

Canada's Kangaroo Courts: Window or Aisle Seat?

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Abstract

Canadian Extradition Law. Recent defence application in case of Meng Wanzhou to adduce evidence denied. What is the Canadian extradition process and what evidence can either side rely upon? What are the judge's powers and how have limitations on these powers led to injustice in extradition cases? The review of the Diab case by Murray Segal exonerated IAG from any wrongdoing, but where does this leave the law? The current system is not working, and the law and the role of the IAG must be changed.

Keywords: Canada's Kangaroo Courts.

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INTRODUCTION

On 29-30 June 2021, Meng Wanzhou's extradition case again came before the Canadian Courts to determine whether additional evidence could be adduced by the defence team in the proceedings. Two days were spent arguing about evidence relating to two discrete issues. First, emails establishing that high-level employees at HSBC knew about Huawei's relationship with Skycom, a company doing business in Iran, and secondly, evidence demonstrating that in deciding to extend a facility to Huawei, HSBC had not considered the power-point presentation provided by Meng. The importance of this evidence is that, if it establishes what it appears to, Meng cannot be guilty of the alleged fraud for which the US seeks her extradition. IAG [1] lawyers said such evidence is not relevant to the extradition request and should only be considered at the substantive trial in the US. On 8 July 2021, the Court ruled that the new evidence would not be admitted into the extradition proceedings.

This article looks at one of the least understood aspects of extradition proceedings and one which continues to confuse those who operate outside this area of law, particularly the public. This is that extradition proceedings are not concerned with whether the person sought is likely or not to have committed the offence for which their extradition is requested. It first provides an overview of the extradition process as it is applied in

Canada and then considers the evidence that the IAG and the defence may adduce in the judicial phase. The third section looks at the law's application and whether cases brought under it have achieved satisfactory outcomes. It concludes that the IAG's role in the process and the law should be changed.

Extradition Proceedings Summary

Meng's case is approaching the end of the second stage of the extradition process, the judicial phase, which considers evidence to decide whether the alleged conduct of the person sought would justify their committal for trial in Canada, had the conduct taken place in Canada. The court must also be satisfied that the person brought before it is the person sought. This follows the first stage, issuance of the ATP or Authority to Proceed, where the Minister of Justice decides whether the request received from the requesting state satisfies certain minimum criteria such as the person's name, the alleged offence and the equivalent offence in Canada. The third or executive stage takes place if the judge commits the person sought. The Minister of Justice decides whether to surrender the person, balancing political and Charter considerations [2]. The second and third stages can be appealed before the relevant Court of Appeal and (with its permission) the Supreme Court of Canada. In extradition proceedings, the Crown's client is the requesting state.

¹Justice Canada's International Assistance Group

²Section 40 and Sections 44-47 Extradition Act

Inequality of Arms

The requesting state must provide Canada with a Record of Case (ROC), which contains evidence available to it for prosecuting the person sought. This allows the judge to be satisfied that the conduct would constitute a crime in Canada. The ROC must also contain evidence that the person sought is the person who has been brought before the judge, and some evidence linking the person sought to the alleged crime [3]. Important here is what is not required. There is no requirement for sworn witness statements, actual reports or other documents relied upon in the requesting state's investigative file. Nor is there any requirement to provide exculpatory evidence that might challenge whether the person sought committed the alleged offence [4]. It is sufficient for the requesting state to provide a summary of its key evidence.

This evidential standard is significantly below that required in criminal proceedings, where statutory law and case precedent protect Charter rights and limit abusive practices of prosecuting authorities. The evidential standard in the extradition process further explains why the judicial stage is not and cannot be dispositive on the innocence or guilt of the person sought. Incomplete evidence is before the court, and there is no adequate way of testing it. The process is built on the premise that a full and fair trial of all issues will occur in the requesting state following the surrender of the person sought.

The practical consequence of this is that when faced with defence evidence that challenges the requesting state's evidence or casts doubt on the guilt of the person sought, the Crown's reflex argument is that this is a matter for the substantive trial in the requesting state and such evidence should not therefore be introduced into the committal proceedings. This is indeed what the Crown's lawyers said on 30 June 2021 in Meng's case concerning the HSBC evidence establishing senior employees copied into emails concerning Huawei's relationship with Skycom and evidence that HSBC did not rely on Meng's Power-Point document.

Evidence that merely invites the extradition judge to assess the credibility of the evidence in the ROC or establishes a basis for competing inferences will not be admissible [5].

The extradition judge cannot deny committal

...simply because the case appears to the extradition judge to be weak or unlikely to succeed at trial [6].

For a committal, there must exist sufficient evidence that a reasonable properly instructed jury could reach a guilty verdict [7]. In contrast, for a defendant to be successful, she must establish that the evidence of the requesting state is 'manifestly unreliable' [8].

In summary, the judicial phase allows the Crown to make allegations without proving them and prevents the defendant from relying on evidence to challenge those allegations. The Supreme Court has confirmed the limited role of the judge in assessing the evidence. We might reasonably question the point of the judicial stage if the outcome is a rubber-stamping exercise by the court, preceded by a series of defence applications predetermined to fail.

The Old and New Regimes

Before the 1999 Extradition Act, the requesting state had to present a prima facie case based on admissible evidence under Canadian law [9]. There had to be evidence offering proof of each element of the offence, and so long as it was reliable, a judge would consider whether a reasonable trier of fact, properly instructed, could find the accused guilty [10]. The judge did not weigh the evidence, but a certain safeguard existed in that, as evidence was admissible under Canadian law, its reliability was reasonable and fair [11]. The 1999 Act introduced the Record of Case as the document required from the requesting state, in which it is sufficient to provide a descriptive summary of the evidence against the person sought, which evidence carried the presumption of being reliable [12]. It is for the person sought to rebut the presumption [13]. There is no presumption of innocence, as in criminal

⁶America v. M.M. [2015] SCC 62 para 71

⁷United States of America v. Ferras [2006] 2 SCR 77 paras 26 and 46

⁸United States v Prudenza (sub nom Anderson), 2007 ONCA 84 at para 31, cited in M.M., para 72

⁹Robert J Currie, 'Wrongful Extradition: Reforming the Committal Phase of Canada's Extradition Law' (2020) Available at <<[¹⁰Ibid](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3664754#>></p>
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¹¹See Anne Warner La Forest, 'The Balance between Liberty and Comity in the Evidentiary Requirements Applicable to Extradition Proceedings' (2002) 28 Queen's LJ 95

¹²United States of America v. Ferras [2006] 2 SCR 77 paras 52-56

¹³Paragraph 32(1)(a) of the Act

³Section 33 Extradition Act

⁴United States v Dynar [1997] 2 SCR 326; United States of America v Kwok [2001] SCC 18

⁵ Canada, Department of Justice, Independent Review of the Extradition of Dr. Hassan Diab, by Murray D. Segal (Ottawa: DOJ, May 2019), online: <<www.justice.gc.ca/>> p11

cases. The lowering of the threshold of evidence that the requesting state could introduce was the subject of much criticism [14].

The 1999 Act has been described as 'a piece of law enforcement legislation...made by law enforcers.' Justice Canada put the legislation together in keeping with its policy goals of making extradition more expeditious and effective for foreign state partners. It then helped push it through parliament and is responsible for implementing its provisions, negotiating treaties and ensuring extradition at the political level [15]. Without any separation of function, and given the Supreme Court's guidance in recent decisions, the IAG has become judge, jury and executioner, transforming the extradition courts into little more than kangaroo courts. Far from hyperbole, Canada's system has become the subject of ridicule, extradition lawyers joking that the only relevant question in proceedings is whether the person sought would prefer a window or an aisle seat [16].

Application of the Law

As Currie observes, the ROC regime effectively spares the requesting state the need to present evidence in court, allowing them to rely on 'hearsay, unsworn statements and otherwise unsubstantiated evidence [17]. Further.

Practically speaking, rebutting the presumption of reliability is not only a difficult hill to scale but an impossible one [18].

The defendant's right to challenge manifestly unreliable evidence is significantly undermined by the judge's inability to look at the evidence 'to assess the

credibility of the evidence in the ROC [19]. How else can the reliability of evidence be tested so as to determine whether it is 'manifestly unreliable' if not by testing its credibility? The proffered protection given with one hand is taken away by the other. The opportunity to challenge is not just 'very rare'[20] in practical terms, it doesn't exist at all, other than as a meaningless form of words.

Justice Robert Maranger, ruling on the Diab case summarised the frustration inherent in the process.

'There is no power to deny extradition in cases that appear to the extradition judge to be weak or unlikely to succeed at trial'. I found the French [handwriting] expert report convoluted, very confusing, with conclusions that are suspect... the case presented by France against Mr. Diab is a weak case; the prospects of conviction in the context of a fair trial seem unlikely. However, it matters not that I hold this view [21].

Should the fact that extradition proceedings are not criminal proceedings justify a blind refusal to take account of cogent and compelling evidence that significantly undermines the credibility of the allegations made against the person sought? The dismissal of such evidence is intellectually and morally questionable, particularly since it renders the second stage of the extradition process meaningless when it happens routinely. A requesting state's application may just as well go straight to the Minister's surrender decision if the judicial phase is reduced to a mere show of tokenism towards Charter rights. The pretence of safeguards and cases such as M.M, Diab and Meng reveal a broken system. La Forest questions why the new Act bothered to retain the judicial phase 'other than as a matter of form' given 'the extradition judge has little, if anything, to do' [22].

The Problems - System and Culture

When Murray Segal produced his report on the Diab case, the outcome of which Prime Minister Justin Trudeau said should not have happened and should never happen again, he found the IAG had not done anything wrong. IAG lawyers, in advising France on how to improve its case, withholding information on the

¹⁴ See for example Maeve W McMahon, 'The Problematically Low Threshold of Evidence in Canadian Extradition Law: An Inquiry into its Origins; and Repercussions in the Case of Hassan Diab' (2019) 42 Man LJ 303

¹⁵ Robert J Currie, 'Wrongful Extradition: Reforming the Committal Phase of Canada's Extradition Law' (2020) Available at <<[¹⁶ <<\[¹⁷ Currie, 'Wrongful Extradition: Reforming the Committal Phase of Canada's Extradition Law'\]\(https://ottawacitizen.com/opinion/columnists/c-lark-results-of-inquiry-into-hassan-diabs-extradition-must-be-made-public-now>> Roger Clark, writing the article said of the Segal Report 'When it is eventually made public, there is zero chance that it will lead to a full public inquiry into Hassan Diab's case.' To date, his prediction is correct.</p>
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¹⁸ Ibid

¹⁹ Canada, Department of Justice, Independent Review of the Extradition of Dr. Hassan Diab, by Murray D. Segal (Ottawa: DOJ, May 2019), online: <www.justice.gc.ca/> p.11

²⁰ America v. M.M. [2015] SCC 62 at para 85

²¹ Attorney General of Canada (The Republic of France) v Diab, 2011 ONSC 337 at paras 11, 121, 191 quoting United States v Anderson, 2007 ONCA 84 at para 28

²² Forest AW, 'The Balance between Liberty and Comity in the Evidentiary Requirements Applicable to Extradition Proceedings' (2002) 28 Queen's LJ 95

status of additional handwriting evidence being prepared, and deciding not to disclose potentially exculpatory evidence, had acted in accordance with the law.

Two unhappy consequences flow from this [23]. First, if evidence described by the committal judge as being ‘questionable’, ‘problematic’, ‘convoluted’, ‘confusing’, and ‘suspect’ cannot be excluded on account of it being ‘manifestly unreliable’, or ‘devoid of reliability and of utility to the fact finder’ [24] then it is difficult to envisage circumstances where any requesting state evidence can be excluded. Secondly, if the law and the test are being correctly applied, then the current position is that Canadians can be extradited based on evidence that is ‘questionable’, ‘problematic’, ‘convoluted’, ‘confusing’, and ‘suspect’.

In Meng’s case, the HSBC emails demonstrating senior employees were aware of the relationship between Huawei and Skycom fatally undermine the ROC allegation that Meng fraudulently misled HSBC. It is inconceivable that the United States could produce evidence that can change this conclusion. The requesting state’s allegation and any evidence supporting it are evidently and unmistakably unreliable in light of these emails, at least to anyone conducting a fair and reasonable appraisal.

During the hearing of 29-30 June, the Crown admitted that the HSBC documents show HSBC executives were provided with sufficient information to make them understand the true relationship between Huawei and Skycom, but say there is no evidence that the executives actually reached that understanding. Such casuistry appears to suggest a novel presumption that senior bank officials do not read their emails. In circumstances where the Crown accepts the legitimacy and import of the evidence, the defence is expected, according to the prosecutors, to prove the bank executives’ state of knowledge.

The prosecutors’ response raises the separate issue of the fervour with which extradition cases are pursued under the current system. Far from being custodians of fairness, the IAG’s focus appears to be to win at any cost and might be contrasted with the criminal justice system, where prosecutors generally have a reputation for seeking justice rather than victory. Currie sees this as part of a Crown ‘culture’ and asks whether the goal is ‘producing a fair result in an extradition proceeding,’ or ‘producing extradition, at whatever cost’.

²³ Currie, ‘Wrongful Extradition: Reforming the Committal Phase of Canada’s Extradition Law’

Court of Appeal in France (Republic) v Diab, 2014 ONCA 374 at para 126

For example, in a case where the United States was criticised by the committal judge of gross misconduct by putting a bounty on the head of the person sought, facilitating his mistreatment by Pakistani security forces and breaching Canada’s international law right to access its citizen [25], the Crown, unhappy with the verdict (a stay of proceedings) appealed to the Court of Appeal, where its appeal was refused [26]. The Court of Appeal went so far as to say that extradition would undermine the rule of law. The Crown’s response was to apply for leave to the Supreme Court, which was denied.

‘The leave application itself was a surprise; surely when one is handed such a resounding defeat by two levels of court, the best course would be to give up – not to press on with an extradition case so desperately tainted by the unlawful and shocking actions of the very state requesting extradition. Surely the people of Canada would want its government to stop such a case in its tracks after these court findings...’ [27].

In another case, the Crown insisted on continuing to request extradition, where the person sought had been threatened by both the prosecutor and a presiding judge in the requesting state [28].

Given the extreme circumstances of Khadr and Cobb, there appears little prospect of the IAG changing its position on its pursuit of Meng’s extradition, despite what seems to be incontrovertible evidence that she could not have misled HSBC. Their priority remains in achieving ‘success’ and satisfying the United States’ requests. Nor is assistance likely to come from the courts when Supreme Court guidance dictates complicity in the charade of a ‘modest screening device’ [29].

CONCLUSION

In his report on the Diab case, Murray Segal indicated that his scope of review did not include ‘examining the Extradition Act at large’ but rather was limited to reviewing whether the law was applied, whether any approaches taken to the case by the IAG needed to be improved or corrected, and whether matters should be taken up with France regarding Dr Diab’s treatment following his surrender. In one respect, we might regret that a review of the Act was not within his remit. However, at least two factors militate against a review of the Act being carried out in the same exercise. First, any combination of criticism of

²⁵United States v Khadr, 2010 ONSC 4338

²⁶United States v Khadr, 2011 ONCA 358, leave to appeal to SCC refused, 34357 (29 July 2011)

²⁷ Currie, ‘Wrongful Extradition: Reforming the Committal Phase of Canada’s Extradition Law’

²⁸United States v Cobb, 2001 SCC 19

²⁹America v. M.M. [2015] SCC 62 at paras 38, 53,

the law and its application in the case might have rendered more difficult the proposal for legislative change, and secondly, a review of the law should be a much larger and structured process.

The wholesale exoneration of the IAG by the Segal Report, while initially incredible to many, unequivocally confirms that it precisely the law that, by process of elimination, requires change. If the IAG conformed with the law and there was nothing to be criticised in its approach, and yet the consequences of Diab were the outcome, then the law is the only remaining factor. Without change, the Prime Minister's promise that a case such as Diab should never happen again will not be achieved.

A review should be undertaken by a committee, with a mandate to consult publicly with stakeholders and relevant interest groups to recommend

the shape of appropriate changes to the law and the implementation regime surrounding extradition. Lessons should be learned from the last approach, which saw a narrow policy-orientated group of government lawyers eager to devise summary system extradition draft and push through legislation under which they became self-appointed custodians of the opaque state machinery that has for years denied Charter rights without limited safeguards by way of accountability or redress through the courts.

Meng's legal team relies on four branches of defence, so the court's decision to exclude what would almost certainly amount to exculpatory evidence is not the end of her case. However, it should be more apparent than ever that Canada's extradition law is broken and in desperate need of change.

Sean D. Yates, July 2021