
Professor Rob Currie, K.C.
Schulich School of Law
Dalhousie University

robert.currie@dal.ca
Agenda

• Defining double criminality
• Canadian and international uses
• Is it a POFJ?
• Does this question even matter?
Double Criminality: Extradition

• Extradition: formal transfer of individuals between states for prosecution/serving sentence

• States will only extradite if the conduct for which the alleged offender is sought by the requesting state is also criminal under the laws of the requested state
  • Rationales: sovereignty, justice, protection, reciprocity
  • Origins: 17th century Europe
  • Ubiquitous; is probably an int’l law rule (custom, general principles)
• Underlying principles not confined to extradition

• E.g.: D is a national of Pakistan, where there is a crime of “blasphemy.” D has one conviction for blasphemy on his criminal record in Pakistan.
• D emigrates to Canada, question comes up as to whether he has a criminal record
• Does this qualify as a criminal record in Canada? No, because we have no crime of blasphemy
• Sometimes used in reverse fashion

  • E.g.: D is a national of state X, where gambling is illegal. Travels to Las Vegas, USA, where gambling is legal, and gambles.
  • X exerts extraterritorial jurisdiction on a nationality basis, can prosecute nationals for offences committed abroad
  • But, laws of X also provide that it will not prosecute if conduct was lawful in foreign state
  • Therefore, D will not be prosecuted
So this involves the same underlying analysis: is the conduct that took place in the foreign state also criminal here (or in some cases, vice versa)? Same question, different purpose.

A broader definition:
- in order for a state to give legal cognizance or justiciability to a criminal offence committed in a foreign state, the conduct underpinning the offence must also amount to a criminal offence in the forum state.
Yes! Many situations come up in which courts have to consider whether a person committed an offence in a foreign state, because it is relevant to some issue in the proceedings.

In those cases, Parliament and the common law tend to employ double criminality (DC).
Examples of DC in Canadian Law

• **S. 12 Canada Evidence Act**: witness (incl accused) can be cross-examined on criminal record for credibility purposes

• Just Canadian record, or foreign convictions too?

• **R. v. Stratton** (ONCA 1978): only if:
  • DC made out
  • Foreign proceedings allow for the “equivalent” of a conviction under Cdn law, and no oppression or unfairness

• Probably for s. 666 of the Code (use of record re character) too
Examples of DC in Canadian Law

• Special pleas of *autrefois convict/acquit*
• Canadian version of “double jeopardy”
• Can be pleaded re foreign convictions/acquittals
  • Law is clear that in order to make out plea, foreign charge and Canadian charge must have been substantially the same
  • Law is very messy on how to do this—conduct-based vs. elements-based approaches
• Could be more here: *Kienapple*, s. 11(h), *res judicata*
Examples of DC in Canadian Law

• **Immigration and refugee protection law**
  • Permanent residents, foreign nationals and refugee claimants can all be held “inadmissible” to Canada (and thus deported) for “criminality” or “serious criminality”
    • If outside Canada, conduct must be something that would “constitute an offence under an Act of Parliament” if committed here → DC
  • Both convictions and uncharged conduct
  • Very well-developed “equivalency” analysis
Examples of DC in Canadian Law

- **Conspiracy: Criminal Code**

  465(3) Every one who, while in Canada, conspires with any one to [commit an offence] in a place outside Canada that is an offence under the laws of that place shall be deemed to have conspired to do that thing in Canada

- **Crown must prove DC beyond a reasonable doubt**
Examples of DC in Canadian Law

• Civil forfeiture: gov’t confiscates proceeds of crime

• Ontario Civil Remedies Act, applies to “unlawful activity”:

  • “an offence under an Act of a jurisdiction outside Canada, if a similar act or omission would be an offence under an Act of Canada or Ontario if it were committed in Ontario”
Examples of DC in Canadian Law

- **International Transfer of Offenders Act**, section 4:

  “...a transfer is not available unless the Canadian offender’s conduct would have constituted a criminal offence if it had occurred in Canada at the time the Minister receives the request for a transfer.”
Examples of DC in Canadian Law

- **Sentencing**
  - Foreign convictions can be adduced as aggravating factors, just like domestic convictions
  - Goes to character, likelihood to re-offend, etc.
  - Seems to be some notion of DC employed; *Stratton* sometimes cited
  - No decisive consideration; one decision says presence of DC makes foreign conviction “more relevant”
Examples of DC in Canadian Law

• More work to do

• Bail? Not unknown to have foreign criminal record adduced as evidence in bail hearing; explicit consideration of DC?

• Any other examples? Do YOU know of any?
Principles of Fundamental Justice (POFJs)

• Charter s. 7: cannot be deprived of life, liberty or security of person, except in accordance with the principles of fundamental justice.

• Basic tenets of legal system. Requirements:
  • Legal principle
  • Consensus that “vital or fundamental to notion of justice”
  • Sufficiently precise to be applied in a way that produces predictable results.
Is DC a POFJ?

• Legal rule? Yes, not policy
• Precise, predictable results? Yes

• Consensus that vital/fundamental to justice?
  • When foreign criminal conduct comes up, almost inevitably used, by Parliament and common law → suggests consensus that there’s something fundamental about it
  • Human dignity: an expression of when the consequences of criminal conduct outside Canada are justiciable in Canada; individual vs state
  • Other countries do it
Is DC a POFJ?

• Main point: if you could be deprived of freedom or security of person for doing something outside Canada which is not criminal in Canada...the gut rebels

• Surely our legal system should not give any legal effect to foreign crimes like adultery, apostasy, engaging in homosexual acts, insulting the honour of the President, etc.

• This is what is at stake – seems fundamental
Is DC a POFJ?

• Strong case that it is a POFJ in the extradition context
  • SCC in *USA v. Burns*: there are POFJs in extradition
  • SCC in *USA v. MM*: double criminality is a “fundamental principle of extradition law,” underpins each phase of the process
• Case law on double criminality indicates that challenges to it will be resisted
Does it matter otherwise?

• When would one seek a s. 7 remedy for being deprived of DC?
  • Sentencing: not clear whether it’s actually applied
  • If state removed a DC protection currently existing in a statute, or legislated one out of the common law
  • Canada prosecutes someone for an extraterritorial crime that was not a crime in the locus state (could be problematic)
  • Mutual legal assistance in criminal matters: requirement of DC being relaxed. Is this appropriate/constitutional?
Thanks

Your input welcome!

- robert.currie@dal.ca