June 2, 2020

Extraditing the Individual in the *Meng Wanzhou* Decision

By: Lisa Silver

Case Commented On: *United States v Meng*, 2020 BCSC 785 (CanLII)

The arrest and extradition of Meng Wanzhou is extraordinary. The case has attracted global interest and has highlighted the fragility of our diplomatic networks. It has the workings of a suspense novel with its political intrigue, double-entendres and power struggles. It brings into question our global alliances and lays bare our international aspirations. But this is not a le Carré novel nor is it a strategic game of Risk. The case, at its heart, is not dissimilar to most extradition hearings in Canada. In all such cases, the stakes are high, international relations are engaged, and the rule of law is tested in both the surrendering state and the requesting one. Moreover, in all extradition cases there is an individual, a person who must either stay or go. To keep extradition at the level of the individual is hard, but it is critical to do so for both legal reasons and human ones.

This post keeps that individual, Meng Wanzhou, in mind. For it is Meng Wanzhou who faces serious criminal charges and for whom this extradition decision will have direct and serious consequences. That is why I am looking for the individual in this recent extradition decision rendered by Associate Chief Justice Heather Holmes on the "double criminality" requirement, in which a person is extradited only when the conduct amounting to the criminal offence in the requesting state is also conduct amounting to a criminal offence in Canada. I am doing so because people matter, and because the law requires it.

It's best to start at the beginning. There are, in fact, two beginnings, both intertwined: one legal and one personal. Meng Wanzhou was arrested in Canada at the request of the United States in December of 2018. She is considered by some to be "corporate royalty" as CFO of one of China's most powerful corporations, Huawei Technologies. At the time of her arrest, Meng was travelling from Hong Kong and through Vancouver to Mexico, with no plans to stop in Canada even though her two youngest children (she has four) were in Vancouver schools at the time. It was this transitory presence in Canada that brought her within reach of the US judicial machinery. The timing seemed odd to many. At the time, the United States was trying to convince Canada to leave out Huawei in the negotiations to develop 5G mobile networks in North America. The allegations also seemed stale. They involved Huawei's financial relationship with the US banks and Huawei's failure to disclose its trade relationship with Iran, an entity embargoed in the United States, but not similarly sanctioned in Canada.

Legally, the *Meng Wanzhou* case began when the person Meng Wanzhou was arrested. I am not going to trace the various court dates of the case. Neither am I going to discuss the bail hearing and other arguments made in the days leading up to the double criminality decision. Rather, I

will start at the point where the individual and the legal principle meet: the decision on "double criminality," what it means legally, and what it means for Meng Wanzhou.

The legal aspect touches upon the purpose behind extradition, which is the process by which a person can be sent to a foreign state for "the purpose of prosecuting the person or imposing a sentence on or enforcing a sentence imposed on" that person (see s 3(1) of the *Extradition Act*, SC 1999, c 18). This purpose is not complete without considering the values behind this process. Justice Ian Binnie, speaking on behalf of the majority decision in *MM v United States of America*, 2015 SCC 62 (CanLII), suggests that "extradition serves pressing and substantial Canadian objectives: protecting the public against crime through its investigation; bringing fugitives to justice for the proper determination of their criminal liability; and ensuring, through international cooperation, that national boundaries do not serve as a means of escape from the rule of law" (at para 15). Importantly, these objectives are deemed "Canadian" in aspect, albeit a fulfillment of international obligations. In other words, these objectives are familiar and apply domestically. We want crimes to be investigated and the apprehension of those individuals suspected of crimes for our protection. We also want a fair and independent tribunal to assess the case by applying our rules and principles, including the presumption of innocence and proof beyond a reasonable doubt. We also want this determination to be done fairly and consistently, with our *Charter of Rights and Freedoms* firmly in mind. Societal interests in the apprehension of crime reside in the same space as our *Charter* values. That space guarantees the person suspected, charged, and facing a criminal offence certain legal rights that coincide with the public interest of apprehending and sanctioning individuals for crimes.

So too in the extradition world, the individual matters. Justice Binnie in articulating the above objectives of extradition, also stated that "the extradition process serves two important objectives: the prompt compliance with Canada's international obligations to its extradition partners, and the protection of the rights of the person sought. The latter objective places important limits on when extradition can be ordered" (*MM* at para 1). The key to extradition, therefore, is the "careful balancing of the broader purposes of extradition with those individual rights and interests" (at para 16). This balance must be in place throughout the extradition process; as we fulfill our international obligations, as we pursue our criminal law objectives, the individual who is at the heart of the process must not be forgotten.

With the above admonition in mind, we can now, with a critical eye, review the decision rendered by Justice Holmes on the issue of "double criminality." We must acknowledge that this issue is merely a threshold one. It permits the process to continue but it does not determine the final extradition decision. That final decision, in fact, lies outside of the four walls of the courtroom. As the extradition process is engaged by the Minister of Justice who issues the Authority to Proceed or ATP, the Minister has the final say on whether the order for surrender will be fulfilled. Nevertheless, the double criminality issue, which is a statutory requirement under s 3(1)(b) of the *Extradition Act*, can end an extradition process if unfulfilled. As suggested by Justice Holmes, double criminality "derives from the foundational principle of reciprocity" (*Meng Wanzhou* at para 20) between nations.

Reciprocity is an international law concept and is more than a mutually beneficial exchange between two entities. It is a concept based on the recognition of the 'other.' An exchange

between two nations requires a recognition of the other state's sovereignty, an admission that the other state exists as an independent and viable society. It requires acceptance, tolerance, trust and patience. The importance of recognizing statehood cannot be underestimated. In the *Meng Wanzhou* extradition for instance, Iran, as a foreign state sanctioned by the United States through a trade embargo, was not to be recognized, tolerated or trusted in the requesting state's view. Reciprocity is not just an exchange; it is a symbolic act between two foreign entities, and a potent one at that.

Double criminality, as an example of reciprocity, accepts differences in foreign approaches to the rule of law (see *Kindler v Canada (Minister of Justice)*, 1991 CanLII 78 (SCC), [1991] 2 SCR 779 at 844, per Justice McLachlin as she then was) but at the same time requires consistency. This may seem contradictory and impossible to fulfill, but the Canadian approach to double criminality, that is, a conduct-focused approach as opposed to offence-focused, permits the fulfillment of these two goals of accepting differences while recognizing the similarities between the two nations. In the *Meng Wanzhou* decision, all parties agreed the conduct-based approach is the correct one. It is in its application where the parties differed.

Counsel on behalf of Meng Wanzhou argued that the alleged conduct underlying the offence of fraud as found in Canada under s 380 of the *Criminal Code*, RSC 1985, c C-46 would not amount to fraud in Canada because, in its essence, it would not be considered misconduct in Canada (at para 30). In Canada, Iran was not a sanctioned entity. The federal prosecutors disagreed. They argued Meng Wanzhou's corporation, Huawei, by failing to disclose their commercial relationship with a US-sanctioned Iran in their dealings with US banks, deceived the banks and materially deprived them of accurately assessing their financial relationship with Huawei (at para 35). The prosecutors relied on the dishonest deprivation required for fraud as arising from both a failure to disclose the Iranian connection and a general dishonest deprivation unconnected to the sanctions (at para 36).

Justice Holmes, in accepting the fraud based on the Iran sanctions only, rejected the narrow interpretation of conduct-based double criminality offered by Meng Wanzhou's counsel. In her view, the conduct should not be so specifically framed. By doing so, it restricts both the meaning of fraud under s 380 and the double criminality requirement under the *Extradition Act* (at paras 60 and 66). Double criminality as a threshold requirement, where the court does not weigh the evidence of the actual events or make a final determination of guilt or innocence, or even make a final determination of an extradition surrender order, needs to be generously interpreted. If not, double criminality would no longer be a threshold issue but would be a final one.

Justice Holmes's view is consistent with other criminal law principles. For instance, in legal causation where there is an intervening act, in assessing whether the intervening event was reasonably foreseeable, the trial judge does not view that foresight through the lens of the specific event but merely reviews the generalities arising from it. Thus, in *R v Maybin,* 2012 SCC 24 (CanLII), the foreseeable event was not "the unprovoked assault by a bouncer of an unconscious patron," but whether it was reasonably foreseeable that someone would intervene in a fight (at paras 33-34). It is the general nature of the event that matters, not the specifics.

Here too, in *Meng Wanzhou*, it is the general nature of the actions in the context of the legal environment of the requesting state that engages or doesn't engage the fraudulent act requirements under s 380. The specific fact, that if Huawei conducted the same business in Canada they would not be acting fraudulently, is of no moment because the general nature of that conduct, that of a dishonest deprivation, could amount to an offence under s 380.

Moreover, a restrictive meaning would cut out the legal landscape of the requesting state. It would necessitate an almost surgical excision of the Huawei conduct, transplanting it into the surrendering state, without context and without that crucial reciprocity consideration. That form of transposing the facts belies legal authorities that are replete with commentary on the need to consider the "institutions and laws of the foreign jurisdiction" (at para 68, quoting Justice Watt as he then was in *Germany (Federal Republic) v Schreiber*, 2004 CanLII 93326 (ON SC) at para 37). The argument is novel and no doubt will be further tested in the appellate courts if there is an order to surrender Meng Wanzhou.

Even if the double criminality decision is consistent with the purpose behind double criminality as a principle, there are fundamental concerns with the *Meng Wanzhou* decision. Double criminality is a threshold issue with a difference. It is a foundational principle that permeates extradition as a whole (see *MM* at para 16). It is not a separate and contained issue to be parsed from the extradition process. This means that it is to be considered in light of the "pressing and significant Canadian objectives" (*MM* at para 15) driving the entire extradition process, which balance international obligations and the individual's rights and interests. Although Justice Holmes may have applied the correct double criminality principles, the more pressing issue is whether she properly applied these foundational extradition principles. By parsing the double criminality issue from the extradition hearing, she treated double criminality as purely a statutory requirement to be reviewed, determined and fulfilled under s 3(1)(b) of the *Extradition Act*. Although that statutory requirement obliges Justice Holmes to determine the issue, it has a doppelgänger or a "double" in the foundational principles of extradition. This other double criminality principle needs to be part of the entire extradition process, including the final extradition determination expressed in s 29(1)(a) of the *Extradition Act* that requires an extradition order only where there is admissible evidence to justify committal to trial in Canada, right through to the Minister's final say on whether the surrender order will stand (*MM* at paras 22-23).

Most importantly, as more than a threshold issue, double criminality has life beyond the statutory reflection of that principle under s 3(1)(b) of the *Act*. Legal principle reads double criminality in a manner consistent with the *Charter* and *Charter* values by requiring the court to consider and balance the individual's rights and interests in the extradition process (*MM* at paras 1, 14-18). Nowhere in the *Meng Wanzhou* decision is this explicitly articulated. Yet it is as foundational as reciprocity and the fulfillment of international obligations. Taking into account the individual throughout the extradition process brings into focus the person who faces surrender, who faces a separation from country and loved ones, and who must attorn to another foreign entity and their justice system.

The *Meng Wanzhou* case is not over by a long shot. Despite Justice Binnie's admonition in *MM* that extradition requires "prompt compliance" (at para 1), this case has not been promptly

handled. As emphasized by Justice Holmes, there is still a "larger" issue to be determined, which is "whether there is evidence admissible under the *Act* that the alleged conduct would justify Ms. Meng's committal for trial in Canada on the offence of fraud under s 380(1)(a) of the *Criminal Code*" (*Meng Wanzhou* at para 90). Extradition is still an open question. Yet, even beyond that, court determined closure is the final step, in which the Minister of Justice could refuse surrender if such an order is "unjust or oppressive" pursuant to s 44 (1)(a) of the *Extradition Act*. In this decision too, the individual looms large, not just as a fugitive who must face justice, but as Meng Wanzhou with her personal history and life story.

This post may be cited as: Lisa Silver, "Extraditing the Individual in the *Meng Wanzhou* Decision" (June 2, 2020), online: ABlawg, http://ablawg.ca/wp-content/uploads/2020/06/Blog_LS_WanzhouExtradition_June2020.pdf