

Case Bulletin: 2020/07

Canada's Double Criminality Principle

In the midst of China-US trade tensions, the Supreme Court of British Columbia handed down a decision, *United States v Meng* 2020 BCSC 785, dismissed Ms. Wanzhou Meng's application to discharge her from the extradition process on the basis that, as a matter of law, the "double criminality" requirement for extradition cannot be met. The judgment explains the relevant principle, and provided the reasons for concluding that the double criminality requirement for extradition is capable of being met in this case.

It is important to note that the Minister of Justice for Canada has identified fraud as the offence reflecting the alleged conduct. The double criminality question is therefore whether Ms. Meng's alleged conduct, had it occurred in Canada, would have amounted to fraud contrary to the *Criminal Code* of Canada. Fraud in Canada requires proof of two elements, namely *actus reus* and *mens rea*, these common law concepts are explained below. It was not necessary to prove the allegations set out by the USA in the present proceedings, and they were taken at face value for the purpose of assessing whether the double criminality requirement is met.

I. Background

1. Ms. Meng is alleged to have made false statements to HSBC in 2013, significantly understating Huawei's relationship with Skycom Tech. Co. Ltd., a company based in Iran.
2. At the material times, Canada has no laws or regulatory scheme preventing banks from doing business with Iran-based entities, however, such conducts

may violate the US sanctions¹ and could lead to criminal and civil penalties.

3. The alleged fraud committed by Ms. Meng involved her false assurance misrepresenting the actual relationship between Huawei and Skycom provided to HSBC, which are said to have put HSBC at risk of fines and penalties for violating the US sanctions. Those misrepresentations are also said to have exposed HSBC to both economic and reputational risk.
4. One of Ms. Meng's main arguments is that Canada does not have the equivalent of US sanctions preventing banks from doing business with Iran-based entities, misrepresentation about an Iran-based affiliate would therefore be legally and factually irrelevant.

II. Key Points

1. Canada implements the double criminality principle through the conduct-based approach, not the offence-based approach. Hence, it is not necessary that the foreign offence have an exactly corresponding Canadian offence. It is the essence of the offence that is important.
2. The *actus reus* of fraud in Canada will be established by proof of:
 - (a) the prohibited act, be it an act of deceit, a falsehood or some other fraudulent means; and
 - (b) deprivation caused by the prohibited act, which may consist in actual loss or the placing of the victim's pecuniary interests at risk.
3. Correspondingly, the *mens rea* of fraud in Canada will be established by proof of:
 - (a) subjective knowledge of the prohibited act; and
 - (b) subjective knowledge that the prohibited act could have as a consequence the deprivation of another (which deprivation may consist in knowledge that the victim's pecuniary interests are put at risk).

¹ Including the *Iranian Transaction and Sanctions Regulations*.

4. There are many situation where a false statement made by a borrower puts the creditor at risk even though the proceeds of the loan are repaid without incident. Even with no actual loss resulting, fraud is made out as the creditor is found to be at some risk of loss while the loan is outstanding. However, the false statement or misrepresentation must have been a material or meaningful one in the sense that it could give rise to a loss or risk of loss. It is no fraud simply to lie, where the lie is unrelated to any potential loss or risk of loss to the deceived party. The risk of loss must be real, and it must be integrally connected with the dishonest act or statement. In this case, reference to the US sanctions is required to provide the causal basis for the economic or reputational risk to HSBC because of Ms Meng's alleged misrepresentation.
5. The Judge relied on a number of cases to rule that domestic Canadian prosecution could rely indirectly on the effect of US laws in extradition proceedings. In *US v Wilson* 2013 BCSC 2423, Mr. Wilson was sought for fraud in relation to a telemarketing scheme selling a fraud protection product to credit card holders in the USA, who in fact had no need of the protection because US law limited their liability for fraudulent charges to \$50. There was no difficulty taking into account US law as explaining the deprivation to the victim credit card holders.
6. In *Germany v Schreiber* (2004), 184 C.C.C. (3d) 367 (Ont. S.C.), the Germany's concept of "income" may be different from Canada's, however, it was found that the essence of the conduct amounted to tax evasion in Canada, and the double criminality requirement was met.
7. The Judge used an old case *Anderson, Re* (1860), 20 U.C.Q.B. 124 (U.C.C.A.) in relation to an alleged murder in Missouri relied in part on US laws concerning slavery to justify the reliance on foreign laws (such as the US sanctions), which were not part of Canadian law but they are also not fundamentally contrary to Canadian values.
8. Furthermore, the Judge explained in the final phase of the extradition process, the Minister of Justice is expressly required to refuse a surrender order for extradition if such an order would be "unjust or oppressive" having regard to all the circumstances. The decision of the Minister concerning surrender is

subject to judicial review giving yet further protection against an unjust or oppressive result flowing from the consideration of foreign laws, as context for the alleged conduct, in the double criminality analysis.

III. Findings

1. The Judge ruled that double criminality cannot be established without reliance on the US sanctions.
2. The essence of the alleged wrongful conduct is the making of intentionally false statements in the banker client relationship that put HSBC at risk. The US sanctions are part of the state of affairs necessary to explain how HSBC was at risk, but they are not themselves an intrinsic part of the conduct.
3. Canada's laws determine whether the alleged conduct, in its essence, amounts to fraud.
4. In conclusion, it was found that the double criminality requirement for extradition is capable of being met in this case. The effect of the US sanctions may properly play a role in the double criminality analysis as part of the background or context against which the alleged conduct is examined.

For enquiries, please contact:

Dennis Fong & Co., Solicitors *(in Association with Llinks Law Offices)*

Adrian Lo

Partner

Tel: +852 2592 1978

Email: adrian.lo@llinkslaw.com.hk