IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *United States v. Meng,*
2020 BCSC 785

Date: 20200527
Docket: 27761
Registry: Vancouver

In the Matter of the *Extradition Act*,
S.C. 1999, c. 18, as amended

and

In the Matter of
The Attorney General of Canada
on behalf of the United States of America

Requesting State/Respondent

and

Wanzhou Meng, also known as
"Cathy Meng" and "Sabrina Meng"

Person Sought/Respondent

Before: The Honourable Associate Chief Justice H. Holmes

Ruling on Double Criminality

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Place and Dates of Hearing:	Vancouver, B.C. January 20-23, 2020
Place and Date of Judgment:	Vancouver, B.C. May 27, 2020

INTRODUCTION

[1] Wanzhou Meng asks for an order discharging her from the extradition process on the basis that, as a matter of law, the "double criminality" requirement for extradition cannot be met.

[2] The United States seeks Ms. Meng's extradition for prosecution in the Eastern District of New York for conduct that the Minister of Justice for Canada (in the Authority to Proceed, or ATP) says

corresponds to fraud contrary to s. 380(1)(a) of the *Criminal Code of Canada*. In the committal hearing, the Attorney General must therefore show, among other things, that the conduct in which Ms. Meng is alleged to have engaged would have amounted to fraud, had that conduct taken place in Canada.

[3] Ms. Meng says that the alleged conduct could not have amounted to fraud in Canada because it relates entirely to the effects of US economic sanctions against Iran, and at the relevant time Canada had no such sanctions (just as it has none now).

[4] The Attorney General counters first, that the elements of the offence of fraud in Canada can be made out, on the allegations, without reference to US sanctions against Iran; and second, that in any event the sanctions may properly give background or context to the alleged conduct and explain why it mattered.

[5] For the reasons I will give, I find that the allegations depend on the effects of US sanctions. However, I conclude that those effects may play a part in the determination of whether double criminality is established. For that reason, Ms. Meng's application will be dismissed.

[6] I will begin by outlining the allegations and the legal framework for this application, before then detailing and discussing the parties' positions in order to explain my conclusions.

THE ALLEGATIONS MADE BY THE REQUESTING STATE

[7] The application is made in the context of allegations set out by the USA in the Record of the Case (ROC) and the Supplemental Record of the Case (SROC). These documents, filed under s. 33 of the *Extradition Act*, summarize the evidence that the US authorities certify is sufficient and available for Ms. Meng's prosecution in that jurisdiction.

[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.

[9] The allegations relate to the banking relationship between Huawei, a China-based telecommunications company, and HSBC, an international bank. Ms. Meng was (and is) Huawei's Chief Financial Officer, as well as the daughter of its founder, Ren Zhengfei. She is said to have made false statements to HSBC in 2013, significantly understating Huawei's relationship with Skycom Tech. Co. Ltd., a company based in Iran.

[10] 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.

[11] This all occurred while regulations were in place in the US that, among other prohibitions and restrictions, required banks to obtain authorization from the US Department of the Treasury's Office of Foreign Assets Control before providing financial or credit services through the US to entities in Iran. Counsel in the committal hearing referred to these regulations, officially titled the *Iranian Transaction and Sanctions Regulations*, as the "US sanctions", and I will do so too. In this application, the details of the US sanctions do not matter, except that, as appears to be agreed as a general proposition, violations could lead to criminal and civil penalties.

[12] 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.

[13] Against this backdrop, Reuters published two articles associating Huawei with Skycom's US-related business dealings in Iran. The first article, published in December 2012, reported that Skycom had offered to sell US manufactured computer equipment to Iran's largest telecommunications equipment maker in violation of US sanctions. The article reported that Huawei and Skycom had "close ties", and that Huawei described Skycom as one of its "major local partners" in Iran. The second article, published in January 2013, reported various connections between Huawei and Skycom, including that Ms. Meng served on Skycom's board from February 2008 to April 2009, and that in 2007 she was company secretary for a Huawei holding subsidiary that, in turn, owned 100% of Skycom's stock.

[14] When HSBC then made inquiries of Huawei about the reports in the Reuters articles, various Huawei representatives denied the substance of the reported allegations. Ms. Meng requested an in-person meeting with a senior HSBC executive responsible for banking operations in Asia, and such a meeting took place on August 22, 2013 in the back room of a restaurant in Hong Kong. Ms. Meng spoke in Chinese, and an interpreter translated into English for the benefit of the HSBC executive. Ms. Meng also showed a PowerPoint presentation written in Chinese, and some time after the meeting provided HSBC with an English translation.

[15] In the meeting, Ms. Meng told the HSBC executive that Huawei's operations in Iran complied strictly with applicable laws and US sanctions. She said that Huawei's relationship with Skycom was one of normal business cooperation in which Huawei required Skycom to make commitments to observe all applicable laws, regulations, and export control requirements. Ms. Meng said that Huawei was once a shareholder in Skycom, and she herself was once a member of Skycom's board of directors, because at that time these measures were necessary for managing Skycom as a business partner and for strengthening and monitoring its trade compliance. However, these

measures later became unnecessary to ensure compliance, and Huawei sold all its shares in Skycom, and Ms. Meng resigned from Skycom's board. Ms. Meng said that Huawei did business in Iran, but did so through its local subsidiary, and that Huawei's subsidiaries in countries such as Iran would not transact business with HSBC.

[16] The HSBC global risk committee met in London on March 31, 2014 to discuss "reputational and regulatory concerns" regarding Huawei, and decided to retain Huawei's business. In reaching that decision, the committee relied on the assurances provided by Ms. Meng at the August 2013 meeting. About a month after the committee's decision, HSBC sent its letter describing terms for the proposed $900 million credit facility. And about a year after that, HSBC participated with other international banks in a $1.5 billion syndicated loan to Huawei.

[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.

[18] Huawei's true relationship to Skycom is said to have been information that was material to HSBC's decision whether to continue to retain Huawei as a client. False assurances by Ms. Meng at the August 2013 meeting in Hong Kong, misrepresenting the actual relationship, are said to have put HSBC at risk of fines and penalties for violating the DPA and for new violations of the US sanctions. Those misrepresentations are also said to have exposed HSBC to both economic and reputational risk.

[19] Before turning to the legal principles that apply, I emphasize once again that the allegations found in the ROC and SROC that I have just outlined are unproven. They are nonetheless to be taken at face value for the purpose of assessing whether the double criminality requirement is met.

THE LEGAL FRAMEWORK

[20] The double criminality principle prevents extradition to another state for prosecution where, in a reversed situation, the requested state would not have made an extradition request. Internationally, the principle is recognised as central to extradition law: *Canada (Justice) v. Fischbacher*, 2009 SCC 46 at para. 26. The principle derives from the foundational principle of reciprocity, by which states are not required to extradite a person to a foreign jurisdiction for conduct that does not amount to a criminal offence in the requested state: *M.M. v. United States of America*, 2015 SCC 62 at para. 207.

[21] 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 favour 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.

[22] Paragraphs 3(1)(b) and 29(1)(a) of the *Extradition Act* express the double criminality requirement that applies in a committal hearing where a person is sought for prosecution (as distinct from sentencing):

> 3 (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 . . . if
>
> . . .
>
> (b) the conduct of the person, had it occurred in Canada, would have constituted an offence [required maximum sentences omitted].
>
> 29 (1) A judge shall order the committal of the person into custody to await surrender if
>
> (a) in the case of a person sought for prosecution, there is evidence admissible under this Act of conduct that, had it occurred in Canada, would justify committal for trial in Canada on the offence set out in the authority to proceed . . .

[23] As mentioned earlier, the Minister has identified fraud as the offence reflecting the alleged conduct. The double criminality question in the committal hearing is therefore whether Ms. Meng's alleged conduct, had it occurred in Canada, would have amounted to fraud contrary to s. 380(1)(a) of the *Criminal Code*.

[24] Section 380(1)(a) reads as follows:

> 380 (1) Every one who, by deceit, falsehood or other fraudulent means, whether or not it is a false pretence 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 . . . .

[25] Fraud in Canada thus requires dishonest conduct with a corresponding deprivation. McLachlin J. in *R. v. Zlatic*, [1993] 2 S.C.R. 29 at 43 neatly described the *actus reus* and *mens rea* of this two-part offence as follows:

> The elements of the offence of fraud are discussed in a general fashion in *R. v. Théroux*, [1993] 2 S.C.R. 5, released simultaneously. For the purposes of this case, it suffices to state that the *actus reus* of fraud will be established by proof of:
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> 1. the prohibited act, be it an act of deceit, a falsehood or some other fraudulent means; and
>
> 2. deprivation caused by the prohibited act, which may consist in actual loss or the placing of the victim's pecuniary interests at risk.
>
> 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 knowledge that the victim's pecuniary interests are put at risk).

Where the conduct and knowledge required by these definitions are established, the accused is guilty whether he actually intended the prohibited consequence or was reckless as to whether it would occur.

[26] The deprivation caused by the prohibited act need not be actual economic loss, but may consist of the potential for loss, meaning that the victim's economic interests are imperilled: *R. v. Théroux*, [1993] 2 S.C.R. 5 at 16.

[27] With this legal framework in mind, I turn to the parties' positions.

THE POSITIONS OF THE PARTIES

[28] The parties agree about the legal state of affairs on the relevant date, namely February 28, 2019, when the Minister issued the ATP. Canada had repealed most of its sanctions against Iran at least three years earlier, including the prohibition against financial services to or from Iran, and has not reintroduced them. The parties agree therefore that, at the time the ATP was issued, financial institutions operating in Canada would not have been at risk of penalty for engaging in financial transactions or providing credit to companies doing business in Iran.

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

Ms. Meng's Position

[30] Ms. Meng submits that the conduct cannot amount to fraud because in essence the proposed prosecution is to enforce US sanctions laws against Iran, measures that are not part of Canadian law and which, indeed, Canada has expressly rejected. She submits that it is an artificiality to cast the case as one of fraud against a bank, because the USA can have no real interest in policing private dealings between a foreign bank and a private citizen on the other side of the world.

[31] Ms. Meng submits that the sanctions focus of the case is evident from the various descriptions of the alleged economic loss or risk to HSBC, all of them resting on the US sanctions regime. One section of the ROC outlines the regime in some detail, and the balance is replete with references to the US sanctions as the basis for the various alleged forms of potential loss (or deprivation) to HSBC in continuing its client relationship with Huawei. These forms of potential loss are said to include exposure to fines or penalties for violations, and loss of reputation as a consequence of HSBC having a sanctions-violating client.

[32] Ms. Meng submits that for Canada to extradite for conduct that does not infringe our own laws and standards would run counter to the rule of law and the principles of fundamental justice, including those that prevent punishment for conduct not clearly prohibited by law.

[33] Ms. Meng submits that the guiding authorities, including *United States of America v. McVey*, [1992] 3 S.C.R. 475, *Fischbacher*, and *M.M. v. United States of America*, require the extradition judge to notionally transpose the alleged acts and consequences to Canada, and to assess them according to Canadian law, without reference to the law of the requesting state. By that approach, the conduct cannot amount to an offence, Ms. Meng argues, because Canada has no laws or regulatory scheme preventing banks from doing business with Iran-based entities. No deprivation could have resulted had Ms. Meng made a misrepresentation to a bank in Canada about the nature of Huawei's relationship to its Iran-based affiliate, and, on the strength of her statement, the bank provided banking services to Huawei in Canada, including services related to commerce in Iran.

[34] With no possible deprivation under Canadian law, the *actus reus* of fraud cannot be made out, Ms. Meng submits. And correspondingly, nor can the *mens rea*, because, with no sanctions under Canadian law, Ms. Meng could not be said to have intended or foreseen deprivation as a consequence of her false statements.

The Attorney General's Position

[35] The Attorney General says that the essence of Ms. Meng's alleged conduct is not violating US sanctions but, rather, deceiving a bank in order to obtain financial services.

[36] The Attorney General then puts forward two legal bases for proof of deprivation, one not requiring any consideration of US sanctions, and the other relying on US sanctions for the limited purpose of explaining why the alleged misrepresentations mattered.

[37] In support of the first basis, the Attorney General says that deprivation can be established without reliance on US sanctions and their effects. Specifically, 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. 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 in relation to fraud, the Attorney General submits.

[38] In support of the second basis, the Attorney General submits that the double criminality analysis may properly take the US sanctions into account as part of the foreign legal backdrop against which the essential conduct is to be understood. He submits that Ms. Meng's approach, being unduly literal in transposing to Canada the alleged acts and consequences but without the context in which they took place, distorts the double criminality test and defeats the objectives of the extradition treaty.

ANALYSIS

[39] I will begin by explaining why I cannot accept the Attorney General's first proposed basis for establishing double criminality, namely that deprivation may be established in this case without reliance on US sanctions.

Can Double Criminality Be Established Without Reliance on the US Sanctions?

[40] There are many situations where a false statement 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. See, for example, *R. v. Abramson*, [1983] B.C.J. No. 1305 (B.C.C.A.), *R. v. Fast*, 2014 SKQB 84, and *R. v. MacMullen*, 2014 ABQB 476.

[41] 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: see *R. v. Knowles* (1979), 51 C.C.C. (2d) 237 (Ont. C.A.). The risk cannot be merely theoretical: *R. v. Olson*, 2017 BCSC 1637 at para. 68.

[42] In *R. v. Riesberry*, 2015 SCC 65, Cromwell J., writing for the Court, stated that proof of fraud does not always depend on showing reliance by a victim on the fraudulent conduct or that the victim was induced to act to their detriment. However, there must be proof of a sufficient causal connection between the fraudulent act and the victim's risk of deprivation, which cannot be too remote: *Riesberry* at paras. 17, 26-28.

[43] As noted earlier, the ROC and SROC are replete with references to US sanctions-related risks to HSBC arising from Ms. Meng's misrepresentation of the relationship between Huawei and Skycom, including potential criminal or civil liability, financial penalties, or damage to HSBC's reputation because of its association with a sanctions-violating client.

[44] The Attorney General submits that the ROC and SROC also describe potential loss or risk of loss to HSBC unrelated to US sanctions, but I cannot agree.

[45] The Attorney General appears to submit that economic or reputational risk to HSBC arose from the simple fact that Ms. Meng misrepresented Huawei's relationship with Skycom in order to maintain the financing relationship, because the misrepresentation deprived HSBC of the ability to make an informed decision about dealing with Huawei. While such may be so, for there to have been a deprivation it nonetheless remains necessary for the evidence to show a causal link between the misrepresentation and the information HSBC needed to make a decision, whether or not HSBC actually relied on that information. It is difficult to discern such a link, in the ROC and the SROC, that does not rely on the effects of US sanctions.

[46] The Attorney General points to but two references in the ROC and the SROC as evidence of potential loss unrelated to US sanctions.

[47] The first reference appears in the ROC, para. 36:

> 36. HSBC Witness A is further expected to testify that, had Huawei not actually sold Skycom, such a fact would have been "material" to HSBC's decision whether to end the client relationship

with Huawei in light of the additional risks the relationship would have posed.

[48] Read in isolation, this conclusory statement expected of Witness A may appear capable of bearing the interpretation the Attorney General would give it, addressing "risks" in broad and general terms raised by a borrower's false statement about whether it had sold and disassociated itself from a smaller company. However, the ROC as a whole, and the immediate context in which para. 36 appears, make clear that the conclusion Witness A would express is integrally related to US sanctions. Witness A's anticipated evidence is also described in para. 35, a paragraph which relates HSBC's concerns about Huawei's relationship to Skycom directly to claims that Skycom had "attempted to sell embargoed HP [c]omputer equipment into Iran". Moreover, the ROC as a whole situates the August 2013 meeting in which Ms. Meng is said to have made her false statements squarely in a context framed by the two Reuters articles that made similar allegations.

[49] I therefore do not read para. 36 of the ROC as offering a basis unrelated to US sanctions by which HSBC was put at risk by Ms. Meng's alleged misrepresentations.

[50] The Attorney General's second reference to evidence of potential loss unrelated to US sanctions appears in para. 8 of the SROC. That paragraph addresses in somewhat more detail the type of evidence described in the ROC, para. 36, expected to be given by a different witness. My comments about that paragraph apply similarly.

[51] To the extent that the Attorney General appears to argue further that reputational risk could arise from the simple fact of economic dealings with Iran, regardless of potential sanctions-related consequences of those dealings, I find no basis for such a conclusion in the ROC or the SROC.

[52] Without reference to the US sanctions, the ROC and the SROC do not set out a causal basis (beyond the theoretical or speculative) for economic or reputational risk to HSBC because of Ms. Meng's alleged misrepresentations.

Can the US Sanctions Play a Part in Double Criminality?

[53] I turn then to the question of whether the US sanctions regime may properly play a part in the double criminality analysis.

[54] Ms. Meng submits that case authorities make clear that it cannot, at least not so as to supply or expand a core element of the domestic offence that is otherwise absent.

[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.

[56] However, those statements were all made in a distinct and different context. In each instance, the court was emphasizing that, because of Parliament's choice of a conduct-based approach to double criminality (instead of an offence-based approach), it is not within the role of the extradition judge to determine *whether the offence can be made out in the foreign state*. The point was being made that, unlike the offence-based approach, the conduct-based approach does not require the judge to determine whether the elements of the foreign offence "match" those of the identified domestic offence.

[57] The judicial statements to the effect that the extradition judge is "not concerned with foreign law" therefore do not assist in the determination of whether in the consideration of the alleged *conduct*, in the domestic aspect of the double criminality analysis, foreign law may play a part.

[58] The answer to whether foreign law may do so turns on the intended scope of "conduct", in my view, and correspondingly on what is to be notionally transposed to the Canadian context. We know that the task (in the domestic aspect of the double criminality analysis) is to identify and notionally transpose to Canada the "essence" or the "essential nature" of the conduct alleged: *Fischbacher* at para. 29. The issue is at what level of abstraction or generality that essence or the essential nature of the conduct is to be described.

[59] Ms. Meng would take a very concrete and specific approach in this exercise. She would transpose each fact as though it took place on Canadian soil in an entirely Canadian context. By this approach, the "conduct" to be considered in the notional transposition would consist of the following:

- making false statements in Canada to a bank in Canada about the nature of Huawei's relationship to its Iran-based affiliate, and
- the bank (in reliance on the false statements) continuing to provide financial services to Huawei in Canada, including services related to commerce in Iran.

Ms. Meng submits that such conduct could not amount to fraud in Canada because there could be no deprivation, Canada having no laws or regulatory scheme preventing banks from doing business with Iran-based entities. A misrepresentation about an Iran-based affiliate would be legally and factually irrelevant.

[60] The difficulty with this approach is that it unduly isolates each of the specific facts said to comprise the overall fraud. By notionally transposing those facts singly, the approach loses sight of their overall effect, and thus of the "essence" of the alleged conduct. For an offence such as fraud, the "conduct" to be considered as though it took place in Canada must, in my view, have a more general scope than Ms. Meng's position would allow it.

[61] Consider this. A domestic prosecution for fraud could properly, I suggest, take place in Canada on the basis of false statements made in Canada that put a US bank at economic risk for violating US sanctions. Nothing about our law of fraud would prevent reference to US law to explain how the US

bank was put at risk, in order to establish deprivation. Nor would it matter to our law of fraud that the victim was a foreign entity, so long as sufficient events occurred in Canada to establish jurisdiction to prosecute in Canada. Canada's law of fraud looks beyond international boundaries to encompass all the relevant details that make up the factual matrix, including foreign laws that may give meaning to some of the facts.

[62] Since a domestic prosecution could in this way rely indirectly on the effects of US law, it is difficult to understand why the domestic aspect of a double criminality analysis in an extradition proceeding should not do so as well.

[63] *United States of America v. Wilson*, 2013 BCSC 2423, aff'd 2016 BCCA 326 offers a useful example of this reasoning in action, although I note that the approach to be taken to US law in the double criminality analysis seems not to have been argued in that case. 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. In the course of ordering Mr. Wilson's committal for extradition, Dickson J. (then of this Court) had no difficulty taking into account US law as explaining the deprivation to the victim card-holders, and how Mr. Wilson's conduct would have amounted to fraud, had it taken place in Canada.

[64] The parties agree that no case authority to date directly answers the question of whether the "essence" of conduct alleged to amount to fraud includes the legal context in which the impugned statements were made (except *Wilson*, where, as I noted, the issue appears not to have been argued). However, strongly persuasive authorities concerning other offences suggest that it does.

[65] In *Re Collins (No. 3)* (1905), 10 C.C.C. 80 (B.C.S.C.), the offence was perjury, in the form of taking a false oath, and the person sought argued, among other things, that the conduct could not be an offence in Canada because the oath was taken before an officer who had no authority in Canada. Duff J. held at 103 that, while the court must not transplant to Canada the law supplying the definition of the offence charged, the court *does* transplant the accused's environment, including the local institutions of the requesting state, and the laws effecting legal powers and rights and fixing the legal character of the persons concerned:

> One may look at it in two ways. One may take it that one is to apply one's mind to the conditions existing in the demanding state; or that one is to conceive the accused, and the acts of the accused, transported to this country; — in the first case, one is to take the definition of the imputed crime in accordance with the law of Canada, and apply that to the acts of the accused in the circumstances in which those acts took place. If in those acts you find that the definition of the crime is satisfied, then you have the statutory and treaty requisites complied with. In the second case, <u>if you are to conceive the accused pursuing the conduct in question in this country, then along with him you are to transplant his environment; that environment must, I apprehend, include, so far as relevant, the local institutions of the demanding country, the laws affecting the legal powers and rights, and fixing the legal character of the acts of the persons concerned</u>, always excepting, of course, the law supplying the definition of the crime which is charged.
>
> Treating the matter in that way, then what have we here? If my view of the law of California is correct, we have this. We have the fact that there was a proceeding pending in a court of competent jurisdiction, the practice of which court authorized a certain affidavit to be made in that proceeding. The affidavit was made, and it contains a wilfully false statement of fact. In other

> words, in addition to all the other elements of perjury, you have an oath taken in a judicial proceeding before a court of competent jurisdiction after a manner in which it was authorized by law. These facts make up the substance and essence of the "criminality" charged against the accused. If you transfer these facts to this country, you get the offence of perjury within the law of Canada.
>
> [emphasis added]

[66] According to the approach Duff J. outlined, the "legal character" of the foreign acts, as fixed by the foreign jurisdiction, is notionally transposed with the other relevant aspects of the context in which they were committed. The "substance and essence" of the impugned conduct is thus framed in generalized, or relatively abstract, terms: "you have an oath taken in a judicial proceeding before a court of competent jurisdiction [in a manner] authorized by law". Ms. Meng's approach to the double criminality analysis would not accommodate this level of generality or abstraction.

[67] Duff J.'s approach and his reasoning were applied by the Ontario Superior Court and the Ontario Court of Appeal in *Germany (Federal Republic) v. Schreiber*, (2004), 184 C.C.C. (3d) 367 (Ont. S.C.), and (2006), 206 C.C.C. (3d) 339 (Ont. C.A.). Each court held that Germany's concept of "income", which they allowed may be different from Canada's, could inform the consideration of whether the alleged conduct would amount to income tax evasion had it taken place in Canada.

[68] Watt J. (as he then was) noted that in transposing relevant facts from the requesting jurisdiction, the court may need to also transpose institutions and laws of the foreign jurisdiction as context (at para. 37):

> . . . in transposing the facts from the requesting jurisdiction to the requested jurisdiction, the institutions and laws of the foreign jurisdiction of necessity must be brought along to provide context for the committal decision. What is important in extradition is the essence of the offence the fugitive is alleged to have committed.

[69] Mr. Schreiber's conduct included earning secret commissions and failing to report them as part of his income, hiding the receipt of the commissions by having them paid to letter-box companies, and obtaining the funds himself through a series of financial transactions involving companies with no other legitimate business: para. 129. Watt J. agreed with the requesting state that the essence of that conduct amounted to tax evasion: Mr. Schreiber earned income that was subject to tax, but deliberately omitted it from his tax return, denied its existence, and concealed it in order to evade the payment of tax. The double criminality requirement was met because a person doing those things in Canada would be evading or attempting to evade tax under Canadian law: paras. 130-137.

[70] The Ontario Court of Appeal dismissed Mr. Schreiber's appeal, determining (in relation to the income tax evasion offence) that his conduct amounted to that offence under Canadian law. However, Sharpe J.A. for the court took the opportunity in *obiter* (at paras. 37-42) to endorse Watt J.'s conclusion that foreign legal concepts may properly provide context to the alleged conduct in the double criminality analysis, as well as his approach to transposing those concepts as necessary background (at para. 42):

> … I agree with the extradition judge (at para. 37) that when "transposing the facts from the requesting jurisdiction to the requested jurisdiction, the institutions and laws of the foreign jurisdiction of necessity must be brought along to provide context for the committal decision." As Anne Warner La Forest, *La Forest's Extradition To and From Canada*, 3rd ed. (Aurora, Ontario: Canada Law Book, 1991) states at pp. 69-70[,] "... The institutions, and laws of the foreign country must necessarily form the background against which to examine events occurring in that country. It is after all, the essence of the offence that is important in extradition." The point was well expressed by Duff J. in *Collins, Re (No. 3)* (1905), 10 C.C.C. 80 (B.C. S.C.) at p. 103:
>
> > ... if you are to conceive the accused as pursuing the conduct in question in this country, then along with him you are to transplant his environment; and that environment must, I apprehend, include, so far as relevant, the local institutions of the demanding country, the laws effecting the legal powers and rights, and fixing the legal character of the acts of the persons concerned, always [excepting], of course, the law supplying the definition of the crime which is charged.

[71] Sharpe J.A. was accordingly satisfied that, had the Canadian definition of "income" not encompassed the secret commissions in issue, the German definition could properly have been considered, because the essence of the alleged wrongful conduct was the use of deceitful and dishonest means to avoid the legal obligation, howsoever determined (at para. 43):

> … However, I am satisfied that the legal definition of income falls within the category of the foreign legal environment that is properly considered as the context or background within which the alleged wrongful conduct occurred. One must look to the definition of income to identify the nature and extent of the obligation to pay taxes but the essence of the alleged wrong is the use of deceitful and dishonest means to avoid that legal obligation, however it is determined.

[72] In *Norris* at paras. 96-101, the UK House of Lords referred at length to the reasoning of Duff J. in *Re Collins*, and applied it in preference to that in *Re Norgren* [2000] QB 817, where in *obiter* the Court of Queen's Bench expressed the tentative view that the alleged insider dealing on the New York and Pacific Stock Exchanges could not have amounted to an offence under the identified UK legislation because it prohibited only insider dealing in listed securities on the London exchange. Mr. Norris therefore did not succeed in his argument that, since the conduct alleged in his case consisted of price-fixing, which was not itself an offence under UK law, the requesting state could not establish that the conduct amounted to obstructing justice.

[73] The Lords in *Norris* adopted a "wider construction" of the conduct to be considered in the double criminality analysis because this was more consistent with the broad and generous construction to be given to extradition statutes to allow them to serve their purpose and the transnational interest in their doing so (paras. 86-90). Applying the approach in *Re Collins*, the Lords concluded that the essence or substance of Mr. Norris' alleged conduct was obstructing a criminal investigation being carried out by the duly appointed body. The fact that the result of the investigation was a charge of price-fixing was "no reason to hold that it would not have been an offence under English law to obstruct the progress of an equivalent investigation by the appropriate body in [the UK]" (paras. 99-100).

[74] Courts in Australia and New Zealand, respectively, haven taken similar approaches in *Linhart v. Elms*, [1988] FCA 416 and *Ortmann v. USA*, 2018 NZCA 233, respectively, the latter expressly adopting the reasoning in *Schreiber* and *Re Collins*.

[75] In *Schreiber* at para. 43, Sharpe J.A. acknowledged that there is little authority on precisely what may be included in "imported legal environment", as opposed to what may be considered an element of the conduct alleged against the person sought. He noted that there is no bright line identifying the boundary between the two in all cases.

[76] If instead of a bright line there is a grey area, the Attorney General argues that the present case falls on the *Schreiber* and *Collins* side of that grey area, while Ms. Meng argues that it falls on the other.

[77] Ms. Meng submits in that regard that the foreign legal concepts in issue in *Collins* and *Schreiber* related to minor details: the authority for taking an oath, and the definition of income. She submits that in this case, by contrast, the foreign law relates to a core element of the offence, and for that reason should not be transposed to the domestic aspect of the double criminality analysis.

[78] I am unable to agree.

[79] First, the authority for taking an oath, and the definition of income, were not minor details in *Collins* and *Schreiber*. Even if of a technical character, they were key to framing the essence of the conduct to be transposed and tested against the elements of the offences in issue.

[80] Second, the essence of the alleged wrongful conduct in this case 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.

[81] For this reason, I cannot agree with Ms. Meng that to refer to US sanctions in order to understand the risk to HSBC is to allow the essence of the conduct to be defined by foreign law. Canada's laws determine whether the alleged conduct, in its essence, amounts to fraud.

[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.

[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?

[84] The answer is two-fold.

[85] First, economic sanctions laws such as were in place in the US at the time of the ATP are not part of Canadian law but they are also not fundamentally contrary to Canadian values in the way that slavery laws would be, for example.

[86] Second, 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 relevant circumstances: s. 44(1)(a) of the *Act*. The Minister's decision will necessarily take account of whether prosecution according to the foreign laws could lead to an unjust or oppressive result according to Canadian values. In *Schreiber*, the Ontario Court of Appeal related this responsibility of the Minister's to, specifically, the double criminality analysis, and to differences between Canadian law and foreign law that may have played a part in that analysis:

> [46] In oral argument, it was suggested that a foreign state may imposes a tax that is so offensive to Canadian standards of justice that Canadian law should refuse to extradite an individual who evades such a tax. In my view, such an exceptional case may be appropriately dealt with by the Minister in the exercise of his discretion under s. 44 to refuse surrender where it "would be unjust or oppressive having regard to all the relevant circumstances."

[87] That the Minister's decision concerning surrender is subject to judicial review gives yet further protection against an unjust or oppressive result flowing from the consideration of foreign law, as context for the alleged conduct, in the double criminality analysis.

CONCLUSION

[88] On the question of law posed, I conclude that, as a matter of law, the double criminality requirement for extradition is capable of being met in this case. The effects 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.

[89] Ms. Meng's application is therefore dismissed.

[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.

"The Honourable Associate Chief Justice H. Holmes"