

Canada's Kangaroo Courts: Part II

Sean D. Yates^{1*}

¹The author is an English Barrister, General Counsel of China State Construction Engineering Corporation (Middle East) L.L.C. and undertaking PhD research on new international commercial courts and their domestic relations

DOI: [10.36348/sijlcrj.2021.v04i10.007](https://doi.org/10.36348/sijlcrj.2021.v04i10.007)

Received: 21.09.2021 | Accepted: 05.10.2021 | Published: 22.10.2021

*Corresponding author: Sean D. Yates

Abstract

Defence applications to adduce evidence in Meng Wanzhou's extradition case. Bases of Court decisions to allow or deny evidence. Different standards required for Requesting State and Person Sought. Extradition proceedings constituting a trial of the Record of Case, not of the Person Sought. Unfairness flowing from the new Extradition Act due to relaxation of evidence standards required in the Record of Case. Whether Extradition Act achieved its aim to prevent Canada being a haven for criminals, or if it has become one of the easiest places from which to extradite, creating concerns about wrongful extradition and denial of Charter Rights.

Keywords: Extradition – Evidence – Unfair process – Miscarriage of Justice - Meng Wanzhou.

Copyright © 2021 The Author(s): This is an open-access article distributed under the terms of the Creative Commons Attribution 4.0 International License (CC BY-NC 4.0) which permits unrestricted use, distribution, and reproduction in any medium for non-commercial use provided the original author and source are credited.

INTRODUCTION

On 20 July 2021^[1] Judge Holmes in Meng Wanzhou's extradition case provided reasons for not allowing Meng to adduce additional evidence that appeared to undermine the U.S. case against her. The evidence forcefully challenges the U.S. case that Senior HSBC employees did not know about Huawei's relationship with Skycom, and further suggests that the PowerPoint presentation through which Meng is said to have misrepresented the relationship between Huawei and Skycom was not considered by the HSBC risk committee when it decided to continue providing banking services to Huawei. This article considers why persons sought in extradition proceedings are routinely denied the opportunity to adduce evidence that helps their case and whether this is fair. It considers whether this has always been the legal position and whether the system affords equal treatment to the requesting state and the person sought.

The first part proposes that extradition proceedings, frequently emphasised as not being a trial, are in fact, a trial of the requesting state's evidence, as presented in the Record of Case ("ROC"). The second part looks at the legal basis for refusing Meng's application and how the law was applied in her three previous applications. The third section considers the

different standards for crown and defence evidence derived from the Extradition Act and relevant case law. The fourth part concludes by concurring with recent commentator's views on the Act and the need for radical reform of the current system.

The "Not a Trial" Myth

Extradition Proceedings are said not to be a trial. The Supreme Court emphasised the point in the case of *MM*:

The extradition process is not a trial and, as the Court said nearly three decades ago, it should never be permitted to become one [2].

Rather, it is said to be "a modest screening device" to establish whether "there is sufficient evidence to justify putting the person on trial [3]".

Yet the process involves two opposing sides, presenting arguments on the same subject matter and a judge making decisions favouring one of the two sides. So it looks like a trial. Accepted, it is not a trial of the person sought on the alleged offences, which takes place in the requesting state's court following any extradition. However, the proceedings can rightly be seen as a trial of the request itself, and the ROC in which evidence supporting the request is set out. The

¹ *United States of America v Meng*, Ruling on Application #4 to Adduce Evidence in the Extradition Hearing, 20 July, 2021

² *M.M. v United States of America*, 2015 SCC at para 2.

³ *Ibid* para 62.

use of 'judicial stage' instead of 'trial' may seek to clarify that this is not a trial of the person sought, or it may be a conscious adoption of alternative terminology to draw attention away from what the judicial stage is really about, namely ensuring the ROC is reliable. Currie likewise questions the non-trial nature of the committal stage in the context of whether the consideration should be given to absolute defences (e.g. the defence of necessity in *MM*) open to the person sought:

It is reasonable to say that extradition should not become a trial, but if it is to comport with basic fairness, neither does it need to be the furthest thing from a trial [4].

The extradition process centres on the premise that the court does not become involved in the exercise of weighing competing evidence. This is to be performed by the trial court in the requesting state. However, this is precisely what the court does when deciding whether or not to permit a defendant to introduce evidence - it weighs the evidence to determine if all it does is raise competing inferences or a possible alternative fact pattern.

As a trial of the ROC, the extradition hearing consciously adopts alternative terminology, such as examination or analysis, weighing or testing, but it is nevertheless a trial. The language tends to bring the process more within the administrative realm, but it is not an administrative process, and the court is not providing an administrative function, however much the IAG would like this to be the case. The admission of evidence supporting the ROC is essential, and its admission does not involve the court trying the person sought. The standard of proof in the substantive trial of the person sought would be entirely different from the standard required in the ROC trial, which is extremely low. In extradition proceedings, the court is concerned with whether the ROC allegations or evidence are manifestly unreliable. It can only determine this by taking into account evidence that points in that direction. However, what if such evidence also points towards the accused's innocence? Should evidence be excluded because it is also likely to appear in the substantive case on the issue of the requested person's guilt?

An example of how evidence serves a dual purpose can be seen in Meng's first application to adduce. Mr Bellinger gave evidence as a U.S. law expert on causation in fraud and on sanctions. His evidence was allowed. The Judge was conscious of the multiple issues to which this evidence was relevant:

It is important to note that this evidence is relevant to the issues to be determined in the extradition hearing, not to support an examination of whether the requesting state will be able to prove its case in the trial [5].

The same can apply when considering evidence relevant for any abuse of process argument. This issue arose on the second day of the August hearing in Meng's case. The Crown argued that because a piece of evidence had been excluded from the committal hearing, it could not be adduced to decide whether to extradite. Because it gave rise to a competing inference, they said, it could not be used to argue abuse of process. Specifically, the HSBC documents were probative on two fronts, first to challenge the proposition that only junior executives knew about the Huawei/Skycom relationship. Secondly, they showed that the requesting state had misrepresented its ROC summary. The fact that this argument could be relied upon by the Crown reveals an absence of settled law about how to treat evidence that has multiple simultaneous roles to play in different parts of the extradition proceedings.

With this consideration in mind, the extradition hearing being a trial of the ROC's reliability, not the guilt of the person sought, we can consider the applications to adduce in Meng's case and their outcomes.

Meng's Applications to adduce Evidence

This section summarises Meng's applications to adduce made to date. Fuller accounts of the Judge's reasoning in each can be found in the published decisions. Here an overview is provided of the nature of evidence in each application and the reasons for admission or refusal. The ROC is given in summary form, and carries much less detail than the prosecution is expected to produce at the full substantive trial of the person sought. In extradition proceedings, evidence can only be introduced by the person sought to challenge the ROC's credibility, whether by direct challenge or filling in gaps that otherwise might cause the ROC to mislead. Evidence relevant in the main trial may not be relevant for this purpose, however important it is likely to be in the trial conducted in the requesting state's court. This, I suggest, is perceived as a significant concern of the person sought and the public - they see evidence relevant to guilt or innocence disregarded as if it had been disregarded in a full criminal case where the defendant is on trial.

As the Judge summarised in the fourth application, evidence that the person sought seeks to introduce must be relevant to the tests in s. 29(1) of the

⁴ Robert J Currie, 'Wrongful Extradition: Reforming the Committal Phase of Canada's Extradition Law' Available at SSRN, 30

⁵ *United States of America v Meng*, Ruling on Application #1 to Adduce Evidence in the Extradition Hearing, 28 October, 2020, para 71

Act, so that when considered in light of the whole of the ROC, it could support a conclusion that “the evidence essential to committal is so unreliable or defective that it should be disregarded” [6], and committal refused. However, the test is demanding, she said, as the evidence proffered “will normally be considered irrelevant” and “will almost never be received” if it invites the Judge (a) to assess the credibility of the requesting state’s evidence; or (b) to offer defences, exculpatory inferences or accounts, or explanations alternative to those found in the requesting state’s evidence [7]. The evidence, she said, is not admitted to provide an alternative explanation or inference, but rather “to ensure that the extradition judge is in a position to engage in a meaningful assessment of the reliability of the ROC [8].”

Further, such evidence would only be admitted in very rare and unusual circumstances where, for example, it is found to be of “virtually unimpeachable authenticity and reliability”, and could demonstrate that evidence in the ROC is manifestly unreliable such that committal is not justified [9].

The Judge found in the fourth application that most of the proposed documents only gave rise to competing inferences [10] and invited a weighing of these inferences, “a function outside the role of the extradition judge [11]”. Nor were these documents capable of showing the ROC’s inferences were unreasonable. In the context of an extradition hearing, the Judge said, the true or most appropriate inference cannot be determined [12].

Some of the HSBC documents Meng sought to introduce did, however directly contradict some of the ROC summaries, for example, that junior HSBC employees did not report Skycom accounts or their closure to other senior executives. These could therefore support the position that the ROC statement was unreliable [13]. However, following a previous disclosure ruling in the case, the Crown had submitted a second supplemental record of the case (SSROC), which changed the relevant distinction to be between those who were decision-makers and those who were not rather than between junior and senior, because not

all senior employees were decision-makers [14]. Consequently, the communications no longer directly questioned the ROC’s reliability and failed the admissibility test.

First Application

Meng’s first application to adduce evidence included seven requests; the decision was given on 28 October 2020. The Judge agreed with a request to allow additional parts of the PowerPoint presentation relied upon by the U.S., who had submitted it in redacted form. The Judge permitted Meng’s team to include her references within the presentation to Huawei’s relationship with Skycom being a “normal and controllable business cooperation”, as this was capable of establishing that the ROC summary was unreliable in alleging that Meng lied by denying Skycom was a subsidiary of Huawei [15].

Witness evidence from a U.S. lawyer, Mr Bellinger, questioning causation in the ROC evidence, was held not to be capable of revealing unreliable aspects by correcting material omissions or other inaccuracies, as it effectively went to the sufficiency of the ROC evidence, and Meng’s counsel could make these points. [16] However, part of Mr Bellinger’s evidence challenging the existence of causation on the fraud element of the Crown’s claim was allowed because it was “capable of demonstrating that the ROC is potentially misleading [17]...” The Judge said:

I am concerned that the ROC has the potential to mislead, concerning the operation and effects of U.S. sanctions laws, because of the generality of some of the ROC’s statements on that topic, coupled with the complexity of the subject matter [18].

When allowing evidence, the Judge in this case can frequently be seen to perform two tasks. First, she says why she is letting it in and then why she is not excluding it. These may sound like the same thing, but the exercise is repeated [19]. This may be appeal-proofing on the Judge’s part and illustrates how careful judges approach the issue of allowing a person sought to adduce evidence.

Meng was not allowed to adduce witness evidence supporting the view that HSBC need not have cleared U.S. dollar transactions through the U.S.

⁶ *M.M. v United States of America*, 2015 SCC at para 78.

⁷ *United States of America v Meng*, Ruling on Application #4 to Adduce Evidence in the Extradition Hearing, 20 July, 2021, para 13

⁸ *United States of America v Meng*, Ruling on Application #1 to Adduce Evidence in the Extradition Hearing, 28 October, 2020, para 40

⁹ *Ibid*, para 13, referring to *MM* para 85

¹⁰ *United States of America v Meng*, Ruling on Application #4 to Adduce Evidence in the Extradition Hearing, 20 July, 2021, para 23

¹¹ *Ibid*, para 25

¹² *Ibid*, para 29

¹³ *Ibid*, para 35

¹⁴ *United States of America v Meng*, Ruling on Application #4 to Adduce Evidence in the Extradition Hearing, 20 July, 2021, para 38

¹⁵ *United States of America v Meng*, Ruling on Application #1 to Adduce Evidence in the Extradition Hearing, 28 October, 2020, para 37-38

¹⁶ *Ibid*, para 56-57

¹⁷ *Ibid*, para 66

¹⁸ *Ibid*, para 69

¹⁹ *Ibid*, paras 39 and 43 and paras 70 and 71

banking system because the ROC did not claim that U.S. clearing was the only option. This evidence was considered irrelevant. However, She was allowed to introduce evidence in emails establishing that senior (as opposed to junior) HSBC employees knew of the close relationship between Huawei and Skycom. This evidence was admitted because “because it could challenge the reliability of the statements in the ROC [20].” As noted above, a similar request in Meng’s fourth application was not allowed because the Crown had shifted its allegations in supplements to the ROC.

Nor was Meng allowed to adduce evidence showing that HSBC could have prevented a risk of loss if it used systems it had in place by clearing funds through the U.S., measures it was obliged to implement under a deferred prosecution agreement (DPA) with the U.S. The Judge considered this irrelevant for the committal proceedings [21]. However, Meng was allowed to adduce another part of the DPA which said that HSBC could breach the DPA if it acted “knowingly” in any future sanctions violations. The Judge considered that the ROC did not spell out how liability could be caused by Meng misleading HSBC - if she had successfully misled them, HSBC would not be “knowingly” in breach of sanctions [22].

Witness evidence establishing that Huawei had a subsidiary in Iran (Huawei (Iran)) and that this was the subsidiary referred to in the PowerPoint presentation was not allowed. Meng argued that the ROC inferred Skycom was being referenced and that this was misleading. However, the Judge decided that the evidence was not relevant to the committal proceedings [23].

Finally, in the first application, Meng was not allowed to rely on evidence establishing that Huawei had not drawn on the credit facilities provided by HSBC. This was to establish that HSBC did not sustain an economic loss. However, the Judge rejected the application saying it was sufficient that the facility had been made available [24].

Second Application

On 11 March 2021, a second application to adduce evidence was refused, the Judge ruling that the evidence fell into three categories. The first category of evidence was denied because it could ‘do no more than invite credibility findings concerning Crown witnesses

[25]. The second was found to offer an alternative narrative from the ROC and to invite competing inferences, and so was also denied. The third category was partly allowed. This was a section of an expert report by Mr Bellinger, in whose opinion, based on U.S. enforcement bodies’ past practices, civil or criminal penalties would be unlikely in the circumstances of this case. After citing relevant cases, he said he did not know of any case where a bank or person had suffered civil or criminal penalties for violating U.S. sanctions following a third party’s misleading conduct, where the bank or person did not have at least a reason to know a violation was occurring. He said enforcement action against the bank or a misled person in those circumstances would be unprecedented. The Judge allowed this part of his evidence because whilst the Crown’s evidence spoke of the availability of civil penalties, it did not also state that penalties never been imposed in the circumstances in which HSBC found itself [26].

Therefore the Bellinger evidence was allowed because it was “realistically capable of addressing a potentially misleading aspect of the requesting state’s evidence[27]”.

Third Application

On 19 March 2021, the Judge ruled on a third application by Meng’s legal team to adduce evidence. This was witness evidence from a Huawei employee relating to Huawei Group corporate finances. It was suggested that his evidence could show Huawei entities and not the parent company had a continuing banking relationship with HSBC. The Judge disallowed the evidence as the ROC did not specifically allege the banking relationship with the parent company was continued because of misrepresentations, but rather that with the group. Further, she said, deprivation arises from the loan and not the borrower’s identity.

This summary of applications to adduce evidence and their outcomes reveal a strict test and a limited opportunity for the person sought to challenge the ROC. Meng’s legal team successfully introduced some evidence, typically filling in gaps in the ROC rather than directly challenging its assertions (or inferences). It might be borne in mind that most persons sought will not benefit from such high calibre legal teams or resources, so Meng’s case cannot be seen as typical insofar as applications to introduce evidence in extradition cases are concerned.

²⁰ *United States of America v Meng*, Ruling on Application #1 to Adduce Evidence in the Extradition Hearing, 28 October, 2020, para 87

²¹ *Ibid*, para 93

²² *Ibid*, para 97

²³ *Ibid*, para 104-105

²⁴ *Ibid*, para 110

²⁵ *United States of America v Meng*, Ruling on Application #2 to Adduce Evidence in the Extradition Hearing, 11 March, 2021, para 12

²⁶ *Ibid*, para 37

²⁷ *Ibid*, para 37

The New Act in Operation

In focusing on the difficulty faced by the person sought to adduce evidence in the extradition proceedings, the real mischief in the Canadian extradition system post-1999 is in danger of being overlooked. The problem is not with how difficult it is for the person sought to adduce evidence, but rather how the requesting state can make the request without providing any evidence.

As discussed in a previous article [²⁸], before the 1999 Extradition Act, in the requesting state's case, there had to be evidence offering proof of each element of the offence. So long as it was reliable, a judge would consider whether a reasonable trier of fact, properly instructed, could find the accused guilty. The ROC procedure fundamentally lowered the threshold of the evidence required from the requesting state. The requesting state's evidence is not weighed at all. Nor does it amount to evidence insofar as the ROC requirements are merely a summary of the proposed case against the person sought.

By contrast, the test for allowing evidence from the person sought remained unchanged by the Act, which simply codified the requirements set in the pre-Act case of *Anderson* [²⁹].

It was, therefore, the balance attained in the system preceding the Act that was upset by the introduction of the ROC. Relaxation of scrutiny attaching to the requesting state's evidence inevitably led to the increased motivation of the person sought to challenge it. Being of a lower quality, the ROC evidence invited greater contestation. Meanwhile, the person sought was allowed no equivalent compensatory ability to introduce evidence to challenge this lower standard of evidence.

An aggravating factor is that the justification for adopting the ROC approach was misleading. It was said, without evidence, that requesting states with civil law-based systems found it difficult to comply with the pre-1999 Act requirements. This is unpersuasive as a ground for change for two reasons. First, because the IAG exists to help requesting states formulate their case and would always be available to ensure their evidence met the required standard, so long as it was capable of doing so. Secondly, provisions already existed for civil law-based partners to use the ROC format as an exception to the norm. There was no need to introduce the ROC format for all requesting states. Notably, the United States makes its requests in the ROC format, even though it can provide a higher standard of evidence, being a common-law jurisdiction. The United States does so because it is much easier to use the ROC

format. Nothing need be proven, and the allegations carry with them the presumption of reliability under the Act [³⁰].

In short, it was always difficult for the person sought to adduce evidence in the extradition proceedings, even before the Act, but it was never so easy for the requesting state to make a request. The Act made this much easier.

Different Standards for Requesting State and Person Sought

In the judicial phase of the Canadian extradition process, two categories of evidence are considered. First, the sufficiency and quality of evidence provided by the requesting state, and secondly, the ability of the person sought to adduce evidence. Note the imbalance from the outset - there is never a question of the requesting state being permitted to introduce evidence - it may even be in summary form. In contrast, the person sought must seek permission to introduce evidence. The requesting state's evidence is also largely untested because there is a presumption that it is reliable.

The differential treatment given to defence evidence stems from a preconceived idea that Crown evidence is provided not to convict but rather to present a prima facie case, and so belongs in the extradition process, while defence evidence is provided to establish the innocence of the person sought, and so belongs not in the extradition process but in the substantive trial to take place later in the requesting state. Accordingly, along with the mantra that 'this is not a trial', the judge is told it is not their job to weigh the evidence, and the defence evidence is said to be irrelevant. This approach seeks to treat the judicial stage as an administrative exercise, which it is not. It also ignores the dual-purpose nature of the defence evidence, which also has a role in challenging whether the prima facie standard has been achieved.

For the requested person to adduce evidence to challenge the RoC as manifestly unreliable, She must establish that the evidence is relevant and reliable [³¹]. Relevance in this context means that it goes to whether the requesting state has established the prima facie case. It will not be admitted if it challenges the allegations against the person sought by challenging witness credibility or offers defences, explanations or alternative inferences from those suggested by the requesting state in its evidence.

²⁸ Yates, S.D. Canada's Kangaroo Courts: Window or Aisle Seat? Scholars International Journal of Law, Crime and Justice 4 (2021), 471-475

²⁹ *United States v Prudenza (sub nom Anderson)*, 2007 ONCA 84

³⁰ This is one of several layers of protection around the RoC and the requesting state's request. Others are its summary form nature, the presumption of reliability it enjoys, its invulnerability to evidential challenge at what is termed the inferential level, and the flexibility afforded to its contents, which may be amended or supplemented throughout the judicial stage.

³¹ *M.M. v United States of America*, 2015 SCC at para 74

The requesting state gets to change its position, even mid hearing, to improve its case, as it did in Meng's case on the issue of junior/senior HSBC employee distinction and whether reputational damage was sufficient. The Judge said it wasn't, so they changed the RoC to enhance the argument.

CONCLUSION

The current system is focused on two aims - preventing evidence from being adduced whilst perpetuating the idea that in certain circumstances, it could be. Secondly, presenting a process appearing to preserve the individual's rights whilst focusing on extraditing as quickly as possible. The first can be seen in the decision of M.M where Justice Cromwell said:

This is not to say that courts must always reject evidence which (1) invites the Judge to assess credibility, (2) establishes a basis for competing inferences, or (3) provides for an exculpatory account of events. It is possible that such evidence may in certain, and likely fairly unusual, cases meet the high threshold for showing that the evidence of the requesting state should not be relied on. Ferras leaves open the possibility that, for example, evidence of virtually unimpeachable authenticity and reliability which contradicts the ROC could rebut the presumption of its reliability and could justify refusal to commit. Such situations I would expect to be very rare.[32].*

The recent rulings in Meng's case again show the need for change in Canada's extradition system, as highlighted in my previous article. They illustrate particularly the imbalance in the trial of the ROC, where the parties are no longer on an equal footing, where the evidence of the person sought is tested before it can play a part in the judge's decision to surrender.

Ironically, motivated by a supposed fear of Canada becoming and being seen as a safe haven for criminals desirous of avoiding facing justice for crimes committed abroad, Canada must be seen by its international partners as one of the easiest places from which to extradite, particularly the U.S. This ought to be a concern for all right-minded Canadian citizens.

Sean D. Yates, 20 September 2021

Post-Script

On 24 September 2021, it was announced that Meng's lawyers had reached an agreement with the US to enter a deferred prosecution agreement ('DPA'). Meng appeared by video link from Vancouver before Judge Ann Donnelly in New York's Brooklyn District, and the DPA was signed. Later the same day,

representatives from Canada's Justice Department appeared before the Courts in Vancouver along with Ms Meng and her legal team and formally withdrew their extradition request. Afterwards, Meng went directly to the airport and left Canada to return home to China, after almost three years of detention.

Under the DPA, Meng pleaded not guilty to the charges against her, and the US agreed to defer and ultimately drop all charges in December 2022. Meng admitted to some minor wrongdoing, namely misleading HSBC about the true relationship between Huawei and Skycom, which conducted business in Iran. Evidence in the case, much of which was not allowed to be introduced in the extradition case but would ultimately have come out in the US trial, suggests Meng did not mislead at all. HSBC was fully aware of Huawei's business dealings, had all information available to allow it to conduct full due diligence, was happy to retain Huawei as its client and freely elected to send money through the US banking system. Further, if Meng had misled HSBC, which seems unlikely, this would not have put HSBC in breach of its own DPA because this would have required HSBC to have knowingly breached sanctions. HSBC could not have acted 'knowingly' if Meng had succeeded in misleading them. The US case fell apart.

Meng's detention and the case brought against her had increasingly been the subject of criticism in the months leading up to her release. Evidence in any trial was highly unlikely to lead to a conviction. This rightly would have brought embarrassment to the US for its politically motivated persecution of Meng and Canada and its extradition system that can facilitate such persecution. Meng should never have been detained, and the case against her have never been brought.

We do not know how Meng's extradition case would have ended. Due to the manifest imbalance in Canada's system, which involves very different standards for evidence assessment between parties, she may have been surrendered to the US. It is almost certain that a fair trial in the US would have acquitted her of all charges. There is, therefore, some lost opportunity again to put Canada's extradition system under the spotlight and press for change. Unfortunately, it is only the extreme cases that muster sufficient public (and eventually political) attention that significant changes are made. The issues we saw in Meng's case, from the Royal Canadian Mounted Police and the Canadian Border Services Agency collusion to deny Charter rights, questionable witness evidence, unproven allegations and a biased system, are likely to continue. However, increased academic and public interest attention is still growing and pressing for changes to the law. Meng's case, with its favourable, though long-overdue outcome, will hopefully continue to be used to illustrate the human cost we continue to pay.

³² *M.M. v United States of America*, 2015 SCC at para 85.