

Federal Court



Cour fédérale

Date: 20200821

Docket: DES-2-20

Citation: 2020 FC 844

Ottawa, Ontario, August 21, 2020

PRESENT: The Honourable Justice Catherine M. Kane

BETWEEN:

THE ATTORNEY GENERAL OF CANADA

Applicant

and

WANZHOU MENG

Respondent

JUDGMENT AND REASONS

[1] The Attorney General of Canada [AGC] filed a Notice of Application (as amended) [the Application] on April 24, 2020 pursuant to section 38.04 of the Canada Evidence Act, RSC 1985, c C-5 [CEA] seeking an order confirming the statutory prohibition of disclosure of certain sensitive information. That information was included in documents that the AGC had produced to the Respondent in redacted form in *In the matter of the Extradition Act, SC 1999 as amended* and *In the matter of the Attorney General of Canada on behalf of the United States of*

America v Wanzhou Meng [*United States v Meng*]. More specifically, the documents were produced in the context of allegations by the Respondent, Wanzhou Meng [Ms. Meng or the Respondent], of abuse of process regarding the manner in which her arrest in Canada was carried out.

[2] The Application identified one redacted document that had been produced. Subsequently, the AGC provided five additional redacted documents to Ms. Meng, which are also subject to this Application.

[3] The AGC seeks to have the prohibition on the disclosure of the redacted information confirmed by the Court. The Respondent objects and seeks additional disclosure of the information the AGC seeks to protect, with the exception of information that relates to certain names or technical information that would not assist them in their abuse of process claims.

[4] The Application was heard in two parts. A public hearing was held at which comprehensive written and oral submissions were made by Counsel for Ms. Meng and oral submissions were made by the AGC supported by public affidavits. The Court also held an *in camera ex parte* hearing at which time confidential affidavits filed by the AGC were considered in addition to the submissions of Counsel for the AGC and the *amicus curiae* (*amicus*), Mr. Anil Kapoor.

[5] The issue is whether the prohibition to disclose the information identified by the AGC in the six documents at issue, as provided for in paragraph 38.02(1)(a) of the *CEA*, should be

confirmed by this Court pursuant to subsection 38.06(3), or whether the disclosure should be authorized, in full or subject to certain conditions, pursuant to subsections 38.06(1) or (2).

[6] The Court finds that, subject to the lifting of some redactions and the provision of replacement wording for other redactions, the prohibition on disclosure must be confirmed. Although the AGC and *amicus* submitted a joint proposal to the Court, which included the lifting of some redactions, the Court has conducted its own review and analysis. The Court finds that information included in the six documents that are subject to this application — which will continue to be redacted in accordance with the joint proposal — is not relevant to the allegations of abuse of process described by Counsel for Ms. Meng. The information does not provide the “missing pieces of the puzzle” that Ms. Meng seeks.

[7] These reasons set out the background and context and describe the proceedings in this Court, the key submissions of the parties and the *amicus*, and the legal principles that have guided the Court in determining this Application.

I. Background to the Application

[8] The Respondent, Ms. Meng, is sought by the United States [US] arising from charges related to financial offences in the Eastern District of New York. The US has sought the extradition of Ms. Meng from Canada to the US. I will not describe the extradition process in detail. The information below is intended only to provide some context for the Application before this Court.

[9] Ms. Meng was en route to Mexico and South America from Hong Kong and transited through Canada on December 1, 2018. During this stopover in Canada, Ms. Meng was arrested pursuant to a Provisional Arrest Warrant issued by the Supreme Court of British Columbia arising from the request from the US for extradition. The Provisional Arrest warrant, issued on November 30, 2018, noted that Ms. Meng was expected to arrive at Vancouver International Airport on December 1, 2018 at 11:30 AM on a particular flight.

[10] Ms. Meng's flight landed slightly earlier than expected on December 1, 2018. She was then questioned by the CBSA, her luggage was searched, her cellular phones and other devices were seized and placed in signal blocking faraday bags, and she was asked to (and provided) the pass codes for her electronic devices. The CBSA ultimately permitted Ms. Meng to enter Canada. She was then met by RCMP Officers, who executed the Provisional Arrest Warrant.

[11] On February 28, 2019, the Minister of Justice issued the Authority to Proceed with the extradition, which identified fraud contrary to section 380 of the *Criminal Code of Canada*, RSC 1985, c C-46 as the corresponding Canadian offence for which the extradition of Ms. Meng is sought.

[12] Associate Chief Justice Heather Holmes, [ACJ Holmes], Supreme Court of British Columbia, is seized with the extradition proceedings.

[13] Ms. Meng opposes her extradition and seeks a stay of those proceedings, arguing that they are an abuse of the Canadian judicial process. Although Ms. Meng argues that this abuse of

process arises in three ways, it is only with respect to the manner of her arrest that she seeks the documents at issue in the present Application.

[14] Ms. Meng submits that the delay in arresting her upon arrival at the Vancouver International Airport, despite the wording in the Provisional Arrest Warrant for her “immediate arrest”, her three hour detention by the CBSA, and the seizure of her electronic devices and passcodes was a misuse of CBSA’s authority and was intended to compel evidence from her for law enforcement purposes. She alleges that her *Charter* rights were breached in several ways.

A. *ACJ Holmes’ Order of December 2019*

[15] Ms. Meng sought disclosure of documents, including from the Royal Canadian Mounted Police [RCMP], the Canadian Border Service Agency [CBSA] and the Department of Justice, relating to her allegations of abuse of process arising from her arrest at the Vancouver International Airport.

[16] In *United States v Meng*, 2019 BCSC 2137, ACJ Holmes found that Ms. Meng had met the applicable legal test for the disclosure of the documents requested. ACJ Holmes ordered that documents relating to her arrest be produced to her, including any regarding:

- Meetings or telephone calls on November 30, 2018 about the coordination of Ms. Meng’s arrest;
- Meetings or telephone calls on December 1, 2018 about the coordination of Ms. Meng’s arrest, including documents from all RCMP and CBSA officers involved;

- All updates to members of the Department of Justice and/or the Federal Bureau of Investigation [FBI] on December 1, 2018 related to Ms. Meng's arrest or detention by CBSA or the customs and immigration process;
- The sharing of information, including between the RCMP and FBI relating to Ms. Meng while she was in the customs and immigration process; and
- Correspondence between November 28 and December 5, 2018 between the RCMP and US law enforcement members.

[17] ACJ Holmes set out the context, the events relating to Ms. Meng's arrest (which were not disputed and which are not disputed in the present Application), the abuse of process allegations and the guiding jurisprudence.

[18] ACJ Holmes applied the three step test for disclosure to support an abuse of process claim established by the Ontario Court of Appeal in *R. v Larosa*, (2002) 166 CCC (3d) 449. ACJ Holmes noted that her finding that the test for disclosure of further documents had been met, which included finding that there was an air of reality to the allegations, does not imply that the allegations of abuse of process will ultimately succeed.

[19] In response to ACJ Holmes' Order, the AGC produced approximately 1200 pages to Ms. Meng. Some of the documents were redacted due to the assertion of various claims of privilege that are not the subject of this proceeding.

[20] On April 23, 2020, the AGC produced one additional document, which originated from the Canadian Security Intelligence Service [CSIS], entitled “December 1, 2018- SIT REP”.

This document was redacted based on the AGC’s claim of national security privilege.

B. *The Proceedings in this Court – the AGC’s Application pursuant to Section 38, CEA*

[21] On April 24, 2020, the AGC filed the Application in this Court pursuant to section 38 of the *CEA* seeking protection from disclosure of the redacted information in one CSIS document that had been produced.

[22] Ms. Meng then requested that the AGC provide further disclosure of a wider range of documents held by CSIS.

[23] On June 2, 2020, the AGC produced five additional documents to Ms. Meng, all of which are redacted to some extent.

[24] The Court’s Order dated April 24, 2020 provided that Ms. Meng be identified as the Respondent, that the Order be served on Counsel for Ms. Meng, that a copy be provided to ACJ Holmes, and that the Order be made public. The Order also provided that additional documents that contain section 38 claims could be added to the Application. Given that the AGC produced five additional documents, the Application now covers six documents that total 13 pages.

[25] The Court convened several Case Management Conferences [CMCs], all of which were public. The CMCs focused on the timetable for the provision of affidavits and submissions, the appointment of an *amicus*, and the tentative and confirmed dates for the public and *ex parte in camera* hearings of this Application.

C. *The Motion by the Respondent for the Appointment of an Amicus Curiae*

[26] Although the Court had signalled its intention to appoint an *amicus* at an early CMC, Ms. Meng brought a formal motion for the appointment of an *amicus* with a particular mandate. In support of her motion, Ms. Meng filed a motion record that included the redacted CSIS documents and other documents that provided information about what had transpired upon her arrival on December 1, 2018 and her allegations of abuse of process.

[27] The AGC agreed that an *amicus* should be appointed, but noted that the role of an *amicus* is to assist the Court and ensure the proper administration of justice, not to advocate for a respondent. The AGC acknowledged, however, that in fulfilling his or her mandate, an *amicus* may be required to play a role opposite to the AGC, but this would depend on the circumstances.

[28] By Order dated June 10, 2020, the Court appointed Mr. Anil Kapoor, a security cleared lawyer, bound to secrecy in perpetuity in accordance with the *Security of Information Act*, RSC 1985, c O-5, as *amicus* to assist the Court in performing its statutory obligations under section 38 of the *CEA*. Counsel for Ms. Meng and Counsel for the AGC agreed that Mr. Kapoor would ably fulfill this role. The Order provided, among other things:

- that the *amicus* shall have access to the confidential information in this Application (i.e. the redacted information);
- that until such time as the *amicus* has had access to the confidential information and documents, he could communicate with the parties for the purpose of understanding matters of interest to them regarding the information and documents to be reviewed;
- that once the *amicus* had access to the confidential information and documents he could not have any further communication with Ms. Meng or Counsel for Ms. Meng; and
- that the *amicus* must keep all information and documents to which he has had access confidential from Ms. Meng, Counsel for Ms. Meng and from any other person not participating in the *in camera ex parte* hearing.

The Order further provided that the *amicus* could participate in the public hearing and make submissions and could participate in the *in camera ex parte* hearing, cross-examine the AGC's *ex parte* witness(es) and present written and oral submissions.

II. The Documents at Issue

[29] The documents produced by the AGC to Ms. Meng consist of the following, in redacted form:

- SITREP , December 1, 2018, marked as AGC 0001. This is a CSIS Situational Report.
- SITREP 2, December 2, 2018, marked as AGC 0002. This is a CSIS Situational Report.

- An email dated December 5, 2018, marked as AGC 003. The email briefly reports on information provided by the FBI. The document includes a privilege claim unrelated to section 38, which has since been provided without the non-section 38 claim.
- SITREP 3, December 4, 2018, marked as AGC 0004. This is a CSIS Situational Report.
- Handwritten notes, marked as ACG 0005, the unredacted parts of which note Ms. Meng's name, date of birth, passport number and that a Provisional Arrest Warrant exists regarding extradition to the US.
- Operational Notes, marked as AGC 0006, dated December 3, 2018, the unredacted parts of which note: Ms. Meng's date of birth, passport number and title; that she was arrested while in Canada en route to Mexico, referred for a secondary examination by CBSA and taken into custody by the RCMP; and, that her electronic devices were seized by the RCMP for analysis.

[30] Public affidavits from representatives of CSIS and Global Affairs Canada identified the type of information to be protected from disclosure and the rationale for doing so. The affidavits of Michel Guay and David Hartman do not refer to the specific information that has been redacted and for which protection is sought in this Application; rather, they explain in a more general way why certain types of information may require protection. Michel Guay explains, among other things, the mandate of CSIS, the categories of national security information and

why such information should be protected. David Hartman describes the current relationship between Canada and China. Both affiants note that they have not seen the unredacted documents.

[31] Confidential affidavits were filed by the AGC that explain why the specific redactions to the six documents have been made and why the disclosure of this information would be injurious.

[32] The unredacted documents were provided to the Court and to the *amicus* for the purpose of determining the section 38 claim. The redacted parts of the documents are marked in a see-through readable format. The see-through versions have been filed with the Court's Designated Proceedings Registry and are kept under seal (not public). The *amicus* has had the opportunity to review these documents. Counsel for Ms. Meng have not seen the unredacted documents.

III. The Section 38 Process and the Relevant Jurisprudence

[33] Section 38 of the *CEA* sets out a procedure whereby information relating to international relations, national defence and national security may be protected from disclosure before a court, person or body with the jurisdiction to compel the production of information. General references to section 38 in these reasons include sections 38 to 38.15, as applicable.

[34] Where information is otherwise required to be disclosed by a party or person who determines that the information relates to international relations, national defence or national security (i.e. is sensitive or injurious), that person must give notice to the Attorney General (section 38.01). The Attorney General may authorize disclosure of all or part of the information

(section 38.03). However, where the Attorney General does not authorize disclosure or enter into an agreement (section 38.031), the Attorney General may apply to the Federal Court for an order confirming the prohibition on disclosure (section 38.04).

[35] In the present case, Counsel for the AGC in the extradition proceedings notified the Attorney General of Canada in accordance with subsection 38.01(1) that the redacted information in the documents disclosed to Ms. Meng was sensitive information required to be safeguarded.

[36] The Court notes that the same obligation to notify the Attorney General of Canada would apply to any participant in a proceeding who is required to disclose documents that are sensitive or injurious. For example, in prosecutions led by a Provincial Attorney General, the prosecutor would be required to notify the Attorney General of Canada that information required to be disclosed is injurious or sensitive.

[37] Where the AGC applies to the Federal Court for an order to confirm the prohibition on disclosure, as in this case, the Court must determine whether: the prohibition on disclosure should be confirmed pursuant to subsection 38.06(3) of the *CEA* or whether the information, or parts of it, should be disclosed pursuant to subsection 38.06; or, alternatively, whether the information or parts of it should be disclosed subject to conditions to limit any injury to international relations, national defence or national security pursuant to subsection 38.06(2) of the *CEA*.

[38] The test to be applied by the Court in making this determination was established by the Federal Court of Appeal in *Canada (Attorney General) v Ribic*, 2003 FCA 246 [*Ribic*].

In *Attorney General of Canada v Telbani*, 2014 FC 1051 at para 22, [*Telbani*],

Justice de Montigny described the “*Ribic* test”:

In the exercise of his or her powers under sections 38 et seq of the *CEA*, the designated judge applies the tests developed by the Federal Court of Appeal in *Canada (Attorney General) v Ribic*, 2003 FCA 246. The judge must first determine whether or not the information sought to be disclosed is relevant to the proceedings in which it is intended to be used. The applicant for disclosure bears that burden. If the judge is satisfied that the information is relevant, the judge must then determine whether disclosure of that information would be injurious to international relations, national defence or national security. At this stage, the Attorney General must prove the potential injury if disclosure of the information were to be ordered. Finally, if satisfied that disclosure of the sensitive information would result in injury, the judge must determine whether the public interest in disclosure outweighs in importance the public interest in non-disclosure. The burden of proving that the public interest scale is tipped in favour of disclosure rests with the party seeking it. This three step test was adopted by this Court in a number of cases (see, *inter alia*, *Canada (Attorney General) v Khawaja*, 2007 FC 490, [2008] 1 FCR 547; *Canada (Attorney General) v Canada (Commission of Inquiry into the Actions of Canadian Officials in Relation to Maher Arar)*, 2007 FC 766, [2008] 3 FCR 248; *Khadr v Canada (Attorney General)*, 2008 FC 549), and the parties agree on its application in the present application.

[39] The *Ribic* test continues to be consistently applied — for example, *Attorney General of Canada v Ader*, 2017 FC 838, [*Ader*], *Huang v Canada (Attorney General)*, 2017 FC 662. In the present case, the parties agree that the three-step *Ribic* test governs.

[40] As noted in *Telbani*, at para 22, the party seeking disclosure bears the onus of demonstrating that the information is relevant (*Ribic* at para 17). In the present case, this onus

rests on Ms. Meng. If Ms. Meng demonstrates that the information is relevant, the onus then shifts to the AGC to demonstrate that injury *would* result from disclosure (*Ribic* at para 20). The use of the word “would” signals that the AGC must establish that the resulting injury is probable. If the AGC satisfies this onus, and both relevance and injury are demonstrated, the onus then moves back to Ms. Meng to demonstrate that the public interest in disclosure of this information to her is greater (i.e., outweighs) the public interest in the non-disclosure (i.e., protection) of the injurious information (*Ribic* at para 21).

[41] In the balancing exercise, relevancy alone is insufficient to tip the balance in favour of disclosure. The Court conducts a case-by-case assessment and considers relevant factors (*Canada (Attorney General) v Khawaja*, 2007 FC 490, (2007) 312 FTR 217 [*Khawaja*] at para 93, *Khan v Canada (Minister of Citizenship and Immigration)*, [1996] 2 FC 316 (TD), (1996) 1 FTR 81 [*Khan*] at para 26).

IV. The Submissions of the Respondent, Ms. Meng

[42] Counsel for Ms. Meng submit that the CSIS documents are likely overredacted and that the AGC has made overly broad claims pursuant to section 38. Counsel believe that there is likely further information in the redacted parts that is relevant to Ms. Meng’s abuse of process allegations. Counsel doubt that any injury to a properly claimed national security interest could result from further disclosure of this relevant information. Counsel argue that national security privilege should not be used to cover up the abuse or to protect government officials from embarrassment.

[43] Counsel for Ms. Meng allege that the CBSA, RCMP and FBI, with the awareness of Counsel for the AGC, engaged in a planned scheme whereby the CBSA used or exceeded its powers pursuant to the *Immigration and Refugee Protection Act* for an improper purpose and compelled evidence from Ms. Meng that the CBSA provided to the RCMP and then to the FBI. Counsel submit that this amounted to a covert criminal investigation of Ms. Meng. As noted above, Counsel argue that the alleged conduct surrounding Ms. Meng's arrest violated her *Charter* rights.

[44] Counsel for Ms. Meng describe more specific allegations of abuse of process, which they submit constitute violations of Ms. Meng's *Charter* rights, based on the conduct of the CBSA including:

- arbitrarily detaining Ms. Meng upon her arrival in Canada in violation of the Provisional Arrest Warrant and her rights under section 9 of the *Charter*;
- delaying Ms. Meng's arrest under the Provisional Arrest Warrant, which required her immediate arrest, and in violation of her rights under section 7 of the *Charter*;
- seizing Ms. Meng's electronic devices for criminal investigative purposes under the guise of conducting routine immigration related examinations, in violation of section 8 of the *Charter*;
- compelling Ms. Meng to provide her passwords, in violation of sections 8 and 10(b) of the *Charter*;

- failing to advise Ms. Meng of the reason for her detention, in violation of paragraph 10(a) of the *Charter*; and,
- failing to inform Ms. Meng of her right to counsel, in violation of paragraph 10(b) of the *Charter*.

[45] Counsel for Ms. Meng explain that they seek five types of information relating to the abuse of process allegations: information about the planning of the arrest; information relevant to the interagency cooperation and coordination; information relevant to the execution of the arrest; information about evidence gathering and sharing with respect to Ms. Meng's pass codes; and, details in the CSIS documents disclosed about the identity of the RCMP officer(s) who provided information to CSIS.

[46] Counsel submit that the redacted information of the type described would be relevant to the allegations of abuse of process. Counsel submit that the relevance of the documents disclosed has been largely determined in two ways. First, Counsel argue that ACJ Holmes concluded the documents are relevant. Counsel note that at para 60 of her December 9, 2019 Order, ACJ Holmes stated, "There is no question that these documents are relevant to the allegations."

[47] Second, Counsel for Ms. Meng argue that by virtue of the fact that the AGC disclosed these six CSIS documents, the AGC has conceded that the documents are relevant and responsive to ACJ Holmes' Order. Counsel further submit that the AGC also must have concluded that the disclosure of the redacted documents could not cause any injury to national security.

[48] Counsel acknowledge that the abuse of process allegations are focussed on the actions of the RCMP, CBSA, and FBI and to a lesser extent, the Department of Justice. They further acknowledge that it appears that CSIS was the recipient of information from others. They note that they are not seeking information about operational or investigative methods unless it is related to evidence relevant to the abuse allegations.

[49] Regardless, Counsel for Ms. Meng argue that the unredacted information disclosed is relevant to the abuse of process allegations and that the redacted information in the CSIS documents is likely similar and would be the other “pieces of the puzzle”, including to identify where certain information originated, which would be highly relevant. Counsel submit that the redacted information should also be considered relevant and non-injurious and should be disclosed.

[50] Counsel for Ms. Meng point to the unredacted information in support of their submission that the redacted parts are likely similar information and relevant. For example, Counsel notes that SITREP 1, dated December 1, 2018, was prepared in anticipation of Ms. Meng’s arrest and notes that the arrest “is expected to occur at 16.00 hours”, that a Provisional Arrest Warrant had been issued the previous day, that the RCMP, “with likely CBSA assistance” would execute the arrest warrant, that advanced communication to CSIS came from the FBI, that Ms. Meng was transiting through Canada en route to Mexico; that the FBI would not be present; and that CSIS would update the information as the “issue develops”.

[51] Counsel submit that this SITREP and other documents produced demonstrate that CSIS was involved in communicating with the FBI, RCMP and the CBSA about Ms. Meng's arrest. Counsel submit that SITREP 1, among other things, conveys that CSIS knew that Ms. Meng's arrest would take place later that same day, December 1, 2018, and not when Ms. Meng exited the plane. Counsel submit that redacted parts of SITREP 1 could tell them how CSIS knew this, who in RCMP FPNS provided this information to CSIS, and how CSIS was aware of Ms. Meng's travel details. They submit that this information is relevant, including to possible further inquiries.

[52] Counsel also note that SITREP 3 (December 4, 2018), states that the RCMP informed someone that Ms. Meng spoke with the CBSA "revealing information relevant to a fuller understanding of the case". Counsel submit that CBSA clearly told the RCMP about the results of their questioning of Ms. Meng. Counsel submit that further information about the identity of the RCMP officer(s) who provided this information to CSIS is necessary and would be probative of the abuse allegations that CBSA misused their powers to interrogate Ms. Meng about the charges she faces in the US, which exceeds the authority of the CBSA. Counsel note that the identities of three RCMP officers have already been disclosed in other documents and if it is one of the same officers, there is no reason not to provide this information. Counsel clarified that the name of the CSIS Officer is not relevant.

[53] With respect to the second step of the *Ribic* test, Counsel submit that the information already disclosed is not injurious and more of the same type of information would not be injurious. Counsel further submit that although the AGC may establish some minimal injury

sufficient to require that the Court conduct the balancing exercise, a minimal injury is not enough to outweigh disclosure of information that is relevant and probative of the abuse of process allegations. The nature and extent of the injury must be measured against the probative value of the information.

[54] Counsel submit that a great deal of information regarding the manner of Ms. Meng's arrest has already been made public and the disclosure of additional information of the same type could not likely cause injury.

[55] Counsel note that they now seek additional details in these documents that are not necessarily in the public domain, but that relate to information that is already known.

[56] Counsel for Ms. Meng submit that it is clear that some of the redacted information was provided by the FBI, and that much of the FBI's involvement is already in the public domain as a result of the disclosure of the unredacted parts of the documents at issue. For example, in SITREPs 1, 2 and 3, there are references to contacts between CSIS and the FBI and the FBI and CBSA. Counsel argue that complete disclosure of the full extent of the FBI's involvement in Ms. Meng's arrest is highly relevant to the abuse of process allegations.

[57] With respect to redacted information that may be based on a claim of injury to international relations, Counsel submit that more than mere embarrassment to Canada is required to be established.

[58] Counsel note that the public affidavit of David Hartman is highly critical of China. Counsel question why the AGC would file this public affidavit if Canada were concerned about damaging relations with China. Counsel question what further injury to international relations with China could result from the disclosure of additional information regarding the details of Ms. Meng's arrest. Counsel submit that Mr. Hartman's affidavit does not address China's response to the details or manner of Ms. Meng's arrest, only to the fact of and reason for her arrest. Counsel add that it is also doubtful that the disclosure of relevant information about the manner of Ms. Meng's arrest could damage international relations with the US.

[59] In summary, Counsel for Ms. Meng argue that the redacted information is relevant and dispute that the information would be injurious to national security or international relations. If the Court finds that the information is both relevant and injurious, Counsel argue that in the balancing exercise (the third step in the *Ribic* test), the Court must consider several factors, including: the nature and extent of the injury if the information is disclosed; the probative value of the redacted information; the seriousness of the issues; the admissibility of the documents; and whether the information could be obtained in any other way. Counsel for Ms. Meng made submissions on each factor but emphasize that the key factor is the extent of the injury balanced against the probative value of the information to the allegations.

[60] Counsel note the difficulty in making submissions on the nature and extent of the injury to national security or international relations without knowing the content of the redacted information. Counsel instead advance several principles for the Court's consideration, including that it should be presumed that there would be no injury from the disclosure of information

already made public. Counsel note that the circumstances of Ms. Meng's arrest are in the public domain and submit that the extent of any injury from disclosure of additional information would be minimal.

[61] Counsel note that the specific allegations of abuse indeed raise serious issues that were found to have an air of reality by ACJ Holmes. Counsel further note that if the redacted information is produced to them, whether that evidence is admissible will be determined in the context of the abuse of process claims by ACJ Holmes and is not a consideration for this Court in this Application. With respect to the probative value of the redacted information, Counsel submit that the degree of relevance to Ms. Meng's abuse of process allegations must be considered. Counsel submit that the information is relevant and again note that ACJ Holmes already concluded that the documents sought by Ms. Meng were relevant to her abuse of process allegations.

[62] Counsel further submit that there is a public interest to be considered over and above the public interest in the fair trial of Ms. Meng, which includes human rights and the open court principle.

V. The AGC's Submissions

[63] The AGC notes that this Court is not tasked with determining whether an abuse of process occurred, only to determine whether further information contained in the six CSIS documents at issue should be provided to Ms. Meng.

[64] The AGC emphasizes that the AGC will vigorously contest the allegations of abuse of process in the Supreme Court of British Columbia. The AGC refutes the allegation that there was any plan or conspiracy to deny Ms. Meng of her rights or that her rights were breached. The AGC denies that government officials failed to properly execute the Provisional Arrest Warrant.

[65] The AGC notes that the *Ribic* test requires this Court to first determine the relevance of the information sought, and that the onus to establish relevance rests on Ms. Meng. The AGC emphasizes that the AGC has not conceded the relevance of the documents provided in any way. The AGC notes that in compliance with an order for production or disclosure, the AGC must “cast a very broad net” and take a generous approach to disclosure. The AGC notes that it does not fall to the AGC to determine relevance. Rather, the Court must determine if the party seeking further disclosure of the redacted information has established its relevance.

[66] The AGC acknowledges that Counsel for Ms. Meng have made their submissions without seeing the unredacted documents, but submit that Counsel cannot satisfy their onus to establish relevance by speculating about what the redacted information might reveal or by making statements unsupported by evidence.

[67] The AGC adds that the third step in the *Ribic* test — the balancing exercise — calls for a case-by-case approach. The AGC suggests that factors raised by Counsel for Ms. Meng, including that some information is widely known, are not necessarily germane to the balancing exercise.

VI. The Joint Proposal of the *Amicus* and AGC

[68] The *amicus* and AGC have submitted a joint proposal based on their consideration of the issues raised, the nature of the information sought by Ms. Meng, the nature of the information redacted, and the application of the *Ribic* test.

[69] The *amicus* and AGC propose that specific redactions be lifted and that other redactions be replaced with alternate wording or a summary. The *amicus* and AGC submit that all other redactions must remain and should be confirmed. The primary position of the *amicus* and AGC is that the remaining redacted information is not relevant to the issues raised by Ms. Meng in the context of her abuse of process allegations. The *amicus* and AGC further submit that if any of the redacted information were relevant, its disclosure would be injurious to national security or international relations and that the public interest in disclosure is outweighed by the public interest in protecting this information.

[70] The AGC and *amicus* have identified the following revisions to the redacted documents:

- SITREP 1 — AGC0001 — a summary will be provided on page 1 under synopsis to indicate “*Advanced communications to CSIS came via FBI HQ to CSIS Washington and then via FBI to CSIS HQ.*”
- SITREP 2 — AGC 0002 — three redactions will be lifted:

Under Synopsis: “*BCR informed that*” and “*MENG was travelling with an assistant*”

Under Details: “*The Admin Assistant was released*”

Under Assessment: “*Senior U.S. officials would have had to possess an understanding of the risk to bilateral U.S. China Relations*”

- Email — December 5, 2018 — ACG 0003 — the paragraph that had been redacted for reasons other than asserted in this Application (e.g. non-responsive) has been lifted. As a result, the document will include the sentence “*The FBI has asked the RCMP for surveillance on MENG in the event that she is released to ensure bail conditions are met. The RCMP was amenable, however, advised that they were unable to afford coverage on a 24/7 basis.*”
- SITREP 3 — AGC 0004 — on page 2, toward the end of the Details section, a summary is provided in lieu of the redacted word or words. The summary states, “*RCMP FPNS informed CSIS on 2018 12 04 that MENG and JI talked to CBSA for some time revealing information relevant to a fuller understanding of the case.*”
- Handwritten notes of a CSIS Officer —AGC 0005 — All of the redactions on the first page of AGC 0005 are lifted. These notes pertain to Ms. Meng’s travelling companion and set out her date of birth, passport number, job title, and general travel itinerary.

- Operational Notes — AGC 0006 — in the Synopsis on page 1, a redaction is lifted, to provide “*MENG travelling in the company of Ji Hui, (dob...) President of Finance department for HUAWEI (MENG’s direct subordinate). JI allowed entry to Canada to continue travel to Costa Rica.*”
- At the top of page 2 a summary is provided in lieu of the redacted text. The summary provides “*On December 1, 2018 a CSIS officer received information from Supt B McRea and BSO L. Tse, CBSA Passenger Operations Vancouver international Airport.*”

VII. The Prohibition on Disclosure is Confirmed, subject to additional lifts as jointly proposed by the *Amicus* and AGC

[71] Notwithstanding the joint proposal of the *amicus* and AGC, the Court must determine — in accordance with the statutory provisions and the governing jurisprudence, as explained above, and the submissions received — whether the prohibition on disclosure of the remaining redacted information should be confirmed. The Court cannot simply “rubber stamp” the joint proposal.

[72] The submissions of Counsel for Ms. Meng regarding the specific allegations of abuse of process, and their theory that there was a planned coordinated approach that failed to respect Ms. Meng’s *Charter* rights, have been informative and carefully considered in assessing the relevance of the redacted information.

[73] Counsel for Ms. Meng submit that ACJ Holmes has already determined relevance of the documents at issue. As noted above, ACJ Holmes found that the documents requested met the applicable *Larosa* test for disclosure in an abuse of process claim. I acknowledge that ACJ Holmes clearly stated that the documents set out in her Order were relevant to the abuse of process allegations. However, I do not agree with Counsel for Ms. Meng that ACJ Holmes' finding in that context means that the relevance of the information contained in the particular CSIS documents subsequently disclosed by the AGC has been established to the extent that this satisfies the first part of the *Ribic* test. ACJ Holmes ordered that documents "relating to" various communications between those involved in the arrest of Ms. Meng be provided to Ms. Meng. At that point, ACJ Holmes did not know the contents of the specific documents that were later disclosed. The list of documents set out in ACJ Holmes' Order did not refer to any specific documents, including from CSIS, nor could it. As noted above, in response to ACJ Holmes' Order, the AGC produced over 1200 pages of documents, including redacted documents, and subsequently produced the six CSIS documents at issue in this Application.

[74] I also do not agree with Counsel for Ms. Meng that the AGC's production of the six redacted CSIS documents means that the AGC has conceded that all the information in these documents is relevant. The AGC explained that it is not the AGC's role to determine what is relevant, rather, that the AGC must take a broad view of potential relevance as required to meet the threshold established in *R v Stinchcombe* [1991] 3 SCR326, 68 CCC (3d) 1.

[75] The determination of the section 38 Application is a separate proceeding, with its own three-part test, which first requires that the party seeking disclosure of redacted information demonstrate that the information is relevant.

[76] A respondent in a section 38 application is at some disadvantage in meeting their onus to demonstrate the relevance of the information that they cannot see. In this Application, to address this disadvantage, Counsel for Ms. Meng made extensive submissions about the underlying issues and the specific allegations of abuse of process arising from Ms. Meng's arrest on December 1, 2018. Counsel for Ms. Meng also made extensive submissions in the context of Ms. Meng's motion for the appointment of an *amicus*, which explained the events that transpired upon her arrival in Canada and set out her allegations of abuse of process. In addition, the December 9, 2019 Order of ACJ Holmes describes the events and the allegations of abuse of process, which Ms. Meng submits accurately captures her position.

[77] Counsel for Ms. Meng made some assumptions about the nature of the redacted information in advancing their arguments for the disclosure of that information. This is understandable and is not a criticism. Counsel also set out the type of information that they expect or hope to be in the documents and why this information would be relevant.

[78] All these submissions have alerted the Court and the *amicus* to the nature of the information that would be relevant to the allegations of abuse and the theory advanced. The Court has viewed the redacted documents and the proposal of the AGC and *amicus* with these submissions front of mind.

[79] Counsel for Ms. Meng submit that information about the planning of Ms. Meng's arrest would be relevant; for example, when did the planning begin, who was involved and the related communications about that planning.

[80] There is no information in the CSIS documents relevant to the planning of Ms. Meng's arrest beyond what has already been provided in the unredacted documents. The documents set out information provided to CSIS by others about the arrest of Ms. Meng. For example, the unredacted parts of SITREP 1 notes that advanced communication to CSIS came via the FBI. The joint proposal of the *amicus* and AGC includes additional information about how CSIS obtained information noted in the SITREP.

[81] Counsel for Ms. Meng submit that information relevant to the interagency cooperation and coordination involving the FBI, RCMP and CBSA is relevant. They want to know who was involved and how and how were they communicating.

[82] The CSIS documents do not include information relevant to this issue. However, the Court notes that the AGC lifted a redaction in a document that was included in the six CSIS documents that was not based on the section 38 claim, relating to information provided to CSIS by the FBI.

[83] Counsel for Ms. Meng submit that information related to the execution of the arrest, from the time that Ms. Meng exited the plane, would be relevant, including information about who was involved, their communications, and reports to the AGC Counsel who had provided advice with respect to the arrest pursuant to the *Extradition Act*.

[84] The CSIS documents do not provide additional information relevant to the execution of Ms. Meng's arrest. The unredacted parts of SITREPs 2 and 3 note that the arrest was executed and the next steps as reported to CSIS by others. The Operational Notes also report that the arrest was made by the RCMP.

[85] Counsel also seeks information about evidence gathering and sharing with respect to Ms. Meng's pass codes. Counsel for Ms. Meng assert that the FBI requested that the pass codes of Ms. Meng's electronic devices, which were obtained by CBSA and provided to the RCMP. Counsel seek information about who and how this information was shared with the FBI.

[86] The CSIS documents do not provide information relevant to Counsel's concern about evidence gathering or the sharing of pass codes.

[87] Counsel also seeks the identity of the RCMP officer(s) who provided information to CSIS as noted in the unredacted parts of the documents produced. Counsel submits that the identity of RCMP officer(s) is important because they seem to know about the events of December 1, 2018, and their identity could support additional inquiries.

[88] The Court notes that the AGC has subsequently provided Counsel for Ms. Meng with the name of the RCMP officer who provided information to CSIS, which CSIS noted in SITREP 3 about the questioning of Ms. Meng by the CBSA. This responds to the submissions of Counsel for Ms. Meng that they want to know the identity of the RCMP officer to determine whether they have all the relevant documents from the RCMP.

[89] The joint proposal also includes the provision of a summary in the Operational Notes (AGC 0006) that identifies the CBSA Officers who provided the information to CSIS.

[90] To extent that the CSIS documents remain redacted, the Court finds that the redacted information is not relevant. The redacted information does not respond to or illuminate the allegations of abuse of process and is not the type of information that Counsel for Ms. Meng noted would be relevant. Apart from the additional disclosure provided by way of lifts, short summaries and the provision of the names of the RCMP Officers, there is no further information in the CSIS documents that is relevant to the abuse of process as claimed by Ms. Meng.

[91] If any of the redacted information were marginally relevant — which it is not — the Court would find that its disclosure would be injurious. Taking into account the relevant factors, including the probative value of such information and the nature and extent of the injury, the Court finds that the public interest in disclosure to Ms. Meng of the remaining redacted information would be outweighed by the public interest in non-disclosure (i.e. safeguarding) that information.

[92] In conclusion, the prohibition on the disclosure is confirmed with respect to the information that remains redacted in the six CSIS documents at issue and which has not been lifted or summarized.

[93] The Application Record, the Respondent's Record and the evidence and submissions received in the *ex parte in camera* proceedings will be kept in the Designated Proceedings Registry of the Federal Court as a Court of record.

JUDGMENT

THE COURT'S JUDGMENT is that:

1. The Application is granted to prohibit the disclosure of the redacted information in accordance with the joint proposal of the *amicus* and Attorney General of Canada.
2. The prohibition on the disclosure of any redacted information in the six documents that are the subject of this Application that has not been lifted or summarized in accordance with the joint proposal of the *amicus* and Attorney General of Canada and the reasons of the Court is confirmed in accordance with subsection 38.06(3) of the *Canada Evidence Act*.
3. The Attorney General of Canada shall propose any necessary redactions to this Judgment and Reasons within three days, after which time, the Judgment and Reasons will be issued publicly.
4. The Attorney General of Canada shall provide the Respondent with replacement pages for the documents that are the subject of this Application reflecting the joint proposal and reasons of the Court.
5. The Attorney General of Canada shall provide ACJ Holmes, Supreme Court of British Columbia, with a copy of this Judgment and Reasons.

6. The *ex parte* Court records relating to this Application shall be kept under seal at the Federal Court's secure facility, to which the public has no access.

7. There is no order as to Costs.

"Catherine M. Kane"

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: DES-2-20

STYLE OF CAUSE: THE ATTORNEY GENERAL OF CANADA v.
WANZHOU MENG

PLACE OF HEARINGS: OTTAWA, ONTARIO

DATE OF HEARINGS: JULY 27 AND JULY 30, 2020

JUDGMENT AND REASONS: KANE J.

DATED: AUGUST 20, 2020

APPEARANCES:

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