File No. 27761
Vancouver Registry

IN THE SUPREME COURT OF BRITISH COLUMBIA

IN THE MATTER OF THE *EXTRADITION ACT*, S.C. 1999, c. 18, AS AMENDED

BETWEEN:

THE ATTORNEY GENERAL OF CANADA
ON BEHALF OF THE UNITED STATES OF AMERICA

REQUESTING STATE/RESPONDENT

AND:

WANZHOU MENG, ALSO KNOWN AS CATHY MENG,
SABRINA MENG

PERSON SOUGHT/APPLICANT

REQUESTING STATE'S RESPONDING SUBMISSIONS
RE: FIRST BRANCH OF ALLEGED ABUSE OF PROCESS

COUNSEL FOR THE RESPONDENT

Department of Justice
900 – 840 Howe Street
Vancouver, BC V6Z 2S9
Tel: (604) 666-2061
Fax: (604) 666-1585

Robert J. Frater, Q.C.
Kerry L. Swift
Monika Rahman

COUNSEL FOR THE APPLICANT

Peck and Company
610 – 744 West Hastings St.
Vancouver, BC V6C 1A5
Tel: (604) 669-0208
Fax: (604) 669-0616

Richard C.C. Peck, Q.C.
Eric V. Gottardi

Martin and Associates
863 Hamilton Street
Vancouver, BC V6B 2R7
Tel: (604) 682-4200
Fax: (604) 682-4209

David J. Martin

Fenton, Smith
235 King Street East, Flr 2
Toronto, ON M5A 1J9
Tel: (416) 955-1611
Fax: (416) 955-1237

Scott K. Fenton

Addario Law Group LLP
101 – 171 John Street
Toronto, ON M5T 1X3

Frank Addario

DDSG Criminal Law
300 – 9924 106 Street
Edmonton, AB T5K 1C4

Mona Duckett, Q.C.

INDEX

IV. ORDER REQUESTED

LIST OF AUTHORITIES

I. OVERVIEW

1. This application is moot. The facts on which it is based – statements by a President no longer in office, about a possible intervention in this case that never occurred, purportedly to achieve a trade deal that has long since been successfully negotiated – have no past, present or prospective impact on these proceedings. The changes in circumstances since the comments were made and this application was filed have served to remove the factual underpinning for the Applicant's arguments.

2. Even if not moot, the application must fail. The statements in question from the former President do not amount to misconduct standing alone. But they do not stand alone: they are inconsistent with statements made by other knowledgeable government officials such as the Acting Attorney General, the Secretary of State and the lead negotiator on U.S. trade talks with China. The Applicant has filed a highly selective factual record, and seeks to compensate for its weakness through hyperbolic characterization of the supposed impacts of the statements.

3. Viewing the statements relied upon in the light most favourable to the Applicant, they establish no misconduct. While the Applicant alleges the statements constituted a "threat", they involved neither a threat to the exercise of her rights nor the prospect of a more severe punishment as in *United States v. Cobb*.[1] At best they involve a suggestion that the Applicant might have received the unjust windfall of the termination of her case to facilitate a U.S.-China trade deal. There is no evidence that the Applicant's charges were politically motivated; the evidence is rather that they were not. There is also no evidence that the statements have had any impact on the fairness of this extradition hearing; indeed the hearing has been conducted fairly. If the Applicant actually feared the "ominous climate" or "oppressive circumstances" as she now claims, she ought to have brought this application two years ago, when the comments were made. Having failed to do so, there is no basis for her application now.

4. The test for establishing an abuse of process is a rigorous one. The Applicant is unable to establish a factual basis for her argument that her right to a fair extradition hearing has been prejudiced, or that the statements have caused damage to the integrity of the Canadian judicial

[1] *United States v. Cobb*, 2001 SCC 19, [2001] 1 SCR 587.

process. There is no evidence of any misconduct by the Requesting State, much less misconduct that amounts to the "clearest of cases" requiring a stay of proceedings.

II. FACTS

1) The Facts on which the Applicant Relies

5. The Applicant was arrested under the *Extradition Act* on December 1, 2018. As the basis for the abuse of process argument, the Applicant has referred to four statements by the former President and Secretary of State made in the months immediately following the arrest, and one made seven months later.[2] It is important to look at the context in which the statements were made, as well as what was (and wasn't) said in each statement. The comments were all made in response to questions posed by the media.

a) The December 11, 2018 comment of former President Trump – This comment is based on an "exclusive" interview by the news service Reuters with the former President. The news story reports it this way:

> Huawei's Chief Financial Officer was arrested in Canada Dec. 1 and has been accused by the United States of misleading multinational banks about Iran-linked transactions, putting the banks at risk of violating U.S. sanctions. When asked if he would intervene with the Justice Department in her case, Trump said in an interview with Reuters, "Whatever is good for the country, I would do."
>
> "If I think it's good for what will be the largest trade deal ever made – which is a very important thing – what's good for national security – I would certainly intervene if I thought it was necessary," Trump said.[3]

b) The December 12, 2018 interview with Secretary of State Pompeo – Three interviewers from the television show Fox & Friends asked the Secretary about a number of foreign affairs topics, including trade and national security issues relating to China. After

---

[2] Applicant's Submissions – First Branch of Abuse of Process, dated July 17, 2020 ("Applicant's Submissions"), paras. 7-14.

[3] Applicant's Abuse of Process Application Record, First Branch, Vol. 1, Tab 1 ("Applicant's Record"), Affidavit #1 of Romi Laskin affirmed July 16, 2020 ("R. Laskin Affidavit #1), Exhibit E, Jeff Mason and Steve Holland, "Exclusive: Trump says he could intervene in U.S. case against Huawei CFO," *Reuters* (11 December 11, 2018) ("*Reuters Dec 2018*"), p. 2.

listing the administration's specific concerns, including threats posed by espionage and cyber-attacks, Secretary Pompeo stated the following:

> **Secretary Pompeo**: "Our effort, from the Department of Homeland Security, and the F.B.I., and the State Department, is to push back against these threats to America from China. Trade is a component of that to be sure, the President is very focused on making sure Americans get a chance to sell their products into China, it's a big market, and the President is determined to get a level playing field for American businesses…"

Shortly thereafter, the interviewer interjected and the following exchange occurred:

> **Reporter**: "This Huawei executive. The President says 'I might have to get directly involved if it hurts our trade negotiations.' That would be him going into the law enforcement end when there is a trade end. Do you worry about the president blending the two?"
>
> **Mr. Pompeo**: "We always have to balance American interests. Any time there is a law enforcement engagement we need to make sure we take foreign policy considerations into effect. It's totally appropriate to do so. The President's mission is very clear: it's America first. Making sure that we protect the American people from threats, whether they emanate from Russia from China, or from any of the other places we've have had a chance to talk about."[4]

c) Answers to media questions by former President Trump at the January 31, 2019 news conference with Vice Premier Liu He of China – In the midst of high-level consultations within the ongoing trade negotiations that were then occurring almost "continuously",[5] the former President, Vice Premier He, U.S. Trade Representative Robert Lighthizer, and others made remarks to the media. In a question and answer session with reporters after the remarks, this exchange occurred:

> **Reporter**: Mr. President, was the Huawei case discussed during negotiations?
>
> **The former President**: No, we haven't discussed that yet. It will be, but it hasn't been discussed yet.
>
> **Reporter**: In what aspect? How will it be discussed?

---

[4] Applicant's Record, R. Laskin Affidavit #1, Exhibit F (USB flash drive), at timestamp 8:39; also available at https://www.youtube.com/watch?v=bxsc7w8U_iI.

[5] Applicant's Record, R. Laskin Affidavit #1, Exhibit K, "Remarks by President Trump in Meeting with Vice Premier Liu He of the People's Republic of China" (January 31, 2019) ("*Trump Remarks Jan 2019*"), p. 44.

> **The former President**: Well, it will be discussed. I'm sure at some point that'll be – that, actually, as big as it might seem, is very small compared to the overall deal, but that will be discussed.[6]

d) Answers to media questions at the February 22, 2019 press conference with Vice Premier Liu He of China – Like the previous press conference, this one focused on the status of the then ongoing trade negotiations.

> **Reporter**: Where do things stand with Huawei and ZTE? Would you still consider a ban of Chinese technology?
>
> **The former President**: Well, ZTE paid a big fine of $1.2 billion, which nobody has ever even heard of before. And we want everybody to compete. And I guess it will be somewhat of a subject that we're talking about here, Bob. We'll be talking about it. We may or may not include that in this deal.
>
> **Reporter**: Include what?
>
> **Reporter**: Would you drop the criminal charges?
>
> **The former President**: The Huawei and ZTE.
>
> **Reporter**: Would you drop criminal charges against Huawei as part of this deal?
>
> **The former President**: We're going to be discussing all of that during the course of the next couple of weeks. And we'll be talking to the US Attorneys. We'll be talking to the Attorney General. But we'll be making that decision. Right now it's not something that we're discussing.[7]

e) The statements by former President Trump at a news conference on June 29, 2019 – The Applicant filed a report from the Telegraph about a press conference held during G-20 talks in Japan. The report noted an apparent policy shift, in which the former President talked about easing restrictions against Huawei after a period when trade talks had reportedly broken down. The article described developments in American policies regarding restrictions on the sale of technology to Huawei due to security concerns. Providing no context as to what question was asked, the article quotes the former President as saying, "Huawei is a complicated situation. We're leaving Huawei toward the end. We'll see where

---

[6] Applicant's Record, R. Laskin Affidavit #1, Exhibit K, *Trump Remarks Jan 2019*, p. 48.
[7] Applicant's Record, R. Laskin Affidavit #1, Exhibit L, "Remarks by President Trump Before Meeting with Vice Premier Liu He of the People's Republic of China" (February 22, 2019) ("*Trump Remarks Feb 2019*"), p. 68.

we go with a trade agreement." Later the article states, "Trump said he didn't discuss the case of Meng Wanzhou, the daughter of Huawei founder Ren Zhengfei, who has been under house arrest in Vancouver since being detained by Canadian authorities on Dec. 1 last year over a U.S. extradition request."[8]

2) <u>Other Relevant Facts</u>

6. In close proximity to the comments referred to above, several U.S. officials, including Secretary Pompeo, made other comments when asked by the media about the Applicant's prosecution. The U.S. Department of Justice subsequently also provided a formal statement to Reuters, emphasizing that the charges against the Applicant were brought based on evidence and in accordance with the rule of law.[9]

a) The Dec. 9, 2018 interview with U.S. Trade Representative Robert Lighthizer – The lead negotiator for the United States in the successful negotiation of the Phase One trade agreement with China, was interviewed on the CBS news program, Face the Nation. The interview contained the following exchange:

> **Margaret Brennan**[reporter]: It is. Let's get into that then. Today we heard from Beijing that they have summoned the United States ambassador and - and demanded some answers about this question regarding Chinese telecom company, Huawei, and one of their top executives who was taken into custody in Canada this week at U.S. request. How is all of this going to impact the talks that you're leading?
>
> **Amb. Lighthizer**: Well it's my view that it shouldn't really have much of an impact. I can understand from the Chinese perspective how they would see it that way. This is a - a criminal justice matter. It is totally separate from anything that I work on or anything that - that the trade policy people in the administration work on. So, for us, it's unrelated, it's criminal justice. We have a lot of very big, very important issues. We've got serious people working on them, and I don't think they'll be affected by this.
>
> **Margaret Brennan**: Has President Trump offered that, I guess comfort, to President Xi? I mean has he talked to him after the CFO of Huawei was taken into custody?

[8] Applicant's Record, R. Laskin Affidavit #1, Exhibit N, Shawn Donnan and Miao Han, "Trump revives China talks with tariffs truce, break for Huawei" *The Telegraph* (June 29, 2019) ("*Telegraph 2019*"), p. 85.
[9] Affidavit of Anamaria Baboi, dated November 2, 2020 ("A. Baboi Affidavit #1"), Exhibit G, "Huawei founder says Huawei CFO arrest was politically motivated: BBC," *Reuters* (February 18, 2019) ("*Reuters Feb 2019*"), p. 2.

> **Amb. Lighthizer**: Not that I'm aware of.
>
> **Margaret Brennan**: Because for Beijing since they have direct interest in this company and they're warning there are gonna be consequences many are wondering if this adds up to essentially a threat that it could impact the talks.
>
> **Amb. Lighthizer**: It's entirely a criminal justice matter. It has nothing to do with anything I'm working on.[10]

b) The December 9, 2018 interview with U.S. National Economic Council Director Larry Kudlow – In a story dated Dec. 9, 2018, reporter Brett Samuels of media outlet "The Hill" reported the following:

> Top White House economic adviser Larry Kudlow said Sunday that trade negotiations between the U.S. and China are separate from the arrest of an executive with Chinese telecom giant Huawei.
>
> Kudlow said on "Fox News Sunday" that it's possible that the Trump administration would release Meng Wanzhou, chief financial officer of Huawei Technologies, as part of ongoing trade talks with China.
>
> "I don't know how it's going to turn out," Kudlow said, saying the arrest falls to the Department of Justice. "I'm not an attorney. It's outside my lane. So we will see."
>
> Wanzhou was arrested by Canadian authorities last Saturday at the request of the U.S. after allegedly violating trade sanctions against Iran. China has demanded her release, and called her detention a possible human rights violation.
>
> Kudlow said Sunday that President Trump did not know about the arrest while he was meeting with Chinese President Xi Jinping last Saturday in Argentina. The president had "no reaction" when he learned of the arrest, Kudlow said.
>
> He added that he's unsure how the arrest will affect trade talks moving forward.
>
> "All it seems to me is there's a trade lane that we are discussing ... and there is a law enforcement lane, and they're different," Kudlow said. "I think President Trump and President Xi and law officials will continue to keep that difference," he continued. "I might be wrong. I can't predict the

[10]A. Baboi Affidavit #1, Exhibit D, "Transcript: Amb. Robert Lighthizer on 'Face the Nation' December 9, 2018" *CBS News* (December 9, 2019) ("*Lighthizer Interview*"), p. 2.

> future, but they're different channels and I think they will be viewed that way for quite some time."[11]

c) The December 14, 2018 press conference of Global Affairs Minister Chrystia Freeland and Secretary of State Mike Pompeo – Cabinet Ministers for Canada and the United States gave a press conference in Washington amidst the State Department's "2+2 Strategic Dialogue" on bilateral and global foreign policy issues. The transcript includes the following questions and answers:

> **Question:** (Via interpreter, in progress) Minister Freeland can answer in French and English after. Madam Freeland, do you have the impression currently that Canada is paying a heavy price for having been involved in this Huawei case and having charged the CFO of Huawei? And some of our citizens have been arrested in China. Do you have the impression that you are being used currently and we are being stuck between the United States and China in this trade war against your will and you are being used politically currently by the United States?
>
> **Foreign Minister Freeland:** (Via interpreter) I'm not in complete agreement with the question, the way it was phrased, because for Canada it was not – the detention of Ms. Meng was not a political decision on Canada's part. It was a matter of following the rules. It's a matter of obligations on the part of Canada to follow through with its obligations under international agreements. Canada follows the rule of law; Canada follows rules. It is very important, especially when there's a lot of pressure on the very idea of democracy in the world, when there's a lot of pressure on international order. Canada will thus continue to follow the rules. This is a strong position of our governments. By the same token, it is also very important for Canada that extradition agreements are not used for political purposes. Canada does not do it that way, and I believe that it is obvious that democratic countries such as our partner, the U.S., do the same. Today we talked about our shared values, and one of them is the fact that both countries, the U.S. and Canada, are countries that follow the rule of law and follow rules in general. (In English) I don't entirely agree with the framing of the question. Canada in detaining Ms. Meng was not making a political judgment. In Canada, there has been, to this point, no political interference in this issue at all. For Canada, this is a question of living up to our international treaty obligations and following the rule of law in Canada, and that is something which has happened scrupulously. Canada is a rule-of-law country.

[11]A. Baboi Affidavit #1, Exhibit E, "Kudlow says he's confident arrest of Chinese executive and trade talks will remain separate issues", *The Hill* (December 9, 2019) ("*The Hill 2019*"), pp. 1-2.

We discussed a little bit in our opening remarks how Canada and the United States are countries with deeply shared democratic values. Those democratic values include the fact that in both countries, we have a deep regard for the rule of law and strong and independent judiciaries. I think that's one of the reasons that Canada and the United States, and both Canadians and Americans, feel comfortable with the existence of an extradition treaty between our two countries. And having said all of that, Canada is clearly of the view that extradition – the extradition process – is a criminal justice process. This is not a tool that should be used for politicized ends.

Secretary Pompeo: You didn't ask me, but – and if I may, I'm just going to answer in English.

Question: *Oui, s'il* (inaudible).

Secretary Pompeo: Thank you, thank you.

Foreign Minister Freeland: I'd like to hear you try to do it in French. (Laughter.)

Secretary Pompeo: I can't say much about the process because we have a U.S. judicial process that is underway, an extradition process that is underway. I can say this: The unlawful detention of two Canadian citizens is unacceptable. They ought to be returned. The United States has stood for that whether they're our citizens or citizens of other countries. We ask all nations of the world to treat other citizens properly, and the detention of these two Canadian citizens in China ought to end.

Mr. Palladino: CNN, Elise Labott.

Question: Thank you, Mr. Secretary. I'd like to follow up on your remarks just now. It does seem as if China is using these two – the detention of these two Canadian citizens – as kind of a bargaining chip on the trade talks between the U.S. and China. And I think the minister alluded to that when she suggested that these type of detentions are so concerning and shouldn't be politicized. Do you think that's what China's doing here? And are you concerned that with President Trump's suggestion that he might be willing to get involved in this other case of Ms. Meng in Canada, that that further puts Canada in a difficult situation and kind of puts Canada in the middle of your trade dispute with China? Thank you very much.

Secretary Pompeo: Yeah, I think that's just the same question that was asked previously. I don't see it that way. The United States is engaged in an extradition process. Ms. Meng travelled to Canada. The Canadians have taken her into custody, now released her on bail pending extradition, an extradition hearing. We'll continue to engage through legal processes to get the just outcome that's connected to that. We have a set of trade discussions that are ongoing with the Chinese. As the Chinese have said, we're working on that while all the other issues – not just this particular

> issue, we have lots of complicated issues going on with China today all around the world. And we work on each of those to get good outcomes for the people of the United States of America and respecting the rule of law each step along the way. We'll do that here as well.[12]

d) The January 28, 2019 press conference by U.S. Acting Attorney General Whitaker – In January, 2019, the Acting Attorney General held a press conference to announce new charges against Huawei. He was asked about the Applicant's case:

> **Reporter**: The President once raised the idea that Ms. Meng's extradition could be used in the trade talks that are forthcoming. Is that possibility now closed given this enforcement action?
>
> **Acting Attorney General Whitaker**: The U.S. Department of Justice does its investigations and its charging decisions independent from the White House, and we pursue this when the evidence and the facts caused us to seek an indictment from the Grand Jury and the Grand Jury returned an indictment.
>
> **Reporter**: You say that you filed this when the facts led you to seek an indictment, but Huawei has been a concern in Washington for a decade, I mean, Tappy was dismembered seven years ago, what has taken the Justice Department…
>
> **Acting Attorney General Whitaker**: Do you know how sad that statement is, the Tappy was dismembered? (laughter)
>
> **Reporter**: I feel for Tappy, but it is a serious question. Why has it taken the Justice Department so long to pursue this kind of case against Huawei, I mean arguably, even back to 2012, perhaps T-Mobile should have known better than to allow Huawei engineers into their factories.
>
> **Acting Attorney General Whitaker**: Okay we conducted the investigation, and maybe the First Assistant from the Western District of Washington wants to add some additional information as to when the investigation started. But fundamentally, the way the Department of Justice works is we predicate an investigation, once the investigation is predicated, we pursue all the means of investigation we have, whether it is search warrants, whether it is other investigative interviews, other investigative manners, and we do these things as an ordinary course of business. One of the things that I think was emphasized but needs to be re-emphasized, is these two cases, while we are announcing them today and they and they concern essentially the same company and different

[12] A. Baboi Affidavit #1, Exhibit F, "Press Availability at the U.S. – Canada 2+2 Ministerial, Remarks to the Press, Michael R. Pompeo, Secretary of State" (December 14, 2018) ("*Pompeo/Freeland Press Availability Dec 2018*"), pp. 11-13.

> behaviours by the same company, are Department of Justice actions. We do our cases independent from the federal government writ large because that is the way the criminal system has to be. There is kind of a tried and true system and regular order that we follow at the Department of Justice and I think that anybody trying to connect dots otherwise are just trying to look for things that aren't there because it is just the way we do our business every day.[13]

e) The Interview with the Applicant's father and Huawei Chairman dated February 18, 2019 – The Applicant's father Ren Zhengfei, gave an interview to the BBC in February 2019 in which he alleged that the U.S. charges against the Applicant were politically motivated. Reuters reported that the U.S. Department of Justice denied the accusation:

> "Firstly, I object to what the U.S. has done. This kind of politically motivated act is not acceptable," Ren told the BBC in an interview.
>
> Canada arrested Meng on Dec. 1 at the request of the United States. Meng was charged with bank and wire fraud to violate American sanctions against Iran.
>
> The U.S. Justice Department denied the charges were politically motivated. "The Justice Department's criminal case against Huawei CFO Meng Wanzhou is based solely on the evidence and the law. The Department pursues cases free of any political interference and follows the evidence and rule of law in pursuing criminal charges," spokeswoman Nicole Navas said in an email to Reuters.
>
> Huawei, along with another Chinese network equipment company, ZTE Corp, has been accused by the United States of working at the behest of the Chinese government. The United States has said their equipment could be used to spy on Americans. Huawei has repeatedly denied the claims.[14]

f) The August 22, 2019 press conference of Global Affairs Minister Chrystia Freeland and Secretary of State Mike Pompeo – At a second press conference in Ottawa in August, 2019, Secretary of State Pompeo was again asked whether the Applicant was being used as a "bargaining chip":

> **Question:** *Bonjour*, Madam Freeland.

---

[13] A. Baboi Affidavit #1, para. 8; Affidavit of A. Baboi affirmed November 4, 2020 (A. Baboi Affidavit #2), Exhibit A (USB flash drive), also available on U.S. Justice Department website at https://www.justice.gov/opa/video/acting-attorney-general-whitaker-announces-national-security-related-criminal-charges ("*Whitaker Press Conference*").

[14] A. Baboi Affidavit #1, Exhibit G, *Reuters Feb 2019*, pp. 1-2.

(Via interpreter) Ms. Freeland, what do you tell the Chinese Government when they target you, when they name you on state television, telling you to stop meddling with internal affairs in Hong Kong and elsewhere in China? And don't you fear that perhaps this denunciation of yours could complicate even further the life of these two detainees in Beijing? Mr. Pompeo, I'm not sure if I got your point of Meng Wanezhou [sic] quite well. I just wanted to know if you see her as a bargaining chip in the U.S.-China conflict, trade conflict.

Secretary Pompeo: No. Go ahead.

Moderator: Madam Freeland —

Foreign Minister Freeland: (Via interpreter) Regarding relations between Canada and China, the prime minister, in his excellent speech yesterday, clearly explained our government's position. I'll be happy to reiterate and underscore this position. Canada and China have longstanding relations. Next year, in fact, we'll be celebrating 50 years of diplomatic ties between Canada and China. It's a relationship that covers many fields – education, the economy, the environment, on which we work very closely, and the World Trade Organization. I believe I've already explained our position considering Michael Kovrig and Michael Spavor, as well as Ms. Meng's position. Regarding Hong Kong, Canada takes a keen interest in Hong Kong. After all, 300,000 Canadians reside in Hong Kong. Therefore, it is only natural and important for Canada to keep a close eye on the developments in Hong Kong. Canada also believes that the idea of one country, one system is important for Hong Kong and for China. But so is the guarantee of peaceful assembly for the people of Hong Kong. This is what Canada has said and this is what our prime minister said yesterday. I'd also like to underscore and reiterate that what Canada said on Saturday was a joint statement with the European Union and with Federica Mogherini. All this to explain that Canada is working very closely with our partners and allies. It is crucial for Canada in the world to always defend our values and our national interests, and we will continue to do so.

Question: (Inaudible), Secretary Pompeo?

Secretary Pompeo: No. I mean, you asked if it's a bargaining – you asked if it was a bargaining chip. It is a legal process by the United States Department of Justice designed to bring someone who we believe we have sufficient information to bring back to the United States under the

> agreements between the United States and Canada – very straightforward.[15]

7. On January 15, 2020, the former President and Vice Premier He signed the new Phase One trade agreement.[16] On January 20, 2021, Joe Biden was sworn in as the President of the United States.

III. ARGUMENT

1) Mootness

8. Courts are in the business of resolving live controversies. Even if the issue is a live one when the case begins, the court must assess the situation when called upon to make a decision.[17] Where circumstances have changed in a material way such that the issue in question no longer exists, the Court should decline to hear it. That is the case with this branch of the Applicant's abuse of process application.

9. The leading case on mootness is the Supreme Court's decision in *Borowski*.[18] *Borowski* sets out a two-part test: the court must first decide whether a live controversy exists. If it does not, the court must decide whether the case should nevertheless be heard. While there is a live controversy between the parties generally, and with respect to abuse of process generally, there can be no live issue in respect of the statements that underpin this distinct branch of the application. *Borowski* applies to individual issues just as much as to the case as a whole; indeed *Borowksi* itself was a case where only 3 of 5 issues were technically moot, but the Court declined to deal with the

---

[15] A. Baboi Affidavit #1, Exhibit H, "Secretary of State Michael R. Pompeo And Canadian Foreign Minister Chrystia Freeland At a Press Availability, Remarks to the Press, Michael R. Pompeo, Secretary of State, National Art Center, Ottawa, Canada" (August 22, 2019) ("*Pompeo/Freeland Press Availability Aug 2019*"), pp. 8-9.
[16] A. Baboi Affidavit #1, Exhibit I, White House "Fact Sheet": "President Donald J. Trump is Signing a Landmark Phase One Trade Agreement with China" (January 15, 2020) ("*U.S.-China Trade Agreement Fact Sheet*"); see also A. Baboi Affidavit #1, Exhibit J, U.S.-China Economic and Security Review Commission, "The U.S.-China "Phase One" Deal: A Backgrounder", February 4, 2020.
[17] *Borowski v. Canada (Attorney General)*, [1989] 1 SCR 342, at p. 353.
[18] *Ibid.*

two remaining issues.[19] In other cases, courts have found that where the basis for an argument disappears, there is no point in considering the issue further.[20]

10. The Applicant has insurmountable evidentiary problems on this application. The maker of the statements at issue, former President Trump, has no authority to intervene in the case due to his departure from office. Second, during the time he was in office, there is no evidence that he did intervene; indeed the best evidence that exists, from the lead U.S. trade negotiator, was that he did not.[21] Finally, the limited context in which the former President mused about intervening – trade negotiations – no longer exists as those negotiations have long since ended. The very thin basis on which this application was launched has vanished.

11. This is not a case where the second part of the *Borowski* test, the Court's residual discretion to hear a moot issue, applies. There is no public interest in knowing whether idiosyncratic comments of foreign officials could lead to an abuse of process. We already know that they can, from the Supreme Court's decision in *Cobb*.[22] But they cannot lead to a remedy in this case, and the Court should refrain from ruling.

12. The Supreme Court has emphasized that on the main branch of the abuse of process analysis, the Court must be satisfied that prospective harm will occur; that is, that by continuing the proceedings the prejudice to the fairness of the proceedings or to the integrity of the administration of justice "will be manifested, perpetuated or aggravated".[23] Not only is there no evidence that such prejudice has occurred, there is no evidence to ground a suggestion that it will occur.

13. The Applicant's position on this application should be contrasted to her approach to the double criminality issue. On that issue, one which is usually considered at the time of committal, she insisted on having it dealt with as a preliminary issue, with a view to terminating the

---

[19] *Ibid.* at p. 357.
[20] *Inuvik Housing Authority v. Koe*, 1991 CanLII 8303 (NWT SC) at para. 14; *Charlie v. British Columbia (Attorney General)*, 2016 BCSC 2292 at paras. 24-29; *Dwyer v. Canada (Public Safety and Emergency Preparedness)*, 2020 FC 919 at para. 48.
[21] A. Baboi Affidavit #1, Exhibit D, *Lighthizer Interview*, p. 2.
[22] *Cobb*, at para. 43.
[23] *R v. Babos*, 2014 SCC 16, [2014] 1 SCR 309 at para. 32.

proceedings immediately. Here, the Applicant alleges that the comments of the former President created such "an ominous climate" or "oppressive, politicized atmosphere"[24] that she could not exercise free decision-making. If that were true, it required an immediate remedy. But she made a tactical choice not to bring it immediately and did nothing to seek an early hearing of the issue. By so doing, she has fatally undermined the credibility of her allegation.[25]

14. Considered in light of the whole record of conduct by U.S. officials, the circumstances of this case cannot plausibly be characterized as misconduct, and are far from being one of the "exceptional" and "very rare" cases where past misconduct will be "so egregious that the mere fact of going forward in the light of it will be offensive".[26] The factual foundation of the application does not, and never did, rise to an abuse. As the foundation no longer exists, the application should not be heard.

2) The Applicant Has Failed to Establish Any Abuse of Process that Warrants a Stay of Proceedings

15. Even if the Court concludes that this application is not moot or should nevertheless be heard, the Applicant has failed to demonstrate any misconduct or circumstances justifying a stay. The comments of the former President cannot be fairly characterized as a "threat;" the comments essentially are about a gift not given. The suggestion that the former President's comments can be stretched to imply potentially punitive consequences[27] is not only speculative but without any evidentiary foundation. Since there is nothing that amounts to misconduct or abuse, nor anything capable of causing ongoing prejudice, there is no basis for a stay of proceedings.

A. The Test for Abuse of Process

i) The Applicant Must Meet the Tripartite Test for a Stay

16. In *R v. Babos*, the Supreme Court clarified the test for when an abuse of process may warrant a stay of proceedings. The test is a rigorous one, requiring evidence that satisfies a high

---

[24] Applicant's Submissions, paras. 54-55, 62, 68, 72.
[25] See *Babos*, at paras. 63-65; *R v. Warring*, 2017 ABCA 128 at para. 11; *R. v. S.C.W.*, 2018 BCCA 346 at para. 27.
[26] *R v. Regan*, [2002] 1 SCR 297, at para. 55, citing *Canada (Minister of Citizenship and Immigration) v. Tobiass*, [1997] 3 SCR 391 at para. 91; see also *Babos*, at paras. 36 and 38.
[27] Applicant's Submissions, para. 47.

standard. The need for a high standard is justified by the fact that a stay "is the most drastic remedy a criminal court can order," and only warranted on rare occasions.[28]

17. The test can be satisfied in either of two ways. On the first, or "main" branch, the Applicant must establish that there has been serious state misconduct or other circumstances that compromise the fairness of the committal hearing. On the second, or "residual" branch, the Applicant must demonstrate that continuation of the hearing will damage the integrity of the judicial process.[29]

18. The *Babos* framework applies equally to the main and residual categories:

> 1) There must be prejudice to the accused's right to a fair trial (or, in this case, fair extradition hearing) or the integrity of the justice system that "will be manifested, perpetuated or aggravated through the conduct of the trial, or by its outcome";
>
> 2) There must be no alternative remedy capable of redressing the prejudice; and
>
> 3) Where there is still uncertainty over whether a stay is warranted after steps (1) and (2), the court is required to balance the interests in favour of granting a stay, such as denouncing misconduct and preserving the integrity of the justice system, against "the interest that society has in having a final decision on the merits".[30]

19. The Supreme Court has repeatedly emphasized that courts must determine the *prospective* impact of the conduct in question, calling the first criterion of the test "critically important".[31] As noted above, it is only in "exceptional" and "relatively very rare" cases that past misconduct will be "so egregious that the mere fact of going forward in the light of it will be offensive".[32]

20. Regarding the second step, *Babos* clarified that different remedies may apply depending on whether the prejudice relates to the right to a fair hearing or the integrity of the justice system. Where the concern is trial fairness, the focus is on restoring the accused's right to a fair trial.[33]

---

[28] See *Babos*, at paras. 30-31, 39; *Regan*, at para. 55; *R v. Carosella*, [1997] 1 SCR 80 at para. 52; *R v. O'Connor*, [1995] 4 SCR 411 at paras. 68-69, 77, 81-82.
[29] *Babos*, at para. 31, see also *Henry v. British Columbia (Attorney General)*, [2015] 2 SCR 214 at para. 50.
[30] *Babos*, at para. 32, citing *Regan*, at paras. 54 and 57.
[31] *Tobiass*, at para. 91; *Regan*, at para. 54; *Babos*, at paras. 34, 38-39; *O'Connor*, at paras. 75, 82.
[32] *Regan* at para. 55, citing *Tobiass* at para. 91; see also *Babos*, at paras. 36 and 38.
[33] *Babos*, at para. 39.

21. Finally, *Babos* affirmed that in residual category cases, balancing must always occur, since courts must consider which of two options better protects the integrity of the justice system: staying the proceedings or proceeding despite the impugned conduct. Relevant factors include

- the nature and seriousness of the impugned conduct;
- whether the conduct is isolated or reflects a systemic and ongoing problem;
- the circumstances of the accused;
- the charges he or she faces; and
- the interests of society in having the charges disposed of on the merits.[34]

22. Moldaver J. observed in *Babos* that the burden to justify a stay in the residual category is onerous and such cases will be "exceptional" and "very rare".[35]

23. The balancing test has been further refined in the extradition context to take into account factors of particular importance to that context. The test has been described as whether the impugned conduct amounting to an abuse is "disproportionate to the societal interest in the effective discharge of our international obligations to those accused of serious crimes in the jurisdiction of our extradition partner."[36] A stay of extradition proceedings is no small matter: imposing one would deny a requesting state the ability to have the truth of the allegations determined, a result that is no less drastic than staying a prosecution.[37]

24. Although the abuse of process doctrine has been largely subsumed under s. 7 of the *Charter*, the Supreme Court confirmed in *O'Connor* that the "clearest of cases" standard continues to apply when considering whether a stay would be "appropriate and just" under s. 24(1) of the *Charter*.[38]

---

[34] *Ibid.* at para. 41.
[35] *Ibid.* at para. 44.
[36] *United States v. Cavan*, 2015 ONCA 664 at para. 67; see also *United States of America v. Wilson*, 2016 BCCA 326 at para. 81.
[37] See for e.g. *India v. Badesha*, 2018 BCCA 470 at paras. 95 and 99. See also *United States v. Lane*, 2014 ONCA 506 where the Ontario Court of Appeal found that the extradition judge erred by failing to consider the improbability of the requesting state later attempting to seek the person sought's extradition once a stay had been entered.
[38] *O'Connor*, at paras. 68, 70.

ii) The Extradition Context

25. The jurisdiction of an extradition judge to stay proceedings is limited. In *United States v. Cobb*, the Supreme Court confirmed that an extradition judge has the jurisdiction to stay proceedings either as a s. 7 *Charter* remedy or as part of the judge's common law power to prevent an abuse of process.[39] However, the extradition judge's *Charter* jurisdiction, which arises from s. 25 of the *Extradition Act*, extends "only insofar as the *Charter* breach pertains directly to the circumscribed issues relevant at the committal stage of the extradition process."[40]

26. Conduct that implicates the integrity of the committal process requires some nexus between the Requesting State's conduct and the committal hearing itself.[41] In *R v. Hulley*,[42] the foreign prosecutor threatened to seek a much higher sentence if the person sought did not accept a plea agreement. Hulley later fled to Canada. Cullen J. (as he then was) concluded that the required nexus had not been established since the prosecutor's comments related to the requesting state's process and not the extradition process. Nor was there any evidence that the sentencing position was designed to pressure Hulley into waiving his rights to resist extradition.[43]

27. Courts have only stayed extradition proceedings for abuse of process in rare circumstances. When the main category is invoked, the question is whether the person sought's right to a fair hearing has been prejudiced and whether that prejudice will be carried forward through the conduct of the hearing.[44]

28. In *Cobb*, a stay of proceedings was upheld because the fairness of the hearing was compromised by the offensive, threatening comments of a foreign prosecutor and trial judge. The extradition judge found that such comments were designed to encourage the persons sought to

---

[39] *Cobb*, at paras. 36-40.
[40] *Ibid.* at para. 26; see also *United States of America v. Kwok*, [2001] 1 SCR 532 at paras. 5, 54, 56-57. Although in *Cobb*, the Supreme Court was considering the extradition judge's *Charter* jurisdiction under s. 9(3) of the *Extradition Act*, R.S.C. 1985, c. E-23 [am. 1992, c. 13], in the companion case of *Kwok*, the Court made clear that s. 25 of the current *Act* is in all intents and purposes identical to s. 9(3) under the previous *Act*. The Court concluded that the resolution of the issue of the *Charter* jurisdiction was the same under both provisions: see *Kwok*, at paras. 24, 56-57.
[41] *United States v. Khadr* 2011 ONCA 358 at para. 45 ("*Khadr* ONCA").
[42] *R v. Hulley*, 2006 BCSC 907.
[43] *Ibid.* at paras. 3, 53-56.
[44] *Babos*, at para. 34.

abandon their rights to an extradition hearing.[45] Although the fairness of the hearing itself was not affected, the requesting state's conduct was found to be a direct attempt to interfere with the committal hearing:

> The issue at this stage is not whether the appellants will have a fair trial if extradited, but whether they are having a fair extradition hearing in light of the threats and inducements imposed upon them, by those involved in requesting their extradition, to force them to abandon their right to such a hearing. The focus of the fairness issue is thus the hearing in Canada, to which the *Charter* applies, and not the eventual trial in the U.S., which it may be premature to consider pending the Minister's decision on surrender. Conduct by the Requesting State, or by its representatives, agents or officials, which interferes or attempts to interfere with the conduct of judicial proceedings in Canada is a matter that directly concerns the extradition judge.[46]

29. The fairness of the proceedings was also at issue in *United States v. Fafalios*.[47] The Crown's appeal was considered an abuse of process as it was precipitated by the Crown's invitation to stay the proceedings after declining to comply with a disclosure order. In *United Kingdom v. Tarantino*, the Court found that the requesting state's conduct in repeatedly and erroneously certifying evidence as available in a careless and cavalier manner undermined the fairness of the proceedings, but also engaged the residual ground by impacting on the ability of the Court to preserve the integrity of the process.[48]

30. The residual category of conduct caught by s. 7 of the *Charter*

> does not relate to conduct affecting the fairness of the trial or impairing other procedural rights enumerated in the *Charter*. It instead addresses the panoply of diverse and sometimes unforeseeable circumstances in which a prosecution is conducted in such a manner as to connote unfairness or vexatiousness of such a degree that it contravenes fundamental notions of justice and thus undermines the integrity of the judicial process.[49]

31. Other extradition cases where courts have found an abuse of process in the residual category include

---

[45] *Cobb*, at paras. 7-9, 14, 33, 43.
[46] *Cobb*, at para. 33 [emphasis added].
[47] *United States v. Fafalios*, 2012 ONCA 365.
[48] *United Kingdom v. Tarantino*, 2003 BCSC 1134 at paras. 28-31, 46, 55-56.
[49] *O'Connor*, at para. 73 [emphasis added].

- *United States of America v. Tollman*[50] and *Poland (Republic) v. Bartoszewicz*,[51] both of which involved misuse of the immigration system to effect an extradition (*i.e.*, a "disguised extradition");

- *Attorney General of Canada v. Khadr*,[52] where the court found that the person sought had been subject to numerous shocking human rights violations while detained in Pakistan at the behest of the requesting state;

- *United States of America v. Licht*,[53] where U.S. law enforcement entered Canada illegally and conducted a reverse sting operation, unbeknownst to the Canadian authorities and despite having been made aware of the legal requirements in Canada for conducting such an operation; and

- *U.S.A. v. Alfred-Adekeye*,[54] where the cumulative effect of a number of findings was found to justify a stay, including the improper use of the criminal process to pressure the person sought to abandon a lawsuit; failure to make full and frank disclosure before the judge issuing the provisional arrest warrant resulting in misleading and "sinister" inferences; use of the extradition process when the person sought had repeatedly attempted to obtain a visa to enter the U.S.; and numerous misleading and false allegations included in a letter from the requesting state's prosecutor filed on the bail hearing.

32. In *United States v. Wilson*,[55] the Court of Appeal found that the failure of the certifying prosecutor to make enquiries about the availability of the victim witnesses, upon learning that two witnesses had died, was not in keeping with the good faith obligations of the requesting state relating to certification. The Court declined to order a stay of proceedings, however, taking into account that there was no evidence of a deliberate intent to mislead or withhold information, or that the requesting state condoned or acquiesced in the prosecutor's conduct, or of a systemic problem. Similarly, the Court of Appeal held in *India v. Badesha*[56] that the conduct of Canadian authorities in attempting to surrender the persons sought prior to making additional submissions to the Minister of Justice was an abuse in the residual category, but found it was not the clearest of cases warranting a stay.

---

[50] *United States of America v. Tollman*, 2006 CanLII 31731.
[51] *Poland (Republic) v. Bartoszewicz*, 2012 ONSC 250.
[52] *Attorney General of Canada v. Khadr*, 2010 ONSC 4338 ("*Khadr* SCJ"), aff'd *Khadr* ONCA.
[53] *United States of America v. Licht*, 2002 BCSC 1151.
[54] *U.S.A. v. Alfred-Adekeye* (31 May 2011), Vancouver 25413 (BCSC, unreported) at paras. 36-56, 63-64.
[55] *Wilson*, at paras. 68-83.
[56] *Badesha*, at paras. 92-100.

33. Taken together, these cases show that the conduct must be extreme to amount to an abuse – threats, involvement in human rights abuses, misuse of the justice system – and even then, the conduct may not be sufficient to justify a stay.

B. There Is No Factual Basis for a Finding of Abuse of Process

34. The Applicant must provide some compelling evidence of misconduct for her argument to be viable. The five statements on which she relies, whether considered individually or cumulatively, are not fairly characterized as misconduct, much less meet the high legal standard for a stay of proceedings.

35. The first statement from the former President on which the Applicant relies comes from a Reuters news article.[57] While the report of the statement is lacking in context, since it does not purport to be a transcript of an interview, taken at its highest it suggests that the Applicant's prosecution may end if a trade deal between the U.S and China is reached. The report of the statement is slight on detail, and implies no threat to the Applicant. It suggests that her prosecution may be terminated for irrelevant reasons.

36. This interpretation is consistent with the former President's response to the question posed at the subsequent February 2019 press conference. A reporter asked, "Would you drop criminal charges against Huawei as part of this deal?," to which the former President responded that the decision would be made later, without offering further detail.[58] Indeed, the Applicant accepts this interpretation of the statements at issue.[59]

37. None of the statements suggest that the prosecution itself was politically motivated, nor is there any other evidence in the record that would suggest this is so. In fact, the Acting Attorney General stated clearly that it was not so.[60] Moreover, the Applicant's account of the Requesting State's national security concerns about Huawei, which purports to provide "context" for the

---

[57] Applicant's Record, Vol. I, Tab E, Exhibit E, *Reuters Dec 2018*, p. 2.
[58] Applicant's Record, R. Laskin Affidavit #1, Exhibit L, *Trump Remarks Feb 2019*, p. 68.
[59] Applicant's Submissions, para. 60(d).
[60] A. Baboi Affidavit #1, para. 8 and A. Baboi Affidavit #2, Exhibit A, *Whitaker Press Conference*, at timestamp 32:10.

alleged misconduct, in no way establishes an improper political basis for the prosecution, nor does it undermine the Requesting State's legitimate interest in trying the charges on their merits.[61]

38. Nor are any of the other statements relied on by the Applicant clearly about her. The statement of Secretary of State Pompeo cited by the Applicant is at best ambiguous, and when looked at in light of his subsequent statements,[62] it is clear that the Secretary of State gives no life to an argument of misconduct. Even the subsequent statements by the former President are not clearly directed at the Applicant; he appears in each case to be speaking about the co-accused Huawei, which faces an ongoing criminal prosecution in the United States District Court in the Eastern District of New York.[63]

39. The Applicant's selective version of the relevant conduct, though insufficient by itself to establish misconduct, is rendered even weaker when the record is amplified by the evidence of the Requesting State. The Acting Attorney General, the Secretary of State, a top economic adviser and the U.S. Trade Representative in the China trade negotiations all present a contemporaneous version of events that is consistent with conduct reflecting a division between prosecution and trade issues.[64] Both in its statement to Reuters and in the Acting Attorney General's comments, the U.S. Justice Department has maintained that the investigation and charges proceeded on the evidence, independent of any other concerns.[65]

40. While subsequent statements of responsible officials may be incapable of undoing serious damage done, here there was no damage done. In no objective sense were the former President's statements an example of a threat. The statements in *Cobb* were threatening: they suggested that if Cobb exercised his rights, he would face punitive consequences for having done so. Because the former President's statements are anodyne in and of themselves, they should be looked at in

---

[61] See Applicant's Submissions, Appendix "A": Historical Context.
[62] Applicant's Record, R. Laskin Affidavit #1, Exhibit L, *Trump Remarks Feb 2019*; A. Baboi Affidavit #1, Exhibit F, *Pompeo/Freeland Press Availability Dec 2018*, pp. 11-13, and Exhibit H, *Pompeo/Freeland Press Availability Aug 2019*, pp. 8-9.
[63] Applicant's Record, R. Laskin Affidavit #1, Exhibit K, *Trump Remarks Jan 2019*, p. 48; and Exhibit N, *Telegraph 2019*, p. 85.
[64] A. Baboi Affidavit #1, Exhibit D, *Lighthizer Interview*; E, and Exhibit E, *The Hill 2019*, p. 2, Exhibit F, *Pompeo/Freeland Press Availability Dec 2018*, pp. 12-13; A. Baboi Affidavit #2, Exhibit A, *Whitaker Press Conference*.
[65] A. Baboi Affidavit #1, Exhibit G, *Reuters Feb 2019*, p. 2; A. Baboi Affidavit #2, Exhibit A, *Whitaker Press Conference*.

relation to the entirety of the record to see if they can sustain any other basis of impropriety. Manifestly, they cannot.

41. Whether this court finds the issue to be moot, it is clear that even taking the case at its highest, there is no factual basis for finding misconduct. The Court need go no further.

C. The Applicant Has Not Justified the Extreme Remedy of a Stay

42. The Supreme Court has emphasized repeatedly that to obtain the drastic remedy of a stay, the Applicant is obliged to demonstrate ongoing prejudice to her right to a fair committal hearing or the integrity of the judicial process. As the Applicant has not established that proceeding with the extradition would manifest, aggravate, or perpetuate prejudice in either the main or residual categories of abuse of process, she cannot pass the first stage of the *Babos* test. A stay is unjustified.[66]

i) There is No Conduct Reaching into these Proceedings that Requires the Intervention of the Court

43. First, there is no basis to grant a stay in either category as the Applicant has not established a nexus between the impugned comments and the extradition proceedings.[67] As Molloy J. observed in *Tollman*, the focus of the extradition judge's power to stay proceedings must be on the Canadian judicial process:

> The abuse power cannot be used to remedy the actions of foreign states outside our borders, nor can it be invoked in respect of any perceived unfairness of the ultimate trial to be held in the foreign state. **However, the power applies to any conduct that reaches into this jurisdiction and undermines the integrity of judicial system here**: *Cobb* at paras. 21-40, and cases referred to therein. [emphasis in original][68]

44. Similarly in *Khadr*, the extradition judge found that evidence of shocking human rights abuses instigated and perpetuated by the requesting state reached into the proceeding, directly

---

[66] *Babos*, at para. 31; *Tobiass*, at paras. 91, 93-94.
[67] *Cobb*, at para. 26 and *Khadr* ONCA, at paras. 44-45.
[68] *Tollman*, at para. 18.

impacting the integrity of the court. The evidence in the ROC originated in the person sought's mistreatment while detained in Pakistan.[69]

45. Unlike the situation in *Tollman* and *Khadr*, the former President's comments have no connection to these proceedings: there is no conduct that requires the Court to act to protect its own integrity. The Applicant has provided no evidence to support her assertion that the Requesting State is "using" or "manipulating" this extradition process to gain an advantage in trade negotiations.[70] At their highest, the comments of the former President and Secretary Pompeo relate to the Requesting State's charges against Huawei and the Applicant, and the related prosecution. As noted above, this Court held in *Hulley* that where statements were not tied to the extradition process and did not suggest that resistance to extradition would trigger a more punitive sentencing regime, the necessary nexus was not shown.[71]

46. None of the comments that the Applicant relies upon involve threats in connection with the extradition process or discourage the Applicant in exercising her right to resist extradition. To the contrary, the comments of Secretary Pompeo on December 14, 2018 suggest that former senior officials of the Requesting State endorsed the legal extradition process in which it was engaged.[72] Simply put, there is no evidence of any conduct "which interferes or attempts to interfere with the conduct of judicial proceedings in Canada".[73]

47. This stands in stark contrast to *Cobb*, where the comments by the U.S. prosecutor with carriage of the case and presiding judge were found to be "an attempt to influence the unfolding of the Canadian judicial proceedings by putting undue pressure on the appellants to desist from their objections to the extradition request."[74] Cobb was one of a number of individuals charged with mail fraud in relation to illegal sales of gemstones to residents of the U.S. While sentencing

---

[69] *Khadr* SCJ at paras. 136-142.
[70] Applicant's Submissions, paras. 41-42.
[71] *Hulley*, at paras. 3, 53-56.
[72] A. Baboi Affidavit #1, Exhibits F, *Pompeo/Freeland Press Availability Dec 2018* and H, *Pompeo/Freeland Press Availability Aug 2019*. See *Lau v. Commonwealth of Australia and Canada*, 2006 BCCA 484 at para. 53; *United States v Kerfoot*, unreported (May 25, 2009) Vancouver 24183 (SC); *United States v Sommer*, unreported (October 26, 2007) Vancouver 23972 (SC).
[73] *Cobb*, at para. 33.
[74] *Cobb*, at para. 43.

one of the co-accused in the U.S. the judge commented on those accused who had not yet been extradited:

> I want you to believe me that as to those people who don't come in and cooperate and if we get them extradited and they are found guilty, as far as I'm concerned they're going to get the absolute maximum jail sentence that the law permits me to give."[75]

48. The U.S. prosecutor made additional comments about the case in the week before the extradition hearing during a television interview on *The Fifth Estate*:

> MacIntyre [reporter]: … For those accused who to choose to fight extradition, Gordon Zubrod warns they're only making matters worse for themselves in the long run.
>
> Zubrod [prosecutor]: I have told some of these individuals, "look, you can come down and you can put this behind you by serving your time in prison and making restitution to the victims or you can wind up serving a great deal longer sentence under much more stringent conditions", and describes those conditions to them.
>
> MacIntyre: How would you describe those conditions?
>
> Zubrod: You're going to be the boyfriend of a very bad man if you wait out your extradition.
>
> MacIntyre: And does not have much of an impact on these people?
>
> Zubrod: Well, out of the 89 people we've indicted so far, approximately 55 of them of said, "We give up".[76]

49. The Supreme Court's fair hearing concerns in *Cobb* arose directly from these explicitly intimidating comments, designed to pressure the persons sought for extradition to abandon their rights. Arbour J. held that courts should not "expect litigants to overcome well-founded fears of violent reprisals in order to be participants in a judicial process" or order committal for the person to face the ominous climate created by such comments. However, not every statement made by a foreign official about the prosecution rises to an abuse of process engaging the judicial

[75] *Cobb*, at para. 7.
[76] *Cobb*, at para. 8.

proceeding's integrity or fairness.[77] The comments of U.S. officials in this case did not refer directly or indirectly to the extradition proceedings, except to acknowledge that it was a legitimate process for seeking her surrender.[78]

ii) Important Contextual Considerations Weigh Against a Stay

50. The Applicant's assertions of "egregious and shocking" abuse[79] and ongoing prejudice to her ability to defend against extradition[80] are baseless. They must be measured against the absence of any urgency with which this application has been pursued.

51. The Applicant has been granted much leeway regarding the order in which her pre-hearing applications have been heard. While the Applicant was clear that she would eventually argue this ground of abuse, if she truly felt that she "face[d] intimidation" in every legal decision she made,[81] she ought to have sought an immediate remedy. The first four of the five impugned comments were made within three months of the Applicant's arrest. The decision to wait almost two years to make this argument – and to pursue this argument after pursuing other applications – undermines her claims of prejudice.

52. The Supreme Court's decision in *Babos* is instructive on this point. The majority found that the accused's failure to seek an early remedy undermined how seriously he took the threats at issue. In *Babos*, the original prosecutor threatened one accused with additional charges if he did not plead guilty. The defence did not immediately confront the prosecutor or raise the issue with the judge in order to seek early removal of the prosecutor, but instead raised the issue 18 months later in the context of an s. 11(b) delay motion.[82] Writing for the Court, Moldaver J. found that the trial judge had erred in considering the seriousness of the conduct without this essential context:

> [63] The threats were made more than a year before the trial began. The 18-month long silence of the appellants and their counsel sheds some light on how seriously they took the threats. Had they been taken seriously, one might have expected counsel to respond

[77] *Hulley*, at paras. 53-56; *Kerfoot*, at paras. 35, 41; *McKinnon v. The United States of America & Anor*, [2008] UKHL 59 at paras. 39-42.
[78] A. Baboi Affidavit #1, Exhibit F, *Pompeo/Freeland Press Availability Dec 2018*, pp. 11-13, and Exhibit H, *Pompeo/Freeland Press Availability Aug 2019*, pp. 8-9; A. Baboi Affidavit #2, Exhibit A, *Whitaker Press Conference*.
[79] Applicant's Submissions, para. 60(a).
[80] Applicant's Submissions, para. 67.
[81] Applicant's Submissions, paras. 64-65.
[82] *Babos*, at paras. 63-65.

> immediately. Surely the proper course of action was not to sit back for over a year before applying, mid-trial, for a stay of proceedings…
>
> […]
>
> [65] Moreover, the trial judge did not consider the passage of time between when the threats were made and when they were first brought to light. He made no mention of this in his reasons. In this regard, while I agree in general with Justice Abella that the passage of time itself cannot "retroactively cure intolerable state conduct" (para. 82), its significance here is that it serves as a yardstick against which to measure just how serious Ms. Tremblay's conduct was perceived by the defence. The fact that defence counsel took no steps for over a year to raise concerns — and then, almost by accident in the context of a s. 11 (*b*) delay motion — sheds important light on this subject. The trial judge erred in failing to take this into account.

53. As in *Babos*, the Applicant's claims of serious prejudice to the fairness of the hearing are wholly undermined by her failure to seek an early remedy.

54. The Applicant's claims of arbitrariness based on the "number of ways" that U.S. officials "may intervene in or otherwise interfere with the Applicant's case"[83] have no evidentiary basis and are thus entirely speculative. Again, the sole basis of "interference" suggested in the former President's comments is conferring an unjust benefit on the Applicant. Likewise, there is no evidence of a chilling effect on prosecutorial discretion in the Requesting State or in Canada, as the Applicant speculates.[84]

55. The Applicant's reference to the facts in other prosecutions in the Requesting State has no bearing on the facts of this case. Even assuming this Court admits the evidence of Mr. Gottlieb that the former President had the authority to intervene in a prosecution, the only reasonable interpretation of the comments at issue in this case is that the prosecution might have been brought to an end.

56. Indeed, viewed in light of the numerous statements by U.S. officials that the charges are based on a *bona fide* investigation and an evidentiary basis deemed sufficient for prosecution by a grand jury, there is no basis to find improper conduct. While the Applicant repeatedly states that

---

[83] Applicant's Submissions, paras. 47, 54.
[84] Applicant's Submissions, para. 47.

the Requesting State is intent on using her as a "bargaining chip", no official has ever used this phrase. Rather, it was introduced by reporters in their questions to Secretary Pompeo.[85]

57. In rejecting this characterization, Secretary Pompeo nevertheless acknowledged the broader geo-political considerations of the administration, within which the legitimate extradition process was taking place.[86] There is nothing inappropriate about this.

58. The comments by the former President – responses to questions posed by reporters in the midst of an intense period of trade negotiations – did not attack the Applicant, nor did they have any impact on the extradition proceeding or the integrity of the Canadian judicial system. Whether the former President could have intervened in the prosecution of the Applicant in the United States, there is no evidence he attempted to do so. As noted, on January 15, 2020, phase one of a trade agreement between the United States and China was signed.[87] The Applicant did not receive the putative benefit suggested as possible by the former President.

59. It is not for the committal court to assess a requesting state's system of justice or question whether a fair trial can occur in the foreign state. As the Supreme Court observed in *Argentina v. Mellino*, "the assumption that the requesting state will give the person sought a fair trial according to its laws underlies the whole theory and practice of extradition."[88] As *Cobb* expressly acknowledged, any consideration of the fairness of the proceedings in the requesting state is an issue for the executive.[89]

iii) No Ongoing Prejudice

60. Finally, the Court must determine whether there would be any ongoing impact of the conduct in question on the extradition hearing.[90] Any suggestion that the current President, or any

---

[85] A. Baboi Affidavit #1, Exhibit F, *Pompeo/Freeland Press Availability Dec 2018*, p. 12, and Exhibit H, *Pompeo/Freeland Press Availability Aug 2019*, pp. 8-9.
[86] A. Baboi Affidavit #1, Exhibit F, *Pompeo/Freeland Press Availability Dec 2018*, pp. 12-13, and Exhibit H, *Pompeo/Freeland Press Availability Aug 2019*, p. 9.
[87] A. Baboi Affidavit #1, Exhibit I, *U.S.-China Trade Agreement Fact Sheet*.
[88] *Argentina v. Mellino*, (1987) 33 C.C.C. (3d) 334, at pp. 350-351; *M.M. v. United States of America*, [2015] 3 SCR 973 at para. 120; *United States v. Qumsyeh*, 2015 ONCA 551 at para. 22.
[89] *Cobb*, at para. 33; *HKSR v. Chang*, 2001 BCSC 1854 at para. 24; *United States of America v. Cheema*, [1993] B.C.J. No. 1365 (S.C) at para. 51, application for leave to appeal dismissed [1999] S.C.CA. No. 418; *Schmidt v. The Queen*, (1987) 33 C.C.C. (3d) 193 (SCC) at pp. 214-215.
[90] *Babos*, at paras. 34, 38-39.

other responsible official, will make similar comments is speculative. Moreover, this is not a case like *Khadr*, where the past conduct of the requesting state was considered to be so egregious that, despite the existence of properly gathered evidence that could have formed the basis for committal, continuing with the extradition was found to be shocking.[91]

61. On the residual branch of abuse of process, the Applicant has not demonstrated that the continuation of the extradition hearing will damage the integrity of the judicial process. The issue on this branch of the test is whether the state engaged in conduct so offensive to societal notions of fair play and decency that continuing to proceed with a hearing in face of such conduct would be harmful to the integrity of the judicial system.[92] The Applicant is far from meeting that standard.

62. Nor has she demonstrated any ongoing prejudice to her fair hearing rights. To the contrary, the Applicant has been afforded every opportunity for her evidence and arguments to be heard and considered by this Court.

63. The conduct at issue, which at its highest amounts to unproven influence in trade negotiations, is far from rising to the level that justified stays in previous extradition cases. There is no involvement in human rights abuses, no illegal police conduct on Canadian soil by foreign authorities, no misuse of the justice system.

64. The Applicant has made multiple distinct abuse of process allegations in this case. Each should be approached separately since they allege abuse "committed at different times by different players."[93] The comments of the former President and other U.S. officials do not establish misconduct justifying a stay, either individually or collectively. There is no ongoing prejudice and it is plain there never was. The societal interests in the effective discharge of Canada's international obligations and in having the charges tried on their merits far outweigh the comments of the former President, which have been rendered moot. The Applicant's allegations do not amount to an abuse of process and fall well short of justifying a stay of proceedings.

---

[91] *Khadr* SCJ, at paras. 133-134, 164-170, 176.
[92] *Babos*, at para. 35; *Khadr* ONCA, at paras. 48-50.
[93] *Babos*, at para. 73.

IV. ORDER REQUESTED

65. The Attorney General asks that the Application be dismissed.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

Dated at the City of Vancouver, Province of British Columbia, this 25th day of January, 2021.

Robert J. Frater, Q.C. Counsel for the Attorney General of Canada on behalf of the United States of America	Kerry L. Swift Counsel for the Attorney General of Canada on behalf of the United States of America	Monika Rahman Counsel for the Attorney General of Canada on behalf of the United States of America

LIST OF AUTHORITIES

Tab **Statutes and Treaties**

Cases

21. *R v. Regan,* [2002] 1 SCR 297

22. *R. v. S.C.W.*, 2018 BCCA 346

23. *R v. Warring,* 2017 ABCA 128

24. *Schmidt v. The Queen*, (1987) 33 C.C.C. (3d) 193 (SCC)

25. *United Kingdom v. Tarantino,* 2003 BCSC 1134

26. *USA. v. Alfred-Adekeye* (31 May 2011), Vancouver 25413 (BCSC, unreported)

27. *USA v. Cavan,* 2015 ONCA 664

28. *USA v. Cheema*, [1993] B.C.J. No. 1365 (S.C)

29. *USA v. Cobb,* 2001 SCC 19, 1 SCR 587

30. *USA v. Fafalios,* 2012 ONCA 365

31. *USA v Kerfoot*, unreported (May 25, 2009) Vancouver 24183 (SC)

32. *USA v. Khadr* 2011 ONCA 358

33. *USA v. Kwok*, [2001] 1 SCR 532

34. *USA v. Lane,* 2014 ONCA 506

35. *USA v. Licht,* 2002 BCSC 1151

36. *USA v. Qumsyeh*, 2015 ONCA 551

37. *USA v Sommer,* unreported (October 26, 2007) Vancouver 23972 (SC)

38. *USA v. Tollman,* 2006 CanLII 31731

39. *USA v. Wilson,* 2016 BCCA 326