



CANADIAN GLOBAL AFFAIRS INSTITUTE
INSTITUT CANADIEN DES AFFAIRES MONDIALES

Extradition and Chinese Bullying

by Lawrence L. Herman
July 2020

COMMENTARY

EXTRADITION AND CHINESE BULLYING

by Lawrence L. Herman

July 2020



CANADIAN GLOBAL AFFAIRS INSTITUTE
INSTITUT CANADIEN DES AFFAIRES MONDIALES

Prepared for the Canadian Global Affairs Institute
1800, 421 – 7th Avenue S.W., Calgary, AB T2P 4K9
www.cgai.ca

©2020 Canadian Global Affairs Institute
ISBN: 978-1-77397-142-1



There's no doubt the June 23 letter from a group of prominent Canadians regarding Michael Kovrig and Michael Spavor has complicated life for Prime Minister Justin Trudeau. He responded, as one would expect, by saying Canada will not engage in hostage diplomacy and will remain resolute in staying the course and not giving in to Chinese bullying. Several experienced, knowledgeable China hands, notably former Canadian ambassadors to that country, have weighed in to support the government.

Canadians are rightly outraged at the arbitrary arrests and the intolerable abuses to which both hostages have been subjected. Their situation is a cautionary tale, showing the world what their fellow nationals can expect when China decides to retaliate for any reason – a telling demonstration of how the Chinese system operates.

The June 23 letter was generated by understandably anxious concern over the fate of the two Michaels, and an attempt to find a solution within the four corners of Canadian law. However, some points were neglected in the letter and in other comments on dealing with China's actions. While Justice Minister David Lametti's role under Canada's *Extradition Act* has been explained, little mention has been made of the 1976 Canada-U.S. Extradition Treaty.

Whatever the provisions in Canadian legislation, when it comes to extradition, Canada has treaty obligations toward the United States. And while the treaty allows some degree of manoeuvrability, it's less than what's allowed internally under the *Extradition Act*.

Article 1 of the treaty says, without ambiguity, "Each Contracting Party agrees to extradite to the other . . . persons found in its territory" who have been charged with any of listed offences, provided those offences are punishable by the laws of both countries. Fraud is on the treaty list. As the B.C. Supreme Court has decided, fraud is equally a crime in Canada. So this initial double-criminality test was met in Meng Wanzhou's case.

However, Article 10 of the treaty says that, even if the double-criminality test is met, extradition will be granted – after due proceedings – only if the evidence would justify committal for trial if the person were charged in Canada. This will presumably be one of the major lines of attack Meng's defence team will mount in the forthcoming hearing.

Second, and possibly more important, Article 4 says that if the charge "is of a political character", extradition may be refused. The article goes on to say that if any question arises as to its political nature, "the authorities of the Government on which the requisition is made shall decide."

While the treaty doesn't define "political", here is where Lametti could step in. From what he has indicated, any involvement on his part would only occur once the court proceedings are over. If the court were to refuse extradition, he may not need to do anything.



On the other hand, if extradition were ordered, Article 4 recognizes the minister's ultimate right to rule the request was political in nature and cancel the order. This would undoubtedly produce an extremely negative reaction in Washington.

These are hypothetical scenarios at this point. It merely shows what Canada's treaty obligations vis-à-vis the U.S. allow and do not allow. Whatever Canadian law says, these treaty aspects can't be overlooked.

Speaking of international obligations, China should have been called out long ago for its unacceptable, callous and egregious disregard for basic human rights in regard to the two Michaels, rights that have been enshrined in the UN's Universal Declaration of Human Rights.

The Declaration says in its preamble – with direct application to China in this case – that “disregard and contempt for human rights have resulted in barbarous acts which have outraged the conscience of mankind”. In substantive terms, the Declaration goes on to say, “No one shall be subjected to arbitrary arrest, detention or exile” and “Everyone charged with a penal offence has the right to be presumed innocent until proved guilty according to law in a public trial at which he has had all the guarantees necessary for his defence.”

China has blatantly disregarded all of these standards, not only in the conditions under which the two Michaels are being held, but in the outrageous statements by Chinese government spokespersons to the effect that, well before any non-public trial takes place, the two Michaels are indeed guilty as charged. This shows the world exactly the kind of dictatorial regime one is dealing with.

From where we are today, it seems likely that events will have to take their course. Meng will have her full extradition hearing and, regrettably, our fellow Canadians will likely remain incarcerated under intolerable, inhumane conditions. Contrast this to the fair and liberal treatment Canadian law has granted Meng. Maybe heightened international pressure will at least force the Chinese to respect basic human rights, allow greater consular access, improved prison conditions, family contact by telephone or video and access to proper legal representation.

In the meantime, notwithstanding pressure from some quarters to release Meng as a way of getting the two Michaels home, the prime minister has firmly stated her extradition process will proceed. Canada won't deal with hostage-takers. So at this point, it's hard to see any positive outcome to this fraught situation.

What has changed is at least stronger language in Ottawa and possibly a more forceful stance by the Trudeau government in responding to these outrageous, appalling and unacceptable Chinese actions.

► About the Author

Lawrence L. Herman, Cassidy Levy Kent (Ottawa & Washington) and Herman & Associates (Toronto), has practiced international trade and investment law and policy in government and in the private sector for over 45 years.

Lawrence Herman was a member of Canada's mission to the UN and the GATT in the 1970s and in private law practice acted as counsel for Canada in the International Court of Justice and has advocated cases before the Canadian International Trade Tribunal (CITT), NAFTA panels and Canadian courts. Mr. Herman advises governments, State agencies and international organizations on trade, economic sanctions and investment issues.

He is a Senior Fellow and National Policy Council member at the C. D. Howe Institute in Toronto, a member of Deputy Minister's Trade Advisory Committee, the North American Forum and the Executive Committee of the Canada-US Law Institute. He currently chairs the Canadian International Trade Tribunal's National Advisory Committee.

Among his other affiliations, Mr. Herman has been chair of the Canada-Taiwan Business Association and has served on the boards of the Canadian Institute of International Affairs, the Canadian Manufacturers Association and the Energy Council of Canada.

He has authored and edited two compendium volumes on international trade: *Canadian Trade Law: Practice and Procedure* (Thomson Reuters 2007, 2016) and *Export Controls & Economic Sanctions* (Thomson Reuters 2010). Mr. Herman regularly publishes commentaries on international law and policy for think tanks and for various news media, including the *Globe & Mail* and the *National Post*.

► **Canadian Global Affairs Institute**

The Canadian Global Affairs Institute focuses on the entire range of Canada's international relations in all its forms including (in partnership with the University of Calgary's School of Public Policy), trade investment and international capacity building. Successor to the Canadian Defence and Foreign Affairs Institute (CDFAI, which was established in 2001), the Institute works to inform Canadians about the importance of having a respected and influential voice in those parts of the globe where Canada has significant interests due to trade and investment, origins of Canada's population, geographic security (and especially security of North America in conjunction with the United States), social development, or the peace and freedom of allied nations. The Institute aims to demonstrate to Canadians the importance of comprehensive foreign, defence and trade policies which both express our values and represent our interests.

The Institute was created to bridge the gap between what Canadians need to know about Canadian international activities and what they do know. Historically Canadians have tended to look abroad out of a search for markets because Canada depends heavily on foreign trade. In the modern post-Cold War world, however, global security and stability have become the bedrocks of global commerce and the free movement of people, goods and ideas across international boundaries. Canada has striven to open the world since the 1930s and was a driving factor behind the adoption of the main structures which underpin globalization such as the International Monetary Fund, the World Bank, the World Trade Organization and emerging free trade networks connecting dozens of international economies. The Canadian Global Affairs Institute recognizes Canada's contribution to a globalized world and aims to inform Canadians about Canada's role in that process and the connection between globalization and security.

In all its activities the Institute is a charitable, non-partisan, non-advocacy organization that provides a platform for a variety of viewpoints. It is supported financially by the contributions of individuals, foundations, and corporations. Conclusions or opinions expressed in Institute publications and programs are those of the author(s) and do not necessarily reflect the views of Institute staff, fellows, directors, advisors or any individuals or organizations that provide financial support to, or collaborate with, the Institute.