

They've Got No Strings: Separation of Powers, Judicial Independence, and the Rule of Law in the Meng Wanzhou Case

The official stance of the Chinese Embassy in Canada is that the “Meng Wanzhou case is by no means an ordinary judicial case, but a serious political incident.”^[1] In 2018, Canadian authorities arrested Meng Wanzhou, a well-known Chinese citizen, in accordance with an [extradition treaty](#) with the United States.^[2] The Chinese government demanded that Canada release Meng immediately, ignoring the binding nature of Canada’s extradition treaty, and the very nature of the rule of law in our democratic system.^[3] Ten days after Meng Wanzhou’s arrest, China arrested and detained two Canadians in what appeared to be a retaliatory measure.^[4]

This article will explain how Canada’s independent judiciary protects the courts from political interference. It will bring together three major constitutional principles: rule of law, judicial independence, and separation of powers. These flow from written and unwritten principles in our Constitution and are key to understanding Canada’s stance in relation to the Meng Wanzhou extradition case.

China’s response to Canada’s extradition treaty

China has warned Canada that it could face consequences for aiding the United States in the Meng Wanzhou case.^[5] These consequences appear to include blocking or limiting Canadian farm exports and arresting two Canadians under questionable circumstances.^[6] China’s apparent retaliation against Canada has worsened since a B.C. Supreme Court Justice determined that Meng Wanzhou’s extradition case can proceed.^[7] On June 19, 2020, shortly after the BC Court decision was issued, Chinese prosecutors charged the two detained Canadians with spying in a potential bid to step up pressure on Canada to drop the U.S. extradition request.^[8] It appears that Chinese authorities expect the Canadian government to bow to their expectations, and to the pressures they are exerting in relation to the Meng Wanzhou case. Meanwhile, the Canadian government has stood by its constitutional principles in refusing to interfere with the judicial process and with the terms of its extradition treaty with the United States.^[9]

Canada’s Constitution is the supreme law in Canada

The Constitution is the supreme law in Canada. It structures the government, and all laws in the country. The Constitution includes both written and unwritten principles. The written principles are stated in the [Constitution Acts, 1867 to 1982](#),^[10] and the [unwritten principles](#) are implied and unstated assumptions in the Constitution.^[11] Unwritten

principles are the norms that existed in the United Kingdom's legal system from which the Canadian Constitution emerged.[12] The preamble of the *Constitution Act, 1867* encourages courts to use these unwritten principles to fill in the gaps in the written text.[13] The rule of law, the separation of powers, and judicial independence are all unwritten constitutional principles that are at the heart of Canada's approach to the Meng Wanzhou case. President Xi Jinping of China has stated, "We must never follow the path of Western 'constitutionalism,' 'separation of powers,' or 'judicial independence'"[14], implying that the judiciary in China may not operate independently as it does in Canada. Canada's [separation of powers](#), [rule of law](#), and [judicial independence](#) protect its judiciary from political interference.

Separation of powers protects the judiciary from interference

The unwritten constitutional principle of separation of powers protects the judiciary from political influence. Canada's system of government has three branches: judicial, executive, and legislative. The separation of those branches ensures their independence from one another, creates a system of checks and balances, and prevents power from concentrating in one area of the system.[15]

The executive branch prioritizes issues, and proposes new laws or changes to existing laws,[16] while the legislative branch passes, rejects, or revises these legislative changes in the form of bills.[17] These bills become laws once signed by the Governor General.[18] The judicial branch makes decisions based on these laws, and reviews any new or changed law to ensure it aligns with the Constitution, including the *Charter*. [19] By impartially ruling on individual cases that come before the courts, the judicial branch protects the Constitution and our fundamental values, including the rule of law, fundamental justice, equality, and the democratic process.[20]

Rule of law levels the legal playing field

The Chinese government's demands that Canada release Meng Wanzhou and ignore its own laws and precedents, spotlight the difference between the Canadian and Chinese systems of government. Canada abides by [the rule of law](#). The Supreme Court of Canada has described the rule of law as "conveying... a sense of orderliness, of subjection to known legal rules and of executive accountability to legal authority." [21] This means that the government must comply with the law and specifically, with the rulings of the courts. The Supreme Court has also said that "at its most basic level, the rule of law vouchsafes to the citizens and residents of the country a stable, predictable and ordered society in which to conduct their affairs. It provides a shield for individuals from arbitrary state action." [22] While politicians may come and go, the law provides a stable, predictable and ordered society. The judiciary operates independently from the executive branch, which includes the Prime Minister and their Cabinet. The executive cannot tell the judiciary what to do, and the executive cannot ignore the rule of law.

Judicial independence ensures that politicians do not control Canadian judges

Judicial independence is essential for upholding the rule of law.[23] Prime Minister Justin Trudeau responded to China's demands by saying that "Canada has an independent judicial system that functions without interference or override by politicians." [24] His statement meant that he and his government would not bow to political pressure from China, because, first, Canada respects the extradition treaty that it has signed, and second, Canadian judges must decide cases on law and evidence alone.

Judicial independence is a consequence of the separation of powers.[25] The concept of an independent judiciary is enshrined in the *Charter* section 11(d), which states that every one has the right "to be presumed innocent until proven guilty according to law in a fair and public hearing by an independent and impartial tribunal". [26] There are two dimensions of judicial independence: the individual independence of a judge, and the collective independence of the court.[27] These dimensions are protected by the core characteristics of judicial independence.[28] Namely, judges have complete independence in assigning and managing cases.[29] Judges' salaries are fixed regardless of the individual decisions they make, providing them with financial security.[30] They cannot be fired for making a decision that the government does not like, giving them security of tenure.[31] Judges also have legal immunity, meaning they do not have to be worried about being sued for their decisions.[32] Finally, the Canadian Judicial Council (CJC) responsible for promoting "efficiency, consistency, and quality judicial service". [33] One of their tasks is to investigate complaints about the conduct of judges inside and outside the courtroom.[34] The CJC may make a recommendation to remove a judge from the bench, which is voted on by both houses of Parliament or a provincial legislature.[35]

These protections ensure that a judge will be impartial to the greatest extent possible.[36] They allow courts to apply the rule of law guaranteed under the Constitution.

Conclusion

The arbitrary detention of two Canadians raises concerns about the possibility of China's further retaliation if Canada continues to detain Meng Wanzhou and then extradites her to the United States. There are compelling arguments for and against releasing Meng Wanzhou from Canadian custody. On one side, a former minister of justice and former Supreme Court justice, amongst others, cite a provision of the Canadian *Extradition Act*, [37] which gives the federal Minister of Justice the power to intervene at any point, even when the case is before a judge.[38] These high-profile Canadians are publicly pressing the current Minister of Justice, David Lametti, to order Meng Wanzhou's release.[39] They argue that the Minister of Justice should use his formal legal power to intervene in exchange for the release of the two Canadians detained in China.[40]

On the other side, critics of Meng Wanzhou's release argue that bending to 'blackmail' from China would create a "false equivalence between Canada's legitimate arrest of Meng in accordance with our legal obligations" and China's detention of the two Canadians.[41] In addition, Canada's national security advisor advised the Prime Minister shortly after Meng Wanzhou's arrest that "there are no examples of the [justice] minister discharging a case for political or diplomatic reasons." [42]

Canadians who want the Prime Minister to intervene to release Meng Wanzhou will be disappointed. Prime Minister Trudeau has followed the advice of his national security advisor. He responded to the calls for release by stating, "If countries around the world, including China, realize that by arbitrarily arresting random Canadians they can get what they want out of Canada politically, well, that makes an awful lot more Canadians who travel around the world vulnerable to that kind of pressure."^[43]

Canada has an independent judiciary that is insulated from political interference. As the Department of Justice has said, barring non-political or diplomatic reasons, "the Minister [of Justice] does not personally make any decisions related to an extradition proceeding until and unless the judge commits the person for extradition."^[44] As long as the matter is before the courts, judges will decide the Meng Wanzhou extradition case based on the law and the evidence without fear of retaliation from the executive branch. So far, BC Superior Court Associate Chief Justice Holmes has found that the alleged fraud that Meng Wanzhou is accused of committing by the United States would be considered a crime in Canada if it happened here.^[45] Next, Justice Holmes must determine whether Meng Wanzhou's *Charter* rights were violated when she was arrested, and if the United States has provided sufficient evidence to justify hypothetically prosecuting Meng Wanzhou in Canada.^[46] After a judge is satisfied that the evidence provided by the United States would be sufficient to commit Meng Wanzhou for trial in Canada should the conduct have occurred in this country, then, and only then, will the Minister of Justice be tasked with deciding based on his consideration of the *Charter*, the *Extradition Act*, and the extradition treaty with the United States, whether Meng Wanzhou should be extradited.^[47] That is how our Canadian democracy functions - the rule of law, an independent judiciary, and a separation of powers that do not allow the government to dictate how this case will proceed.

^[1] Embassy of the People's Republic of China in Canada, "Remarks of the Spokesperson of the Chinese Embassy in Canada on the US's Request to the Canadian Side for the Extradition of a Chinese Citizen" (29 January 2019) online: <<http://ca.china-embassy.org/eng/sgxw/t1633677.htm>>

^[2] Moira Warburton, "Timeline: Key Events in Huawei CFO Meng Wanzhou's extradition case" (27 May 2020) *Reuters*, online: <<https://www.reuters.com/article/us-usa-huawei-tech-canada-events-timelin/timeline-key-events-in-huawei-cfo-meng-wanzhous-extradition-case-idUSKBN233179>>.

^[3] *Ibid.*

^[4] *Ibid.*

^[5] Embassy of the People's Republic of China in Canada, "China urges Canada to immediately release Meng Wanzhou" (27 May 2020) online: <<http://ca.china-embassy.org/eng/zjwl/t1783360.htm>>.

^[6] *Ibid.*

[7] Jason Proctor, “Huawei CFO Meng Wanzhou loses key court battle as B.C. judge rules extradition bid should proceed” *CBC News* (27 May 2020), online: <<https://www.cbc.ca/news/canada/british-columbia/meng-wanzhou-extradition-decision-1.5585737>>.

[8] The Associated Press, “China Charges 2 Canadians with spying in Huawei-linked case”, *CBC News* (19 June 2020), online: <<https://www.cbc.ca/news/world/kovrig-spavor-china-espionage-1.5618674>>.

[9] The Associated Press, “Timeline: The China-US-Canada battle over Huawei (29 January 2019)”, *Associated Press News*, online: <<https://apnews.com/e9b6190b97944ffd88ab645fae837405>>.

[10] *Constitution Act, 1867* (UK), 30 & 31 Vict, c 3, reprinted in RSC 1985, Appendix II, No 5; *Constitution Act, 1982*, being Schedule B to the Canada Act 1982 (UK), 1982, c 11.

[11] *Reference re Secession of Quebec*, [1998] 2 SCR 217, 161 DLR (4th) 385 at para 50.

[12] *Reference re Remuneration of Judges of the Provincial Court (PEI)*, [1997] 2 SCR 3 at para 96 .

[13] *Ibid* at paras 95, 104.

[14] Charlotte Gao, “Xi: China Must Never Adopt Constitutionalism, Separation of Powers, or Judicial Independence” *The Diplomat* (19 Feb 2019), online: <<https://thediplomat.com/2019/02/xi-china-must-never-adopt-constitutionalism-separation-of-powers-or-judicial-independence/>>.

[15] *Beauregard v The Queen*, [1986] 2 SCR 56, 1986 CanLII 24 (SCC) at para 23 .

[16] “The Judiciary” (last modified 9 September 2016), online: *Department of Justice* <<https://www.justice.gc.ca/eng/csj-sjc/ccs-ajc/05.html>> [The Judiciary].

[17] *Ibid*.

[18] *Ibid*.

[19] *Ibid*.

[20] *Beauregard*, *supra* note 15 at para 24.

[21] *Reference re Resolution to Amend the Constitution*, 1981 CanLII 25 (SCC), [1981] 1 SCR 753 at 806.

[22] *Reference re Secession of Quebec*, 1998 CanLII 793 (SCC), [1998] 2 SCR 217 at para 70.

[23] Beverley McLachlin, “The Decline of Democracy and the Rule of Law: How to Preserve the Rule of Law and Judicial Independence?” (28 September 2017), online: *Supreme Court*

of Canada <<https://www.scc-csc.ca/judges-juges/spe-dis/bm-2017-09-28-eng.aspx>>.

[24] Amanda Connolly, “Trudeau says China ‘doesn’t seem to understand’ Canada’s judicial independence” (21 May 2020), *Global News*, online: <<https://globalnews.ca/news/6968640/justin-trudeau-china-meng-wanzhou/>>.

[25] *Remuneration*, *supra* note 12 at para 130.

[26] *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982 (UK)*, 1982, c 11, s 11(d).

[27] *Remuneration*, *supra* note 12 at para 118.

[28] *Ibid.*

[29] The Judiciary, *supra* note 16.

[30] *Ibid.*

[31] *Ibid.*

[32] “An Independent and Impartial Judiciary” (2018), online: *The Canadian Superior Courts Judges Association* <<http://www.cscja.ca/judges/an-independent-and-impartial-judiciary/>>.

[33] *Ibid.*

[34] The Judiciary, *supra* note 16.

[35] *Ibid.*

[36] *Ibid.*

[37] *Extradition Act*, SC 1999, c 18, s 23(3).

[38] John Paul Tasker & Brennan MacDonald, “Former parliamentarians, diplomats pen letter calling on Canada to release Meng”, *CBC News* (24 June 2020), online: <<https://www.cbc.ca/news/politics/letter-release-meng-1.5625669>>.

[39] Sean Fine, “Ottawa has authority to free Meng Wanzhou now, former justice minister, Supreme Court justice say”, *The Globe and Mail* (22 June 2020), online: <<https://www.theglobeandmail.com/canada/article-ottawa-has-authority-to-free-meng-wanzhou-now-former-justice-minister/>>.

[40] *Ibid.*

The arguments in support of releasing Meng Wanzhou may complicate the application of rule of law and separation of powers in this case. However, an in-depth discussion of these concepts in the context of extradition is beyond the scope of this article.

[41] Patricia Adams et al, “Canada must reject calls to release Meng Wanzhou: an open

letter to Prime Minister Trudeau” (26 June 2020), online: <<https://www.macdonaldlaaurier.ca/canada-must-reject-calls-release-meng-wanzhou-open-letter-prime-minister-trudeau/>>.

[42] Joan Bryden & Jim Bronskill, “Canada never drops extradition cases for ‘political, diplomatic reasons,’ Trudeau advised” *Global News* (26 June 2020), online: <<https://globalnews.ca/news/7111061/canada-china-extradition-requests/>>.

[43] Amanda Connolly, “Caving to China’s demand to release Meng Wanzhou would put Canadians in danger: Trudeau” *Global News* (25 June 2020), online: <<https://globalnews.ca/news/7106759/justin-trudeau-meng-wanzhou-judicial-interference/>>.

[44] Jolson Lim & Marco Vigliotti, “Huawei’s Meng Wanzhou loses bid to end extradition process”, *iPolitics* (27 May 2020), online: <https://ipolitics.ca/2020/05/27/huaweis-meng-wanzhou-loses-bid-to-end-extradition-process/>.

[45] *United States v Meng*, 2020 BCSC 785 at para 88.

[46] *Ibid* at para 90.

[47] See Government of Canada, “General Overview of the Canadian Extradition Process” (26 July 2019), online: <<https://www.justice.gc.ca/eng/cj-jp/emla-eej/extradition.html>>.