

Ambassador McCallum's Controversial Comments on the Huawei Extradition Case Resulted in His Termination. But Was He Right?

Date: February 04, 2019

Meng Wanzhou is the Chief Financial Officer for Huawei Technologies Co. Ltd. (“Huawei”). She was arrested in Vancouver on December 1, 2018, pursuant to a provisional arrest warrant that was issued under the [Extradition Act](#) (the “Act”). The United States has now made a formal request for her extradition.

On January 22, 2019, John McCallum, Canada’s Ambassador to China, [told a gathering of Chinese-language journalists in Toronto](#) that he thought Meng Wanzhou had a strong case to fight extradition to the United States. He also raised several arguments that he thought would support her case.

During his meeting with Chinese-language journalists, Mr. McCallum specifically referred to the following arguments:

- Political involvement by the White House in connection with the extradition request;
- The extraterritorial aspect to her case; and
- That Canada has not signed onto the same Iran sanctions that Huawei is accused of violating.

As a result of the above comments, John McCallum was [forced to resign](#) on January 25, 2019.

There is no doubt that his comments were politically controversial but were they legally accurate? To answer this question, we need to examine Canada’s extradition laws more closely.

[What Conduct Can Result in Extradition?](#)

Section 3 of the Act provides that a person may be extradited under the Act, in accordance with a relevant extradition agreement. In other words, the requesting country must have an extradition agreement in place with Canada.

If an extradition agreement exists, the foreign country may request the extradition of a person (either to prosecute them or to impose an existing sentence) if:

- The offence for which extradition is requested is punishable by at least two years of imprisonment, by the requesting country
- The alleged conduct would have been an offence punishable by at least two years of imprisonment, if it had occurred in Canada.

In other words, the conduct upon which the extradition request is based must be considered a crime in both Canada and the requesting country. This is often referred to as the “dual criminality” requirement.

According to Section 5 of the Act, a person may be extradited:

- Whether or not the conduct on which the request is based occurred in the territory over which the foreign country has jurisdiction; and
- Whether or not Canada could exercise jurisdiction in similar circumstances.

[Is Meng Wanzhou's Alleged Conduct Considered an Extraditable Offence?](#)

In the present case, the [Treaty on Extradition Between the Government of Canada and the Government of the United States of America](#) (the “U.S. Extradition Treaty”) provides for the extradition of persons from Canada to the United States. The schedule to this U.S. Extradition Treaty (the “U.S. Extradition Schedule”) lists the offences that can result in extradition.

According to an [affidavit from the Royal Canadian Mounted Police](#), which was submitted in support of Meng Wanzhou's provisional arrest warrant, she misrepresented the true nature of Huawei's relationship to Skycom Tech Co. Ltd. (“Skycom”), a related Hong-Kong company, in order to induce several multinational financial institutions to process more than \$100 million worth of Iran-related transactions in violation of U.S. trade sanctions.

Had the United States merely alleged that Meng Wanzhou violated U.S. trade sanctions, this likely would not have supported an extradition request. This is because the U.S. Extradition Schedule does not list the violation of trade sanctions as an extraditable offence. Of course, it appears that the United States is instead alleging that Meng Wanzhou committed bank fraud, albeit for the purpose of circumventing U.S. trade sanctions with Iran.

The U.S. Extradition Schedule lists the offence of “fraud by a banker, agent, or by a director or officer of any company.” So the offence of fraud could potentially result in extradition under the U.S. Extradition Treaty. Fraud is also a criminal offence in Canada under [Section 380 of the Criminal Code](#), which would appear to address the dual criminality requirement contained in the *Extradition Act*.

[Overview of the Canadian Extradition Process](#)

According to Section 14 of the Act, once a provisional arrest has been made, the person will be released if a formal extradition request is not made by the foreign country within 60 days (or the specific period is stated in the relevant extradition agreement, if such a provision exists). Article 11 of the U.S. Extradition Treaty specifically refers to a period of 45 days.

After receiving an extradition request from the foreign country, if the Minister of Justice is satisfied that the requirements of Section 3 have been satisfied, he *may* issue an Authority to Proceed, which authorizes the Attorney General to proceed with the extradition process. In other words, the Minister of Justice has complete discretion to decide whether an Authority to Proceed should be issued. However, the decision to issue an Authority to Proceed is normally delegated to government lawyers working in the Ministry of Justice.

Upon receipt of an Authority to Proceed, a judge will hold an extradition hearing. In general, the judge must issue an Order of Committal if there is evidence of conduct that, if it occurred in Canada, would justify a committal for trial; this is a relatively low threshold. However, the person sought for extradition may challenge the proceedings on other grounds, for example, by demonstrating that their extradition would violate the *Charter of Rights and Freedoms*.

If the judge issues an Order of Committal, the person sought for extradition will have 30 days to appeal the decision to the Court of Appeal. If the Order of Committal is not appealed, the Minister of Justice may *personally* (this responsibility may not be delegated) order that the person be surrendered to the foreign country, within the 90-day period following the date of the person's committal to await surrender. If an appeal is filed, the Surrender Order may be issued within the 45-day period following the decision from the Court of Appeal.

During the 30-day period following his or her committal, the person sought for extradition may also make submissions to the Minister of Justice on any relevant ground. According to Section 44 of the Act, the Minister of Justice *shall* refuse to issue a Surrender Order if he is satisfied that:

- The surrender would be unjust or oppressive; or
- The request for extradition is made for the purpose of prosecuting or punishing the person by reason of their race, religion, nationality, ethnic origin, language, colour, political opinion, sex, sexual orientation, age, mental or physical disability, or status.

According to Section 46 of the Act, the Minister *shall* refuse to issue a Surrender Order if he is satisfied that the conduct in respect of which extradition is sought is a political offense or an offense of a political character.

According to Section 47 of the Act, the Minister of Justice *may* also refuse to issue a Surrender Order if he is satisfied that none of the conduct, upon which the extradition request is based, occurred in the territory over which the foreign country has jurisdiction.

If the Minister of Justice decides not to issue a Surrender Order, the person sought for extradition will be released. On the other hand, if the Minister of Justice decides to issue a Surrender Order, the person sought for extradition may seek judicial review within 30 days of receiving notice of the decision. The Court of Appeal for the province in which the person's

committal was ordered has exclusive jurisdiction to determine applications for judicial review of the Surrender Order.

Analysis of John McCallum's Comments

Political Involvement by the Whitehouse

President Trump has [publicly stated that he would be willing to “intervene”](#) in Meng Wanzhou’s criminal matter if it would help him establish a new trade deal with China. If the criminal allegations made by the United States are in fact politically motivated (i.e., they are being used as a bargaining chip in its trade dispute with China), Meng Wanzhou could actually fight extradition on this basis. For example:

- The Minister of Justice could refuse to issue an Authority to Proceed, if he believes that the conduct of the United States amounts to an abuse of process.
- If an Authority to Proceed is issued by the Minister of Justice, the judge could consider this claim during the extradition hearing.
- If an Order of Committal is issued by a judge, the Minister of Justice may consider this claim when deciding whether to issue a Surrender Order.

The Extraterritorial Aspect

This apparently refers to the fact that the alleged conduct, upon which the extradition request is based, appears to have occurred outside of U.S. territory. The alleged bank fraud involved multinational financial institutions and the Iran-related transactions involved a Hong-Kong based corporation (Skycom).

The only potential link to the United States was the fact that Skycom had to repatriate income from Iran through U.S. dollar clearing transactions, which typically pass through the United States. Of course, the United States frequently applies extraterritorial jurisdiction. Even a remote nexus to the U.S. will often be cited by the United States, to justify the application of its laws outside its own territory. In contrast, Canada generally does not attempt to apply its laws outside of Canadian territory.

In any event, Section 5 of the Act makes clear that extradition may occur even if the conduct upon which the request is based occurred outside of the foreign country’s territory. It is also irrelevant whether Canada could exercise jurisdiction in the same circumstances.

So arguing that the United States is attempting to extend its laws to conduct that occurred outside of its own territory will not prevent the extradition process from going forward. However, as confirmed by Section 47 of the Act, the Minister of Justice may refuse to issue a Surrender Order if he is satisfied that none of the conduct, upon which the extradition request is based, occurred in the territory over which the United States has jurisdiction.

In other words, the extraterritorial application of U.S. laws could be used to support the Minister of Justice’s decision to not issue a Surrender Order, once the extradition process reaches this final stage.

Canada Has Not Signed onto the Same Iran Sanctions

John McCallum suggested that Canada and the United States do not impose the same economic sanctions against Iran. Although this may be true at the present time, the RCMP affidavit filed in support of Meng Wanzhou's provisional arrest warrant claims that the alleged bank fraud occurred between 2009 and 2014. So John McCallum's statements on this point appear to be inaccurate, at least in relation to the period in question.

[According to Global Affairs Canada](#), Canada's recent history of economic sanctions against Iran may be summarized as follows:

- Between 2006 and 2010, the United Nations Security Council imposed four rounds of sanctions against Iran in response to its nuclear program. Acting under Chapter VII of the Charter of the United Nations, the Security Council adopted resolutions 1737 (2006), 1747 (2007), 1803 (2008) and 1929 (2010) imposing sanctions against Iran in response to the proliferation risks presented by Iran's nuclear program in light of Iran's failure to meet the requirements of the International Atomic Energy Agency and to comply with the provisions of earlier Security Council resolutions. The United States and Canada both implemented the same economic sanctions.
- In July 2010, Canada imposed additional sanctions on Iran in close consultation with like-minded partners (including the United States) under the [Special Economic Measures Act](#). These sanctions were increasingly tightened through amendments made in October 2011, November 2011, January 2012, December 2012 and May 2013 resulting in a broad prohibition on exports and imports to and from Iran and also on financial transactions.
- On July 14, 2015, the five permanent members of the UN Security Council (China, France, Russia, the United Kingdom, and the United States) plus Germany reached a deal with Iran on its nuclear program, which was known as the [Joint Comprehensive Plan of Action](#) ("JCPOA"). In addition to establishing an inspection process, the JCPOA also addressed the removal of UN sanctions against Iran, upon certain conditions being satisfied. On July 20, 2015, the UN Security Council officially endorsed the JCPOA by passing [UN Security Council Resolution 2231](#).
- On January 16, 2016, following confirmation that Iran had fulfilled the prescribed commitments under the JCPOA, sanctions imposed by the UN, the United States and the European Union against Iran were immediately relaxed. On February 5, 2016, Canada also relaxed its economic sanctions against Iran, in accordance with UN Security Council Resolution 2231.

On May 8, 2018, [President Trump announced that the United States would withdraw from the JCPOA](#). On the same day, the Government of Canada [reaffirmed its continued support for the JCPOA](#). On November 5, 2018, the United States [fully restored the tougher economic sanctions](#) that had been lifted as a result of the JCPOA.

In summary, Canada's economic sanctions against Iran only began to diverge from those of the United States on November 5, 2018. During the period when the alleged bank fraud is alleged to have occurred (2009 to 2014), both Canada and the United States imposed the same economic sanctions against Iran.

Conclusion

It would appear that at least two out of the three arguments that John McCallum raised could theoretically be argued in support of Meng Wanzhou's release, either during her extradition hearing or in submissions to the Minister of Justice. Nevertheless, he should never have commented on whether those arguments would ultimately be successful. In doing so, John McCallum created the perception that the extradition process could be affected by political influence.