

A CASE STUDY OF EXTRADITION: UNITED STATES V. MENG WANZHOU

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Abstract: This article's ultimate purposes are to answer the heated-discussed questions in the Meng Wanzhou case and provide a brief introduction to extradition, especially essential sections such as double criminality. The article focuses mainly on the facts of the Meng Wanzhou case and the necessary procedures concerned. First, the investigation abstracted from the Extradition Act of Canada, applying principles and theories in the extradition practice to fully explain the case in detail. Then, the study explored two critical terms: extraditable offenses, double criminality, and their primary coverages. Next, the research provided two main arguments: the abuse of procedure and the acknowledgment of double criminality. Finally, the analysis added another extradition case to compare the Meng Wanzhou case. Overall, the study analyzed the procedural law and law ideologies in the case. The consideration of national values is the cornerstone of the case.

Keywords: Double Criminality; Extradition Practice; Procedural Law; Law Ideologies; National Values; Meng Wanzhou

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INTRODUCTION

Ms. Meng Wanzhou, Huawei's Chief Financial Officer, was escorted and detained by Canadian officials at the Vancouver Airport in December 2018 while flying to Mexico through Canada.¹ Meng Wanzhou's detention became publicized as the trade battle between China and the United States heated up. Since then, every material on the extradition case "United States v. Meng," whether publicly revealed or not, has piqued the public's interest. Consequently, a number of people believed that Ms. Meng's detention was an effort by the United States to interfere with Huawei's emergence as a Chinese telecommunications behemoth.²

Ms. Meng was detained in Canada for over 1000 days before the Deferred Prosecution Agreement.³ It was on December 11th, that Ms. Meng was freed from prison a few days after her detention at the Vancouver Airport on the condition that she strictly follow Mr. Justice W.F. Ehrcke's 16 instructions. Despite her later release from prison, the bail terms mandated her to be monitored by a security detail that would last 24 hours a day, seven days a week at her expense.⁴

It is far from an exaggeration to say that the general public emphasizes the political motivations for the US's request that Canada extradite Ms. Meng. The same can be said regarding the question of whether the Canadian government improperly interfere with the administration of justice while ignoring the legal implications of the Extradition Act of Canada. However, from the first arrest to the finally signed DPA, the whole procedure must take place inside a legal framework. As a result, this essay will examine the Meng Wanzhou case to explain extradition practice, focusing mainly on the court procedure, i.e., the legal part of the claim, rather than the element of the geopolitical event.

During the whole process from the arrest to Ms. Meng's release, a number of civil or official groups will play their roles. The United States Department of Justice and Eastern District Court of New York launched the prosecution of fraud against Meng and requested the Canadian authority to extradite the person sought to Canada. The CBSA and RCMP mainly executed the Warrant of Arrest issued by Justice

¹ The Courts of British Columbia: *United States v. Meng*, 2019 BCSC 2137 – 2019/12/09, <https://www.bccourts.ca/jdb-txt/sc/19/21/2019BCSC2137.htm> (last visited Nov. 21, 2021)

On December, 1, 2018, the flight arrived a bit early. When it did, CBSA officers met Ms. Meng near the arrival gate as she emerged from the jetway into the airport building. This was at about 11:21a.m. After identifying Ms. Meng as the person of interest to them, the CBSA officers began their dealings with her by seizing her cellular telephones and placing them in mylar bags to prevent any remote alteration of those devices or their data. It is common ground that US authorities had asked that electronic devices in Ms. Meng's possession at the time of her arrest be handled in this way. After so seizing the telephones, the CBSA officers then escorted Ms. Meng and her travelling companion to the secondary immigration screening area.

² Dan Bilefsky, *What You Need to Know About the Huawei Court Case in Canada* 5.

³ *United States of America against MENG WANZHOU Deferred Prosecution Agreement Cr. No. 18-457(S-3)(AMD)*, <https://www.justice.gov/opa/press-release/file/1436211/download> (last visited Jan. 14, 2021)

⁴ The Courts of British Columbia: *United States v. Meng*, 2018 BCSC 2255 – 2018/12/11, <https://www.bccourts.ca/jdb-txt/sc/18/22/2018BCSC2255.htm> (last visited Nov. 21, 2021)

Fleming, which later aroused the debate of the abuse of procedure. The whole legal procedure was carried out in the Supreme Court of British Columbia before Madam Justice Holmes accepted the first hearing concerning the Oral Reasons for Judgment. The Attorney General of Canada participated in the proceedings on behalf of the United States of America. A third-party HSBC provided the PowerPoint as an issue to the US Justice Authorities.

Meng Wanzhou's case fully serves the purpose of examining the identification of double criminality (also called dual criminality). The Double Criminality rule is a basic composition of extradition law. It is used in many countries, regional domestic extradition legislation, and bilateral treaties.⁵ As Oppenheim succinctly stated: "No person may be extradited whose deed is not a crime according to the criminal law of the state which is asked to extradite as well as the state which demands extradition".⁶ Generally speaking, the Double Criminality rules demonstrates the judicial cooperation between the requesting states and the requested states. At the same time, the Double Criminality rules arouses the argument of whether it violates the principle of "no punishment without law". Therefore, the identification of double criminality is crucial in the extradition process. In greater detail, the modern practice of identifying double criminality will be examined in this note by comparing the judgement of the Meng Wanzhou Case and past extradition cases.

In Part I of the note, the background information of Ms. Meng, Huawei and the case she was involved in will be provided. Mostly, the information about the case is abstracted from the court verdicts released by the Supreme Court of British Columbia. The facts themselves won't cause an argument, and their validity was confirmed by both parties. In Part II of this note, I will discuss part of the theories and practices concerning modern extradition cases. More specifically, this part is divided into three sections: extraditable offenses, double criminality, and a brief analysis of the most recent Canadian Extradition Act. In part III, the Meng Wanzhou Case will be discussed more carefully. This part will focus mostly on two arguments concerning the arresting procedure and the identification of double criminality respectively. In addition, the legal ideology will be paid sufficient attention to in the note, especially the similarities of legal ideology concerning financial crimes. Part IV is composed of another extradition case: *THE MINISTER OF JUSTICE v HENRY C. FISCHBACHER*. In this part, excluding the content analysis of the case, the details of the evidence standard and the division of phases in modern extradition practice will be looked into. More specifically, the judgements will be compared with that of the Meng Wanzhou case. In the last part of this note, I'll give my conclusions based on the discussions.⁷

I. BACKGROUND

Ms. Meng Wanzhou is the Chief Financial Officer of HUAWEI TECHNOLOGIES CO., LTD, a Shenzhen based technology giant founded in 1987. To date, this company has enrolled approximately 197,000 employees and it has been operating in more than 170 countries and regions worldwide. Its services have covered

⁵ Sharon A. Williams, *The Double Criminality Rule Revisited*, 27 *Isr. Law Rev.* 297–309 (1993).

⁶ *Id.* citing L. Oppenheim, *International Law* (8th ed., 1955) 701.

⁷ Daniela J Restrepo, *Modern Day Extradition Practice: A Case Analysis of Julian Assange* 22.

more than 3 billion people around the world.⁸ Ms. Meng is the daughter of Huawei CEO Mr. Ren Zhengfei. She has become a member of the board and CFO of Huawei since 2011, making great contributions to the development of the company.⁹

The very beginning of the case was that days before Ms. Meng's arrival at the YVR Airport, on Aug. 22, 2018, a United States district court (Eastern District of New York) issued a warrant, requesting Canada to arrest Meng Wanzhou on behalf of the United States. Simultaneously, Ms. Meng's flight information and her travel plan indicating that she would be on Cathay Pacific flight CX838 and would land in Mexico via Vancouver were submitted to the Canadian justice authorities. Madam Justice Fleming then issued a provisional arrest warrant on November 30, 2018, ordering "All peace officers having jurisdiction in Canada" to "immediately arrest" Ms. Meng¹⁰."

Ms. Meng was arrested on Dec.1, 2018, at Vancouver Airport, therefore, the arrest and the procedures before the arrest were generally classified as a YVR event. At the airport, when she disembarked her flight, she was controlled by Canada Border Services Agency (CBSA) officers instantly after the confirmation that Ms. Meng was the person of interest. Her mobile devices were seized and kept in mylar bags to avoid possible remote control of them. Shortly afterwards, Ms. Meng was requested to submit her passwords and was questioned about the charges she would confront before she was finally arrested by Royal Canadian Mounted Police (RCMP) officers.¹¹ The arrest of Ms. Meng may have involved the abuse of procedure and it was one of the important sources of argument in the hearings. The arguments will be fully discussed in Part III of this note.

Ms. Meng was detained at the Alouette Correctional Centre for women before she was released from custody. In the hearing, the application of judicial interim release of Ms. Meng held on Dec. 11, 2018, the Attorney General objected to her release and sought an order for her detention¹² by claiming that there were a number of passports under Ms. Meng's control. This indicated that there was a great chance

⁸ About HUAWEI, <https://www.huawei.com/cn/corporate-information> (Last visited on Nov. 21, 2021)

⁹ The Courts of British Columbia: United States v. Meng, 2018 BCSC 2255 – 2018/12/11, <https://www.bccourts.ca/jdb-txt/sc/18/22/2018BCSC2255.htm> (last visited Nov. 21, 2021)

Ms. Meng has significant financial resources which would enable her to flee Canada should she choose to do so. She is a senior executive at one of the world's largest telecommunications companies and the daughter of its founder. Her father has an approximate net worth of U.S. \$3.2 billion. Ms. Meng is a Chinese national. China has no extradition agreement with the U.S. Should Ms. Meng want, she has the means to flee and remain outside Canada and the United States indefinitely. As held by the Court in United States of America v. Baratov, 2017 ONSC 2212, "if you have infinite sources, the value of the pledge diminishes.": para. 40.

¹⁰ The Courts of British Columbia: United States v. Meng, 2019 BCSC 2137 – 2019/12/09, <https://www.bccourts.ca/jdb-txt/sc/19/21/2019BCSC2137.htm> (last visited Nov. 21, 2021)

The events were set in motion when the USA submitted a Request For Provisional Arrest to Canada asking Canada to seek a warrant for Ms. Meng's arrest on the USA's behalf. Based on information in that document, an application was made to this Court under s. 13 of the Extradition Act for a provisional warrant for Ms. Meng's arrest. Madam Justice Fleming issued a provisional arrest warrant on November 30, 2018, ordering "all peace officers having jurisdiction in Canada" to "immediately arrest" Ms. Meng.

¹¹ Id. at Undisputed Events Relating to Ms. Meng's Arrest.

¹² The Courts of British Columbia: United States v. Meng, 2018 BCSC 2255 – 2018/12/11, <https://www.bccourts.ca/jdb-txt/sc/18/22/2018BCSC2255.htm> (last visited Nov. 21, 2021) ("Ms. Meng now applies for judicial interim release under s. 18 of the Extradition Act, S.C. 1999, c. 18 (the "Act"). The Requesting State opposes her release and seeks an order for her detention. ")

that she would flee Canada without the permission of Canadian authorities. Furthermore, the Attorney General mentioned that Ms. Meng had not travelled to the United States since 2017. While on Ms. Meng's side, she defended the fact that there are only two currently valid passports, one issued by the People's Republic of China, and the other by Hong Kong SAR. The reason given by the judge was that there exists no relevance between "not entering the US" and posing threat to society because "Ms. Meng may have myriad good reasons for choosing not to travel to the United States during the past two years"¹³. On these grounds, the application of judicial interim release was approved.

In the years that followed, Ms. Meng attended several hearings concerning the issues of double criminality, evidence adducing, media release, etc. and part of these problems will be discussed in detail in Part II & III of this note. Eventually, on September 24, the US Department of Justice withdrew their request for Canada to extradite Meng Wanzhou to the United States. (In the form of DPA) As a result, there is no basis for the extradition proceedings to continue and the Minister of Justice's delegate has withdrawn the Authority to Proceed, ending the extradition proceedings. The judge released Meng Wanzhou from all of her bail conditions. Meng Wanzhou is free to leave Canada¹⁴.

Another important party, in this case, is HSBC (The Hongkong and Shanghai Banking Corporation Limited). HSBC, a Hongkong based bank, is one of the largest banks and monetary facilities in the world. It entered into a deferred prosecution agreement (DPA) with the US Department of Justice in December 2012, in which it agreed not to commit further sanctions violations.¹⁵ That is to say, on condition that HSBC violates the US sanctions, chances stand that HSBC will be prosecuted and penalties will be imposed.

¹³ Id.

I put very little weight on the suggested inference that Ms. Meng's failure to travel to the United States since March 2017 is evidence of an intent to evade apprehension there. That inference is entirely speculative and without any reliable foundation. Residents of countries other than the United States, including Ms. Meng, may have myriad good reasons for choosing not to travel to the United States during the past two years.

¹⁴ Government of Canada: Statement from the Department of Justice Canada, <https://www.canada.ca/en/departement-justice/news/2021/09/statement-from-the-department-of-justice-canada.html> (last visited Nov. 21, 2021)

The Department of Justice Canada issued today the following statement: Today, counsel for the Department of Justice attended a case management conference regarding the extradition proceedings for Meng Wanzhou. We informed the Court that on September 24 the US Department of Justice withdrew their request for Canada to extradite Meng Wanzhou to the United States. As a result, there is no basis for the extradition proceedings to continue and the Minister of Justice's delegate has withdrawn the Authority to Proceed, ending the extradition proceedings. The judge released Meng Wanzhou from all of her bail conditions. Meng Wanzhou is free to leave Canada. Canada is a rule of law country. Meng Wanzhou was afforded a fair process before the courts under Canadian law. This speaks to the independence of Canada's judicial system.

¹⁵ The Courts of British Columbia: *United States v. Meng*, 2020 BCSC 785 – 2020/05/27, <https://www.bccourts.ca/jdb-txt/sc/20/07/2020BCSC0785.htm> (last updated Nov. 21, 2021)

HSBC had run afoul of the US sanctions relating to Iran and other countries before the events relating to the allegations against Ms. Meng. It entered into a deferred prosecution agreement (DPA) with the US Department of Justice in December 2012, in which it agreed not to commit further sanctions violations, as well as to undertake various remedial measures and to pay forfeitures and penalties amounting to well over a billion dollars.

Then Reuters, a mainstream British media outlet, respectively published two articles associating Huawei with Skycom's US-related business dealings in Iran on December 2012 and January 2013. These two articles captured the attention of HSBC regarding the existing financial relationship between the bank and Huawei. More specifically, HSBC was coordinating a syndicated loan worthy of 1.5 billion USD to Huawei. If providing such a loan to Huawei, then HSBC violated the US sanction. In order to avoid possible risks, the loan might not be provided¹⁶. Therefore, the relationship between Huawei and Skycom is what HSBC concerned for, and it is directly linked to the final decision of providing loans.

In this situation, Ms. Meng, the CFO of Huawei gave a presentation to elaborate how vital the relationship was.¹⁷ After her meeting with the bank executives, the PowerPoint was translated and submitted to HSBC.

For certain purposes, the United States Department of Justice requested that HSBC submit the PowerPoint while proposing that Ms. Meng's presentation conceal the real relationship between Huawei and Skycom, which might ultimately lead to HSBC's violating US sanctions and being prosecuted according to the DPA. Ms. Meng was therefore involved in this case and was accused of fraud, namely making false presentation to lead the bank to continue banking services.

II. EXTRADITION PRACTICE

A. Double Criminality

Double criminality refers to the characterization of the relator's conduct as criminal under the laws of both the requesting and requested states. "It is a reciprocal characterization of criminality that is considered a substantive requirement for granting extradition."¹⁸ To put it more simply, if a person sought is to be extradited to another

¹⁶ Id.

The banking relationship between Huawei (and its subsidiaries and affiliates) and HSBC (and its US subsidiary) ran from at least 2007 to 2017, and involved very significant transactions, including the following. HSBC's US subsidiary cleared very substantial dollar transactions for various Huawei entities between 2010 and 2014. In August 2013, HSBC coordinated a syndicated loan to Huawei in an amount equivalent to USD 1.5 billion, and was one of the principal lenders. In April 2014, HSBC sent Huawei a signed letter describing negotiated terms for a USD 900 million credit facility. HSBC was also part of a syndicate of banks that loaned Huawei USD 1.5 billion in July 2015. HSBC had run afoul of the US sanctions relating to Iran and other countries before the events relating to the allegations against Ms. Meng. It entered into a deferred prosecution agreement (DPA) with the US Department of Justice in December 2012, in which it agreed not to commit further sanctions violations, as well as to undertake various remedial measures and to pay forfeitures and penalties amounting to well over a billion dollars.

¹⁷ The Courts of British Columbia: *United States v. Meng*, 2020 BCSC 1607 – 2020/10/28, <https://www.bccourts.ca/jdb-txt/sc/20/16/2020BCSC1607.htm> (last visited Nov. 21, 2021) at Para 25. The allegations against Ms. Meng, who is the Chief Financial Officer of Huawei Technologies Co. Ltd., are based at their foundation on a PowerPoint presentation she delivered when she met with a senior HSBC executive on August 22, 2013 in the back room of a Hong Kong restaurant. Ms. Meng had requested the meeting after various inquiries from HSBC management to Huawei executives about allegations in two Reuters articles associating Huawei with Skycom Tech. Co. Ltd., a company said to have engaged in sanctions-violating business conduct in Iran. As I will discuss below, Ms. Meng is alleged to have falsely denied that Huawei controlled Skycom.

¹⁸ Id. at 500.

country, it is a principle that the person's conduct must reach the level of criminality in both nations.

Consider the situation in which a person's conduct doesn't meet the threshold of crime in the requested state, but he is still extradited to the requesting state, it can be concluded that the law of the foreign nation comes into effect beyond its territory and the judicial sovereignty of other countries is therefore violated, whether it is for or against the willingness of the requested countries. In an extradition case, the absence of double criminality is in disregard of "nulling crimes in legality" principle. It is certainly against the Charter rights to arrest a person merely for the interest of another country.

It should be noted that more or less, there exist differences in constituent elements between similar offenses in the criminal law of the requested and requesting nation. For the sake of international cooperation in the field of criminality, double criminality does not require that absolute identity is present between the crime charged and the counterpart crime in the other nation. So long as the crimes are "substantially analogous" in both nations, the requirements of double criminality can be met. Besides, the punishment need not be identical as well.¹⁹

To be more specific, in this article, the extradition practice of the United States will be quoted to explain the matter:

"1. It does not require that the crime charged be the same crime contained in federal or state law; it is sufficient that it be the same type of crime.

What matters is whether the facts giving rise to the criminal charges would also give rise to a similar criminal charge in the requested state.

The same facts can give rise to multiple criminal charges in one or both systems, but that is not a dual criminality issue; rather it may be an issue of *ne bis in idem* (double jeopardy)."²⁰

The three statements of the identification of double criminality above eradicated the possibility of the person sought claiming that due to different sentencing and types of crime, the requirements of double criminality should not be met. Take the example of International Extradition, for example, the crime the person sought committed constituted simple homicide in Mexico, while in the United States, it should constitute felony murder.²¹ Clearly, the person sought, claimed that requirements of double criminality aren't satisfied since the type of crimes in Mexico and the United States are different, or at least the severity of the crime is not the same. If we make a judgement

¹⁹ Id. at 505.

²⁰ Id. at 506. See Ch. VIII, Sec. 4.3.

²¹ Id. at 503–504. Dual criminality requires that an accused be extradited only if the alleged criminal conduct is considered criminal under the laws of both the surrendering and requesting nations. *United States v. Saccoccia*, 18 F.3d 795, 800 n.6 (9th Cir. 1994). The doctrine is incorporated into the Extradition Treaty Between the United States and Mexico at Article II, §§ 1, 3. Both the magistrate judge and district court found that the requirement of dual criminality is met in this case because Clarey's acts, which constitute simple homicide in Mexico, would constitute felony murder in the United States. Felony murder is "murder . . . committed in the perpetration of, or attempt to perpetrate, any arson, rape, burglary, or robbery."

under the three statements above, even though the crime charged is not exactly the same, they both belong to the type of murder. In addition, it is apparent that the conduct will give rise to criminal charges both in Mexico and the United States. Therefore, the requirements of double criminality are met and Clarey's argument stand no ground.

The standard of "substantially analogous" provides much space for the judge to explain the judging reasons and the approach accepted in the matter of ruling on double criminality. It has been widely accepted that a conduct-based approach is adapted in the procedure of extradition. This approach is also accepted in Canadian extradition practice and the alternative offense-based approach, "expressly rejected in Canada, looks for a match between the elements of the foreign offense and those of an equivalent Canadian offense"²².

As can be learned above, the key factor deciding whether the requirements of double criminality can be met is that the person sought can be prosecuted for a similar crime in the requesting state. Therefore, the purpose of extradition is partly to punish those who are found guilty of crimes in a microscope. On the contrary, if the extradition is manifest that the request is like a subterfuge for achieving non-penological purposes. In this case, the requested state will not be bound to adhere to the proposed formulation and the extradition request will be denied.

Double criminality is closely linked to extraditable offenses. As is mentioned in Part II. A of this note, the extraditable offenses can be agreed on between nations either with a treaty or without a treaty. Under the circumstances where the treaties are absent (i.e., there isn't any definition or method of designating extraditable offenses), the identification of double criminality is possibly the substantial requirement of extradition according to the legislation of the nation. While in other cases where there exist treaties, the identification of double criminality is commonly a constitution of the formula defining the offenses. Whichever method is adopted, double criminality is deemed essential in modern extradition.

B. Extradition Act of Canada

The latest edition of the Canadian Extradition Act (S.C. 1999, c. 18) was last amended in 2005, and the judgement of the Meng Wanzhou Case was also made under the legal framework of this act. In this section, an analysis of the contents concerning the Meng Wanzhou case will be provided but the legal practice of the act will be left for Part III.²³ The general principle of extraditable conduct is regulated as follows:

²² The Courts of British Columbia: United States v. Meng, 2020 BCSC 785 – 2020/05/27, <https://www.bccourts.ca/jdb-txt/sc/20/07/2020BCSC0785.htm> (last visited Nov. 21, 2021)

Canada and most other jurisdictions internationally have opted to implement the double criminality principle through the conduct-based approach that asks whether the conduct in the foreign jurisdiction could amount to an offence under domestic law: Fischbacher at para. 29. The alternative offence based approach, expressly rejected in Canada, looks for a match between the elements of the foreign offence and those of an equivalent Canadian offence. Because Canada has rejected that approach in favor of the conduct-based approach, it is not necessary that the foreign offence have an exactly corresponding Canadian offence identified in the Minister's authority to proceed. It is the "essence of the offence" that is important: Fischbacher at paras. 28-29."

²³ Restrepo, supra note 7.

(1) A person may be extradited from Canada in accordance with this Act and a relevant extradition agreement on the request of an extradition partner for the purpose of prosecuting the person or imposing a sentence on — or enforcing a sentence imposed on — the person if

(a) subject to a relevant extradition agreement, the offense in respect of which the extradition is requested is punishable by the extradition partner, by imprisoning or otherwise depriving the person of their liberty for a maximum term of two years or more, or by a more severe punishment; and

(b) the conduct of the person, had it occurred in Canada, would have constituted an offense that is punishable in Canada,

(i) in the case of a request based on a specific agreement, by imprisonment for a maximum term of five years or more, or by a more severe punishment, and

(ii) in any other case, by imprisonment for a maximum term of two years or more, or by a more severe punishment, subject to a relevant extradition agreement.²⁴

As can be concluded from the leading part of s3(1), decisions of surrendering the people sought are made based on the Extradition Act and relevant extradition agreements (treaties), and the purpose of an extradition request is limited to prosecution. Generally speaking, the approach Canadian justice authorities adopt is mainstream. Besides, the procedure of extradition is started passively for the request of an extradition partner is essential in starting the procedure.

S3(1)(a) and (b) constitute the interpretation of double criminality rules in the Extradition Act of Canada. S3(1)(a) requires that the offense should be punishable by the extradition partner and the crime should be of a certain degree of severity (a maximum term of imprisonment for two years or more). While S3(1)(b) requires that the offense should be punishable as well in Canada and the maximized sentencing of this offense should either reach the level of a two-year imprisonment or more and a five-year imprisonment or more, depending on the types of agreements. S3(1) fully demonstrates the requirements of double criminality and sets a limit of extraditable offenses. More specifically, minor offenses are excluded, the offense should not only be considered a serious one in the requesting state, but also the requested state (Canada).

The extraditable offenses are not listed in the Extradition Act of Canada, but the designation of the formula is included. Before 1999 when the Extradition Act of Canada was amended, "Section 2 of the Canadian Extradition Act provides that an "extradition crime" is one that if committed in Canada or within Canadian jurisdiction would be one of the crimes listed in Schedule I of the Act"²⁵.

S13(2) of the Extradition Act of Canada regulates the contents of provisional arrest warrants.

²⁴ Extradition Act of Canada, R.S.C. 1999, c. 18.

²⁵ Williams, *supra* note 5 at 4 citing Professor of Public International Law and International Criminal Law, Osgoode Hall Law School, Canada.

13 (2) A provisional arrest warrant must

(a) name or describe the person to be arrested;

(b) set out briefly the offense in respect of which the provisional arrest was requested; and

(c) order that the person be arrested without delay and brought before the judge who issued the warrant or before another judge in Canada²⁶.

S13(2)(c) states that it is deemed essential that the arrest procedure be executed "without delay" and this requirement is further clarified in the provisional arrest warrant issued by Justice Fleming to arrest Ms. Meng by noting: all peace officers having jurisdiction in Canada" to "immediately arrest" Ms. Meng²⁷. The arrest procedure was later questioned by the defendants because it might well violated Ms. Meng's Charter rights and the procedure was abused.

The admissibility of evidence is another important matter in extradition practice. Subsections concerning evidence in the Extradition Act are listed as follows:

32 (1) Subject to subsection (2), evidence that would otherwise be admissible under Canadian law shall be admitted as evidence at an extradition hearing. The following shall also be admitted as evidence, even if it would not otherwise be admissible under Canadian law:

(a) the contents of the documents contained in the record of the case certified under subsection 33(3);

(b) the contents of the documents that are submitted in conformity with the terms of an extradition agreement; and

(c) evidence adduced by the person sought for extradition that is relevant to the tests set out in subsection 29(1) if the judge considers it reliable.

(2) Evidence gathered in Canada must satisfy the rules of evidence under Canadian law in order to be admitted²⁸.

"The question of admissibility of evidence goes to the issue of determining what type of evidence can be presented at a Hearing. It does not go to the weight or sufficiency of the evidence presented."²⁹ According to S32, the admissible types of evidence in extradition practice should surmount those in Canadian domestic justice practice for three other sources of evidence are admissible. However, as far as Meng Wanzhou Case is concerned, although much effort was made by Ms. Meng and her

²⁶ supra note 27.

²⁷ The Courts of British Columbia: United States v. Meng, 2019 BCSC 2137 – 2019/12/09, <https://www.bccourts.ca/jdb-txt/sc/19/21/2019BCSC2137.htm> (last visited Nov. 21, 2021)

Madam Justice Fleming issued a provisional arrest warrant on November 30, 2018, ordering "all peace officers having jurisdiction in Canada" to "immediately arrest" Ms. Meng. The application for the warrant was supported by an affidavit of an RCMP officer.

²⁸ supra note 27.

²⁹ M Cherif Bassiouni, *International Extradition: United States Law and Practice* at 901.

team to try to adduce evidence in her favor, very limited evidence was accepted by the court. One of the most important reasons lies in S32(1)(c): the standards of tests required are rather high and the admissibility is limited. Canada is a common law country, the circumstances in which the judges should consider reliable have already been strictly controlled. In brief, the evidence admissible should be reliable and relevant.

To meet the relevance requirement, the person sought must generally establish that the evidence, taken at its highest, is realistically capable of satisfying the exact standard required to justify refusing committal on the basis that the requesting state's evidence is unreliable. In *M.M.* at para. 78, Cromwell J. described the standard as follows: "I conclude that in order to admit evidence from the person sought, directed against the reliability of the evidence of the requesting state, the judge must be persuaded that the proposed evidence, considered in light of the entire record, could support the conclusion that the evidence essential to committal is so unreliable or defective that it should be disregarded."³⁰

More specifically, Justice Fitch delivered his explanation of Subsection S32(1)(c) by concluding that three types of evidence are inadmissible: evidence inviting the extradition judge to consider "alternative explanations for the certified evidence; evidence that would only "supplement the evidence of the requesting state with an innocent exculpatory explanation"; evidence of an innocent explanation or evidence that might found an inference inconsistent with guilt³¹.

In this procedure of evidence admission, the proposed evidence should serve the purpose of challenging the evidence raised by the requesting state directly. New evidence should prove that the contents of the Record of Case (ROC) are unreliable to such an extent that they should be removed from the case. This requirement puts the person sought in a disadvantaged position for in the extradition practice, the evidence raised by the requesting state listed in ROC is not challenged but they are presumed to be solid. Neither can the person sought adduce evidence to provide other possible explanations nor can he prove directly that he is innocent of the allegations.

Judging the Extradition Act of Canada, I hold the point of view that the act itself put the person sought at a disadvantaged situation improperly, making the person sought facing jeopardy exceeding the normal level of being extradited to the requesting state. The most typical factor, lies in the issue of evidence admission. S32(1)(a) and S32(1)(c) list two situations in which the evidence is admissible, the former one is aimed at the requesting states while the latter one is aimed at the person sought.

The evidence admissible under in the two situations share the similarity that they are both exceptions of Canadian law, namely they may not be admissible in cases that aren't classified as extradition cases. However, they differ greatly in the matter of relevance and accuracy. If a Record of Case is to be admitted, it needs to satisfy the

³⁰ The Courts of British Columbia: *United States v. Meng*, 2020 BCSC 1607 – 2020/10/28, <https://www.bccourts.ca/jdb-txt/sc/20/16/2020BCSC1607.htm> (last visited Nov. 21, 2021) at Para 19.

³¹ Extradition Act of Canada, R.S.C. 1999, c. 18.

requirement of available for trial or so called accurate. In S32(1)(a), no requirements of relevance and the subjective evaluation of the judge were mentioned.

However, when it comes to the person sought, two requirements should be met if the evidence adduced by the person sought is to be accepted. On one hand, it has to satisfy the requirements of the test set out in subsection 29(1) to be relevant to the case. While on the other hand, the judge has to be convinced that the evidence is reliable.

The conclusion drawn from the analysis above is that: the level of requirements of accuracy, relevance and reliability the evidence to be adduced by the person sought is much higher than that of the requesting state. The person sought has to ensure that the evidence is reliable, relevant simultaneously and the judge has the freedom of deciding on the reliability. But if the evidence to be adduced comes from the side of requesting states, even though the evidence is not accurate and fails to meet the requirements of S33(3)(b), as long as it is capable of starting a trial and is collected under the law of extradition partner or able to justify prosecution, it should be admitted, in regardless of the judge's opinion on the evidence to be adduced.³²

Therefore, I proposed that the part of Extradition Act concerning evidence admission deprived the person sought of the chance of defense against the requesting state by setting differed standards of evidence admission. The statement is mainly supported by two indications: 1) the lack of accuracy of evidence from the requesting state can be compensated by the probability of being prosecuted in the partner state; 2) the judge possesses the right to deny the evidence to be adduced by the person sought by claiming the reliability is in question and no further regulation is imposed on these decisions by the Extradition Act.

III. EXTRADITION PRACTICE I: A CASE STUDY OF MENG WANZHOU

Although the judgement whether Meng Wanzhou would be surrendered from Canada to the United States wasn't made by the Supreme Court of British Columbia and the whole extradition procedure came to a stop with the existence of Deferred Prosecution Agreement, some conclusions can be made directly through the analysis of court verdicts released. In this part, two arguments that aroused heated debate will be paid due attention to. The two arguments are concerned with the arresting procedure (YVR Event) and the ruling on double criminality respectively. To ensure the credibility of this note, all the facts mentioned in the paragraphs below are cited from the court verdicts. Besides, law ideology, another important factor having an effect on the identification of double criminality in Meng Wanzhou Case, will be discussed in this part of analysis. Law ideologies reflects a judge or even a nation's attitudes towards a certain type of crime and ultimately play a role in deciding the extent to which two extradition partners cooperate in combating criminality. As is abstracted from the court verdict ruling on the double criminality, the requirements of double criminality identification in financial crimes are less demanding than those dealing with human rights. This is an excellent indication of Canadian law ideology. The present literatures mostly focus on the ideology itself, for instance, "the relationship between ideology,

³² Extradition Act of Canada, R.S.C. 1999, c. 18 at S33.

consensus and decisions made in the Supreme Court"³³. However, in this note, more attention will be paid to the issue of what effects ideology have on the identification of double criminality, a process calling for the comparisons between the law values adopted by different nations.

A. Argument 1: Whether the Arrestment (YVR Event) Was in Violation of Meng Wanzhou's Charter Rights?

The most important question to answer in this framework is whether or not Ms. Meng's Charter rights were deprived of due to the possible delay of arrestment. According to S.10 of the Canadian Charter of Rights and Freedoms, everyone has the right to arrest or detention:

"(a) to be informed promptly of the reasons therefor;

(b) to retain and instruct counsel without delay and to be informed of that right; and

(c) to have the validity of the detention determined by way of habeas corpus and to be released if the detention is not lawful."³⁴

However, Ms. Meng claimed that she was unlawfully detained for she had been detained for hours in the name of customs and immigration screening process before she was finally arrested by RCMP officers at Vancouver Airport.³⁵ Before her arrest, she was escorted by CBSA, and it was during this period that her mobile devices were seized and the passwords were collected and copied. Since Ms. Meng hadn't been arrested then, she wasn't informed of the offense and her rights. Therefore, on this ground, Ms. Meng proposed that the process was abused and her Charter rights were violated.

To fully settle this argument, a more detailed description of the YVR Event should be provided. On Nov. 30, 2018, Madam Justice Fleming issued a provisional arrest warrant, ordering "all peace officers having jurisdiction in Canada" to "immediately arrest" Ms. Meng. When she disembarked her flight, as is introduced before, her cellular telephones and other mobile devices were seized and kept in mylar bags to prevent any remote alteration (which is the common method taken by US authorities). During this period, RCMP officers, with the arrest warrant in possession, stood by. Neither did they arrest Meng and show the arrest warrant, nor did they identify themselves. When the CBSA officers concluded their process and the immigration examination was suspended, Ms. Meng was escorted to the secondary

³³ Paul H. Edelman, David E. Klein & Stefanie A. Lindquist, Consensus, Disorder, and Ideology on the Supreme Court: Consensus, Disorder, and Ideology on the Supreme Court, 9 J. EMPIR. LEG. STUD. 129–148 (2012).

³⁴ Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982 (U.K.).

³⁵ The Courts of British Columbia: United States v. Meng, 2019 BCSC 2137 – 2019/12/09, <https://www.bccourts.ca/jdb-txt/sc/19/21/2019BCSC2137.htm> (last visited Nov. 21, 2021)

Ms. Meng contends that the RCMP's original plan was to execute the provisional warrant by going onto the plane and keeping Ms. Meng back while other passengers disembarked. This plan, she submits, would have conformed to the warrant's requirement that peace officers "immediately arrest" her. However, the plan changed, Ms. Meng contends, to delay the arrest and the corresponding implementation of her Charter rights.

screening area and was arrested by the RCMP officers. Meanwhile, Ms. Meng was informed of the reason for her arrest, and of her right to counsel, as required by s. 10(b) of the Canadian Charter of Rights and Freedoms.³⁶

One detail emphasized in the court verdict is that when CBSA officers were dealing with Ms. Meng, the passwords were recorded and copied. Ms. Meng and her team questioned that the conduct of copying is the sign of an early intention to provide the passwords to a third party unlawfully.³⁷ In response, the Attorney General on behalf of the United States clarified that members of the RCMP and the FBI communicated about what Canadian law required for the transfer of evidence to the USA³⁸. To support this explanation, the Attorney General submitted that CBSA had just declined an FBI request concerning Meng Wanzhou's Case. However, this evidence submitted had nothing to do with the conduct in question and the detailed information was not noted in the court verdict either.³⁹ The Attorney General did admit that the CBSA's turning over passwords to RCMP was a mistake, but it was a simple one and led to no consequence.

This detail serves as a simple indication of the Canadian authorities' abuse of process. However, compared with the possible violation of Ms. Meng's Charter rights and delayed arrestment, the latter one deserves more attention, for it is suffused with more undisputed facts. Since no official judgment concerning this issue was made by the Canadian judge in the whole process, it makes no sense in giving more detailed discussion. Therefore, in this note, the analysis of this detail comes to a pause here.

In the argument of whether the arrestment was delayed or not, Ms. Meng contended that according to the provisional arrest warrant, peace officers should have arrested her immediately. In the screening process, CBSA officers would covertly use their powers, not for true customs and immigration purposes, but rather to improperly gather evidence to help the US investigation and prosecution⁴⁰. On the Attorney General's side, he proposed that the examination carried out by CBSA is essential and CBSA officers are not peace officers themselves. Therefore, they were not in the position to execute the arrest warrant and the arrest procedure was not delayed.

³⁶ Id.

³⁷ Id. at Para. 14

Ms. Meng contends that the RCMP's original plan was to execute the provisional warrant by going onto the plane and keeping Ms. Meng back while other passengers disembarked. This plan, she submits, would have conformed to the warrant's requirement that peace officers "immediately arrest" her. However, the plan changed, Ms. Meng contends, to delay the arrest and the corresponding implementation of her Charter rights.

³⁸ Id.

³⁹ Id. Para. 29

The Attorney General also denies that Canadian authorities planned to give, or actually gave, covert assistance to US authorities by unlawful means. On the contrary, members of the RCMP and the FBI communicated about what Canadian law required for the transfer of evidence to the USA and acted following the requirements. The Attorney General submits that this can be seen in, for example, the exchange by which the CBSA declined to comply with an FBI request for the substance of Ms. Meng's secondary customs and immigration examination, and instead referred the FBI to the formal mutual legal assistance process.

⁴⁰ Id. at Para. 22

Justice Holmes didn't rule on this issue directly, for the hearing held on Dec. 9, 2019, was to decide whether the Defense Application for Disclosure proposed by Ms. Meng should be granted or denied. The information given above is abstracted from the "undisputed facts" part of the court verdict. The credibility can be guaranteed in that, both Ms. Meng and the Attorney General cast no doubt on these facts.

From the point of view of the author, whether or not CBSA officers are "peace officers" makes no sense in the judgement of whether the arrestment was delayed in the YVR Event. Consider the presumption that CBSA officers can be defined as peace officers; as the first Canadian authority dealing with Meng after she arrives in Vancouver, they kept Ms. Meng under their control for hours, in the name of customs and immigration screening process but took no arrestment action. It is beyond doubt that the arrestment was delayed under this presumption.

If the other presumption is to be accepted, that is, CBSA has no authority to execute the arrest warrant, In that case, only RCMP officers were in a position to arrest Meng then. As is mentioned in the court verdict, RCMP officers stood by when CBSA officers dealt with Ms. Meng. They knew for sure that Ms. Meng was the person of interest and the provisional arrest warrant required an immediate arrestment. However, they didn't take any action until the immigration examination came to an end. Their witness and standing by is the direct proof of their delaying the arrestment.⁴¹

In conclusion, the arrestment procedure was delayed due to subjective factors. With this conclusion, Ms. Meng's Charter rights were partly deprived of in the YVR Event and there stands the chance of process abuse.

B. Argument 2: Whether the Requirements of Double Criminality Should Be Satisfied?

In the hearing and ruling on the matter of double criminality, the requesting state and the person sought disagreed fundamentally about whether the conduct alleged in this case is capable of amounting to fraud, as the double criminality principle requires⁴². The requesting state, the United States of America, made the allegation that Meng Wanzhou had made a false presentation to HSBC, resulting in HSBC's risk of civil and criminal penalties due to its violation of DPA with the United States Department of Justice. While Ms. Meng contended that due to the absence of sanctions on Iran in Canada, Ms. Meng's conduct wouldn't put HSBC at any risk in Canada. Therefore, fraud couldn't be amounted to and the requirements of double criminality couldn't be met either.

⁴¹ Id. at Para. 12

RCMP officers had been nearby, observing the proceedings at the arrival gate. When the proceedings moved to the secondary immigration screening area, the RCMP officers went as well. However, they did not identify themselves to Ms. Meng or take steps to arrest her until nearly three hours later, when the CBSA officers concluded their process, as I will outline. Nor did the CBSA officers, or anyone else, tell Ms. Meng before that point about the provisional warrant or the fact that RCMP officers were waiting to arrest her.

⁴² The Courts of British Columbia: United States v. Meng, 2020 BCSC 785 – 2020/05/27, <https://www.bccourts.ca/jdb-txt/sc/20/07/2020BCSC0785.htm> (last updated Nov. 21, 2021)

The parties disagree fundamentally about whether the conduct alleged in this case is capable of amounting to fraud, as the double criminality principle requires.

The allegations of the US were made in ROC (Record of the Case) and SROC (Supplemental Record of the Case). "These allegations were unproven, but they were presumed to be true" and were admitted by the court in the proceedings unless solid evidence was adduced by the defendant to prove that the allegation is false.⁴³

The requesting state alleged that Ms. Meng Wanzhou had lied on the relationship between Huawei and Skycom, an Iran-based company, during her presentation. According to ROC and SROC, the requesting state claimed that Huawei in reality continued to control Skycom and its banking and business operations in Iran after selling the share of Skycom and Ms. Meng's resignation from the board of Skycom⁴⁴. In Ms. Meng's presentation, she mentioned that she was once a member of the board but she resigned from Skycom's board later and Huawei had ceased the financial communications with Skycom. However, the US denied the explanation by contending "Skycom employees had Huawei email addresses and badges, and some used Huawei stationery. Skycom's directors, and the signatories to its bank accounts, were Huawei employees. The company that had purchased Huawei's shareholding in Skycom did so with financing from Huawei, and its banking and business operations were under Huawei's control."⁴⁵. On this ground, the United States accused Ms. Meng of fraud.

The key problem in deciding whether the requirements of double criminality are met was: whether Ms. Meng's conduct amounts to fraud in Canada. s. 380(1)(a) of the Criminal Code reads as follows:

"380 (1) Ever one who, by deceit, falsehood or other fraudulent means, whether or not it is a false pretense within the meaning of this Act, defrauds the public or any person, whether ascertained or not, of any property, money or valuable security or any service,

(a) is guilty of an indictable offence and liable to a term of imprisonment not exceeding fourteen years, where the subject matter of the offence is a testamentary instrument or the value of the subject-matter of the offence exceeds five thousand dollars:⁴⁶

Therefore, dishonest conduct with a corresponding deprivation is an essential and primary condition of fraud in the Canadian Criminal Code. It should be noted that there existed no Canadian sanctions on Iran when the case took place and the only risk

⁴³ Id. at Para. 8,

It is important to note that these allegations are unproven but must be taken as true for the purpose of this application. Ms. Meng intends to dispute the allegations, but accepts that this application must be argued as though they were unchallenged.

⁴⁴ Id. at Para. 17,

Although Huawei had sold its shareholding in Skycom some years before the August 2013 meeting, and Ms. Meng had resigned from Skycom's board, Huawei in reality continued to control Skycom and its banking and business operations in Iran. Skycom employees had Huawei email addresses and badges, and some used Huawei stationery. Skycom's directors, and the signatories to its bank accounts, were Huawei employees. The company that had purchased Huawei's shareholding in Skycom did so with financing from Huawei, and its banking and business operations were under Huawei's control.

⁴⁵ Id.

⁴⁶ The Courts of British Columbia: United States v. Meng, 2020 BCSC 785 – 2020/05/27, <https://www.bccourts.ca/jdb-txt/sc/20/07/2020BCSC0785.htm> (last updated Nov. 21, 2021) at Para. 24.

HSBC might face derived from the US sanctions. There were two approaches to decide on the existence of "corresponding deprivation": Firstly, HSBC would not be prosecuted in Canada and no deprivation would be caused accordingly. Secondly, there's no need to consider the source of deprivation, since HSBC might be prosecuted by USDOJ, the corresponding deprivation should be deemed as existential. Justice Holmes was in favor of the latter explanation, which was also held by the Attorney General.

In Meng Wanzhou's case, the issue of double criminality is in essence a matter of what role can foreign laws or regulations play in the extradition practice. As the statements, Meng cited, "the extradition judge is not concerned with foreign law at all"⁴⁷. Ms. Meng contended that the reference to US sanctions was in essence the quotation of foreign laws and this could be offensive to Canadian values. In brief, the lack of sanctions on Iran in Canada led to no deprivation and the charge of fraud couldn't be amounted to.

However, Justice Holmes disagreed with Ms. Meng and dismissed her application. In the matter of the admissibility of US sanctions in this case, she proposed that "Ms. Meng's approach to the double criminality analysis would seriously limit Canada's ability to fulfill its international obligations in the extradition context for fraud and other economic crimes"⁴⁸. That is, as long as there doesn't exist restrictions on other nations in Canada, the person involved in the case stands no chance of being successfully extradited on condition that no Canadian interest is infringed, since no deprivation can be caused in Canada. Justice Holmes maintained that this approach is unacceptable, for it would limit the extension of Canadian jurisdiction in the field of economic crime and the intended purpose of strengthening international legal cooperation might fail.⁴⁹ More specifically, Justice Holmes emphasized in the judgement that fraudsters making false statements in the interest of unlawful benefits are always completed through international approaches and only by taking the conduct-based method in the analysis of double criminality can Canada play its role in combating criminality of this type, namely, how the victim of fraud is confronted with risk doesn't make sense in the identification of double criminality.

⁴⁷ Id. at Para.55,

In support of this position, Ms. Meng cites the statement of La Forest J. in *R. v. McVey* at 529, that "the extradition judge is not concerned with foreign law at all"; as well as that of Charron J. in *Fischbacher* at para. 35, that "the role of the extradition judge does not include any review of the foreign law"; and similar source or derivative statements in other governing authorities. See, for example, *Norris v. Government of the United States of America*, the Secretary of State of the Home Department, Bow Street Magistrates' Court, [2008] UKHL 16 at paras. 65 and 78-80.

⁴⁸ Id. at Para. 82.

Ms. Meng's approach to the double criminality analysis would seriously limit Canada's ability to fulfill its international obligations in the extradition context for fraud and other economic crimes. The offence of fraud has a vast potential scope. It may encompass a very wide range of conduct, a large expanse of time, and acts, people, and consequences in multiple places or jurisdictions. Experience shows that many fraudsters benefit in particular from international dealings through which they can obscure their identity and the location of their fraudulent gains. For the double criminality principle to be applied in the manner Ms. Meng suggests would give fraud an artificially narrow scope in the extradition context. It would entirely eliminate, in many cases, consideration of the reason for the alleged false statements, and of how the false statements caused the victim(s) loss or risk of loss. By that approach, Wilson, described above, would, it seems, require a different result.

⁴⁹ Id.

In addition, Ms. Meng's contention that if foreign laws play a part in the double criminality analysis, the extradition process may, in some cases, indirectly help to enforce laws based on policy offensive to Canadian values,⁵⁰ but Justice Holmes voiced her disagreement on this contention. In the paper of judgement, she didn't deny the possibility of Canadian values' being offended by the enforcement of foreign laws on the whole, but she argued that the application of foreign laws concerning economic crimes aren't "fundamentally contrary" to Canadian values. She noted that laws concerning economic criminalities and slavery differed greatly that they should be distinguished when the issue is discussed.⁵¹ Except for the type of crime that can determine the identification of double criminality, the Minister of Justice's final decision of extradition is also a barrier against value offense. Even though in the extradition hearing, the judge released the judgement in favor of requesting state, on condition that the values are invaded, the Minister of Justice should refuse to surrender.

On these grounds, accepting the conduct-based analysis and taking the aim of international cooperation in combating criminality into consideration, Ms. Meng's application was dismissed and the requirements of double criminality were met.

C. The Analysis of Law Ideology on the Basis of Meng Wanzhou Case

As is suggested in Article written by Perino: Law, Ideology, and Strategy in Judicial Decision making: Evidence from Securities Fraud Actions, "Empirical studies have repeatedly shown that ideology matters, although it is not outcome determinative; as a result, the attitudinal model largely dominates judicial politics."⁵² Furthermore, the attitudinal model has received great challenges recently and the factors of law ideology carry more weight.

In many situations where conflicted interpretation of regulations exists, an intermediate standard stands more chance of being widely accepted.⁵³ The trend can be deemed as the proof of the role law ideology plays in practice. In the face of vague laws or regulations, the conservative or liberal attitudes towards the law from a judge is determined by the ideology he or her holds and it is the uncertainty and unclarity of the law itself that evokes possible disputes and drive judges from lower-level courts to choose intermediate methods. As is mentioned in the literatures, the avoidance of reversal by the court of appeal is one of the contributing factors due to differed ideologies.⁵⁴

⁵⁰ Id. at Para. 83.

Finally, I will address the concern raised by Ms. Meng that if foreign laws play a part in the double criminality analysis, the extradition process may, in some cases, indirectly help to enforce laws based on policy offensive to Canadian values. The 1860 decision of the majority of the Court of Queen's Bench of Upper Canada in *Anderson, Re* (1860), 20 U.C.Q.B. 124 (U.C.C.A.) provides a good example, where the double criminality analysis in relation to an alleged murder in Missouri relied in part on US laws concerning slavery. Even today, one could construct a scenario in which hypothetical foreign slavery laws could lead to conduct for which the equivalent Canadian offence would be fraud. Should the offensive character of the foreign laws play no part in the double criminality analysis?

⁵¹ Id.

⁵² Michael A Perino, *Law, Ideology, and Strategy in Judicial Decisionmaking: Evidence from Securities Fraud Actions* 29, 498.

⁵³ Id. at 500.

⁵⁴ Perino, *supra* note 56.

In Meng Wanzhou's case, the influence of ideology, from the author's point of view, appears mainly in the identification of double criminality. Justice Holmes believed that the extradition decision of approval concerning human right offenses should have higher threshold than mere financial crimes.⁵⁵ Since according to the Extradition Act of Canada, as long as the offense reaches a certain level of severity and is punishable in Canada, the person sought can be extradited to the requesting state, there leaves much room for the extradition judge to decide on the identification of double criminality under the influence of ideology. The requirements of identification test the similarities of law ideology between nations. The ruling of Meng Wanzhou's case demonstrates that Justice Holmes holds the view that between Canada and the United States, they share more common values or ideologies in the matter of financial crimes than other types of criminality.

As far as the long-term influence of the judgment is concerned, since the previous judgements may be the legal basis of subsequent judgements in Canada, it is plausible that the lower extradition threshold for financial crimes eventually be a trend in Canadian legal practice. Meanwhile, the legal cooperation between nations, namely Canada and the US, gradually gets strengthened with the frequent admission of extraditing the person in charge. The analysis above provides an example of how law ideology makes sense in the international legal aspects, but it doesn't mean that law ideology only has an effect on the threshold of extradition.

Apart from the different levels of caution paid in different types of extradition cases, the law ideology gets into every aspect where the personal reasoning of the judge is required. For example, if the person sought is to adduce evidence, the judge will be in the position of deciding on the reliability of the evidence, which will ultimately lead to the admission or denial of the evidence. In Meng Wanzhou's case, she and her counsel put forward four applications requesting to adduce evidence but most of which were denied by Justice Holmes for lack of relevance. Since the reasons for judgement were given according to the judge's personal recognition, law ideology once again determines the critical issues of extradition cases. However, since no sufficient evidence points to the close relationship between Justice Holmes's ideology and her judgements, the discussion concerning law ideology will come to a stop here.

IV. EXTRADITION PRACTICE II: A CASE TO BE COMPARED WITH IN THE FIELD OF EXTRADITION—THE MINISTER OF JUSTICE V HENRY C. FISCHBACHER

A. Facts and Comparisons

Henry Fischbacher was the respondent in this case. In the extradition case, he was alleged of murder and was about to be extradited to the US. In this case, the Minister of Justice intended to extradite him for the offense of first degree murder. In the Court of Appeal For Ontario, it held that "it was unreasonable to order F's surrender for first degree murder in the absence of evidence of the essential element of

⁵⁵ See The Courts of British Columbia: United States v. Meng, 2020 BCSC 785 – 2020/05/27, <https://www.bccourts.ca/jdb-txt/sc/20/07/2020BCSC0785.htm> (last updated Nov. 21, 2021)

premeditation at the committal proceeding"⁵⁶. Although in this case, the requirements of double criminality were met, the ruling on the type of crime and the level of offense are what should be paid attention to.

Fischbacher was alleged to have struck his wife on the head during a heated debate which led to his wife's unconsciousness. Later on, he dragged his wife's body to the swimming pool in the backyard. The facts stated above can be proved by the evidence listed in the Amended Record of the Case. After murdering his wife, Fischbacher fled America and entered Canada, where he was arrested.⁵⁷

Fischbacher himself accepted to face the trial in Arizona, deciding whether he was guilty of second degree murder. However, the Minister of Justice insisted on extraditing him for the offence of first degree murder. Although both first and second degree of murder belongs to the type of crime, murder, they differed greatly in moral blameworthiness and the composition of first degree of murder includes "planning and deliberation".⁵⁸ For lack of evidence proving the planning and deliberation, the extradition judge of The Court Of Appeal For Ontario refused the application of the Minister of Justice, surrendering Fischbacher for the offence of first degree murder.

Considering the purpose of the extradition procedure and the conclusion reached in the former part of this note, it is apparent that the detailed decision of types of crime is not the focus of this process. However, much effort, including the hearings between the respondent and the Minister of Justice has been made in deciding whether the offense should be first or second degree murder in the case. Although this procedure is different from the ruling on double criminality in Meng Wanzhou's case, it still proved that the types of crime are not that unimportant and irrelevant as is mentioned in Meng's case. Besides, in the matter of evidence, the judge of SCC didn't support the Minister of Justice on the grounds that there's no sufficient evidence proving the "planning and deliberation" necessary for composing the first degree murder. In this period, the judge played a most important role in the decision and Fischbacher himself didn't provide evidence to contend that he didn't plan to murder his wife and the deliberation didn't exist. Compared with the allegations made by the requesting state

⁵⁶ SUPREME COURT OF CANADA-Supreme Court Judgments: Canada (Justice) v. Fischbacher, 2009 SCC 46, <https://decisions.scc-csc.ca/scc-csc/scc-csc/en/item/7821/index.do?q=henry+fischbacher> (last visited Jan. 15, 2022) F was indicted of first degree murder in Arizona in relation to the death of his wife. The United States requested his extradition. The Minister of Justice authorized the request, identifying the corresponding Canadian offence in the authority to proceed as "murder, contrary to s. 231 of the Criminal Code" without particularizing the crime as first or second degree murder. The Attorney General proceeded to a committal hearing and the extradition judge committed F for the offence of second degree murder, finding no evidence of planning and deliberation to justify committal for first degree murder under Canadian law. No appeal was taken from the committal order. The Minister subsequently ordered F's surrender to face trial for first degree murder in the United States. F sought judicial review of the Minister's decision. The Court of Appeal held that the principle of double criminality was met but, applying the "misalignment test", it held that it was unreasonable to order F's surrender for first degree murder in the absence of evidence of the essential element of premeditation at the committal proceeding. The court allowed the application for judicial review and remitted the matter to the Minister for reconsideration.

⁵⁷ Id.

⁵⁸ Id.

in Meng Wanzhou's case, the Attorney General also failed to provide evidence proving that Huawei and Ms. Meng have financial communications with Skycom, enough to put HSBC at risk, but this allegation was taken as true. In addition, although Ms. Meng tried to adduce critical evidence that may well prove that HSBC knew the relationship in question clearly, the application was denied, for the relevance is not acceptable according to Justice Holmes. Furthermore, summarizing the judgement of the Meng Wanzhou's case, the sentencing and decision of crime are left for the requesting state, in the requested state, whether a similar type of crime can be established is of primary importance. While in the Fischbacher's case, it is clear that the crime can be established, but only the degree of crime aroused argument, however, this argument managed to lead the procedure of extradition to a pause.

On the whole, the ruling on the Fischbacher's case and that on Meng Wanzhou's case differed in the following aspects as far as legal procedure is concerned:

- 1) the role the types of crimes play in the extradition practice
- 2) the allocation of the burden of proof
- 3) the admissibility of evidence in the hearings

B. Discussion

It should be clarified here that the key procedural difference between the Meng Wanzhou's case and Fischbacher's case is that: in the former case, the parties attending the hearing are the respondent and Attorney General on behalf of the requesting state, while in the latter one, the parties are the Minister of Justice (Appellant) and the respondent. Therefore, a detailed comparison between corresponding phases cannot be made in this part of the note, but it makes no difference in comparing the general principles of extradition practice shown in these cases.

1) Judicial phases and the influence of political factors

The final surrendering of the person sought from Canada, according to the Extradition Act, must go through two phases different in nature. The first, the judicial phase, encompasses the court proceedings which determine whether a factual and legal basis for extradition exists. If that process results in the issuance of a warrant of committal, then the second phase is activated. There, the Minister of Justice exercises his or her discretion in determining whether to issue a warrant of surrender. The first decision-making phase is certainly judicial in its nature and warrants the application of the full panoply of procedural safeguards. By contrast, the second decision-making process is political in its nature. "The Minister must weigh the representations of the fugitive against Canada's international treaty obligations"⁵⁹.

The citation clarified that political factors serve as an integral part of extradition practice for the Order for Surrender to be made by the Minister of Justice is the final stage of the three-stage process. It is the discretion of the Minister to weigh the person's conduct and the purpose of extradition in each case. The Minister should also refuse

⁵⁹ Id. at Para. 44 citing " *Idziak v. Canada (Minister of Justice)*, [1992] 3 S.C.R. 631."

to surrender if the extradition may be unjust or oppressive. Apparently, the weighing of international justice cooperation doesn't belong to the field of sheer justice at least, and the levels of cooperation are also determined on the basis of inter-relationship. Besides, as is mentioned in the verdict of the Meng Wanzhou's case, Justice Holmes held that it is the Minister's authority to decide whether the extradition is against the Canadian values. If so, the Minister has the authority to suspend the extradition. In essence, Holmes's ruling is a detailed explanation of so-called "unjust and oppressive". Therefore, the conclusion reached in this note is, the order of surrender is the combination of legal procedure and political factors and it is impossible to totally eradicate the effects of political factors in extradition practice.

2) In the matter of evidence that should be included in the ROC and SROC

In the Fischbacher's case, the United States made a formal diplomatic request for the extradition of the Respondent for "the offense of first degree murder."⁶⁰ However, in the last stage, the order to surrender on the charge of first degree murder was denied by the court for lack of evidence proving the existence of "planning and deliberation" which is essential to compose a first degree murder. Instead, given the level of evidence provided, the court held that extraditing for a second degree murder is proper. It can be concluded that to extradite a person on the request, the requesting nation should at least provide a certain standard of evidence that is sufficient to enable the case to go to trial in Canada. In the Fischbacher's case, the United States provided evidence on the following list: the domestic argument and the killing, the leaving of the body in the pool⁶¹... Though not able to prove the deliberation of the respondent, they clearly proved the fact of murder.

In the Meng Wanzhou's case, the requesting state alleged that she should be prosecuted with fraud. Fraud in the Criminal Code of Canada is defined as:

"380 (1) Everyone who, by deceit, falsehood or other fraudulent means, whether or not it is a false pretense within the meaning of this Act, defrauds the public or any person, whether ascertained or not, of any property, money or valuable security or any service,

(a) is guilty of an indictable offence and liable to a term of imprisonment not exceeding fourteen years, where the subject-matter of the offence is a testamentary instrument or the value of the subject-matter of the offence exceeds five thousand dollars; or

(b) is guilty

(i) of an indictable offence and is liable to imprisonment for a term not exceeding two years, or

⁶⁰ *Id.* at Para. 9

⁶¹ *Id.* at Para. 36.

(ii) of an offence punishable on summary conviction, where the value of the subject-matter of the offence does not exceed five thousand dollars."⁶²

The Supreme Court of British Columbia held that "fraud is established by proof of subjective knowledge of the prohibited act and subjective knowledge that the prohibited act could have as a consequence the deprivation of another"⁶³. Similar to requirements of "planning and deliberation", the fraud requires "subjective knowledge of possible deprivation". The establishment of possible deprivation was clearly stated in the court verdict: HSBC's providing financial services to companies having business in Iran violates the DPA, leading to its risk of civil and criminal penalties. But the evidence in ROC didn't sufficiently prove that Ms. Meng had subjective knowledge. More importantly, the relationship between Huawei, Ms. Meng and Skycom wasn't clear enough to prove that there exists cause and effect relationship between Meng's presentation and possible deprivation.

In the hearing, the position of Ms. Meng was that she resigned from the board of Skycom years ago and Huawei had ceased the financial communications with Skycom. HSBC's providing loans to Huawei (the parent company) instead of the Huawei subsidiary will not lead to deprivation. On the other side, the Attorney General contended that "Ms. Meng's false statements about Huawei's relationship to Skycom prevented HSBC from taking into account all of the material facts when it was assessing the risk of maintaining the client relationship"⁶⁴.

In the hearing, the Attorney General only put forward the position, but no sufficient evidence was provided in the ROC to support his argument and it couldn't establish a case capable of going to trial in Canada. In this situation, Justice Holmes still decided that the requirements of double criminality be met in the absence of sufficient evidence, neglecting the problem: whether the relationship between Huawei and Skycom may lead to deprivation of HSBC. It should be noted that Holmes required this question to be determined at a later stage in the proceedings⁶⁵ and the question

⁶² See The Government of Canada: Criminal Code (R.S.C., 1985, c. C-46), <https://laws.justice.gc.ca/eng/acts/C-46/page-51.html#h-122424> (last updated Nov. 17, 2021) ("PART IX Offences Against Rights of Property (continued)")

⁶³ See The Courts of British Columbia: United States v. Meng, 2020 BCSC 785 – 2020/05/27, <https://www.bccourts.ca/jdb-txt/sc/20/07/2020BCSC0785.htm> (last updated Nov. 21, 2021) ("Correspondingly, the mens rea of fraud is established by proof of: 1. subjective knowledge of the prohibited act; and 2. subjective knowledge that the prohibited act could have as a consequence the deprivation of another (which deprivation may consist in the knowledge that the victim's pecuniary interests are put at risk).")

⁶⁴ The Courts of British Columbia: United States v. Meng, 2020 BCSC 785 – 2020/05/27, <https://www.bccourts.ca/jdb-txt/sc/20/07/2020BCSC0785.htm> (last updated Nov. 21, 2021)

In support of the first basis, the AG says that deprivation can be established without reliance on US sanctions and their effects. Specifically, Ms. Meng's false statements about Huawei's relationship with Skycom prevented HSBC from taking into account all of the material facts when it was assessing the risk of maintaining the client relationship. He submits that this put HSBC at risk, whether or not there was any real possibility of loss in the circumstances. This basis of risk was entirely independent of US sanctions, and is sufficient on its own to satisfy the double criminality test about fraud, the AG submits.

⁶⁵ Id. at Para. 90.

I make no determination of the larger question under s. 29(1)(a) of the Act of 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. This question will be determined at a later stage in the proceedings.

wouldn't affect the identification of double criminality. Therefore, the required level of evidence to make allegations in the aim of extradition varied greatly.

CONCLUSION

This note examined part of the substantial parts of extradition practice, looked into the details of Meng Wanzhou extradition case and compared this case to another typical case. I reached the conclusions listed as follows:

The arrestment procedure (i.e., YVR Event) didn't meet the requirements of a provisional arrest warrant issued by Justice Fleming, for the arrestment was delayed due to contrived factors. Meanwhile, Ms. Meng's Charter rights were deprived of partly due to the delay.

On the whole, the approach of double criminality analysis is conduct based, which is the trend in modern extradition practice for the sake of international cooperation in combating criminality. The types of crime don't need to be exactly the same, similar crimes in both countries are sufficient to extradite.

In the matter of the sovereignty of justice, the threshold for foreign laws to enter the domestic legal system is lower when it comes to financial crimes such as fraud, in the Meng Wanzhou's case, than that of ethical crimes.

The standard of evidence required for the requesting state to make allegations in the extradition procedure is rather low than that of trial in the requesting state for evidence sufficient to go to trial in Canada will be enough to surrender the person sought.

There's no extradition case that can completely eradicate the influence of political factors, for in the second phase, the order of surrender is made by the Minister of Justice and the Minister should make the decision based on his(her) weighing of extradition purpose and the person's conduct. If the judgment is unjust or oppressive, the surrender procedure should be paused. Therefore, the Meng Wanzhou's case can partly be defined as a political incident due to the political factors involved in the case.

Justice Holmes didn't make any response in the matter of conflicting contentions on the relationship between Huawei, Ms. Meng and Skycom, which plays a very important role in deciding whether the requirement of "subjective knowledge of fraudulent" can be met, arousing my doubt on the impartiality of her ruling on double criminality.

The law ideology may have great effects on condition that the law is vague or leave room for explanation by the judge. In extradition cases, the general law ideology of a nation is directly associated with the chance of the person sought's being extradited. More specifically, the law ideology influences the scales of successful extradition of crimes of different types.

On these grounds, I propose that during the whole process, Ms. Meng was unfairly treated, her rights were violated and possibly, the procedure was abused. I cannot fully rule out the possibility of political interference due to the legal

particularity of extradition practice and the judgment made by Madam Justice Holmes is questionable through the comparison with other typical extradition cases.