 56 at para. 66, holding that the Minister of Justice is required to consult with the Minister of Citizenship and Immigration before surrendering a person with refugee status for prosecution in a foreign state.

³¹ *Németh v. Canada (Justice)*, 2010 SCC 56 at para. 64.

if the Minister concludes, at any time prior to committal and for any legitimate reason, that the Authority to Proceed should be withdrawn, the Minister not only has the authority, but the obligation to end the extradition proceeding. These political considerations are unrelated to the legal questions being considered at the judicial stage, and there is no practical or policy reason why the Minister ought to wait for the judicial phase to conclude before exercising his or her discretion to give effect to broader political interests.

Principles of Comity and International Law

As extradition is a matter of international relations, the provisions of the relevant extradition treaties and general principles of international law are relevant, though not determinative, in guiding the exercise of ministerial discretion.

We acknowledge that, as extradition is an act of international relations that finds its basis in a treaty relationship, the United States may complain that Canada has breached the extradition treaty if it refuses to extradite Ms. Meng. However, that complaint would only be of a political nature as the United States would be well aware of the provisions of the *Extradition Act* which empower the Minister of Justice of Canada to act in Canada's national interest in the application of the Treaty.

Given the weakness of the case against Ms. Meng, the political undertone of the American pursuit of Huawei and Ms. Meng as part of the American government's larger trade war with China, and consistent with its sanctions against Iran, which Canada does not support, the valid overriding Canadian foreign policy objectives of normalizing its own relations with China as well as encouraging Iranian nuclear disarmament, any global reputational consequences to Canada if it refused to extradite Ms. Meng would be attenuated.

Considerations of comity and Canada's obligations "as a responsible member of the international community"³² ordinarily will weigh in favour of complying with an extradition request. Canada generally seeks to facilitate extradition requests because Canada expects other countries to reciprocate when Canada seeks extradition of an individual from an extradition partner's territory. However, this is not an ordinary extradition case. It requires Canada to act contrary to its policy on Iran by assisting in the enforcement of sanctions that it rejects as inappropriate, and has precipitated a hostile reaction from one of Canada's most important trading partners: China.

A Principled Intervention

It is our respectful position that the balance which the Minister should strike between the objectives of national interest and considerations of international comity are significantly influenced by an objective analysis of the evidence upon which the United States relies in the Record of the Case.

Based on the Record of the Case and the Supplemental Record of the Case submitted by the United States, the evidence is arguably insufficient to even pass the very low threshold for committal. The conduct of Ms. Meng identified in the Record of the Case and Supplemental Record of the Case does not arguably meet the threshold of deceit or dishonesty for the *actus reus* of fraud. While the actions of Huawei, independent of Ms. Meng, may be sufficient to establish deceit or dishonesty, a person cannot be extradited to be prosecuted for another person's offence. Section 3(1) of the *Extradition Act* only permits extradition of a person "for the purpose of prosecuting the person". It does not permit extradition for the purpose of prosecuting another

³² *Fischbacher, supra* at para. 38.

person, such as an organization. Ms. Meng therefore can only be subject to extradition with respect to the alleged fraud committed by her. It is therefore only her conduct that is at issue.

Having extensively reviewed the materials provided by the United States, we believe that the case against Ms. Meng is both weak and speculative. This is an additional factor which may be appropriately considered by the Minister and which militates in favour of withdrawing the Authority to Proceed without incurring inevitable delays, both at the committal and surrender stage.

The unfettered discretion vested in the Minister of Justice pursuant to s. 23(3) of the *Extradition Act* aligns with the sovereign act aspect of extradition. Although as Justice La Forest commented in *Morguard Investments Ltd. v. DeSavoye*, “[m]odern states ... cannot live in splendid isolation”,³³ the tension which may exist in this case between comity and sovereignty supports the conclusion that comity if necessary but not necessarily comity.

Yours sincerely,
Greenspan Humphrey Weinstein LLP



Brian H. Greenspan

Cc: The Right Honourable Justin Trudeau
Prime Minister of Canada

The Honourable Chrystia Freeland
Deputy Prime Minister and Minister of Intergovernmental Affairs

The Honourable Francois-Philippe Champagne
Minister of Foreign Affairs

Ian Shugart
Clerk of the Privy Council

³³ *Morguard Investments Ltd. v. DeSavoye*, [1990] 3 S.C.R. 1077 at 1095.