

CANADA / JUDGMENT

United States v. Meng

2020 BCSC 1461

COURT

Supreme Court of British Columbia

DECIDED

1 October 2020

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2020 BCSC 1461 United States v. Meng

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

United States v. Meng,

2020 BCSC 1461

Date: 20201001

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/Applicant

Amended Ruling: Cover page amended on October 8, 2020. This ruling was originally sealed and was unsealed by order of the Court on October 7, 2020 for the purpose of releasing it to the Person Sought and for publication.

Before: The Honourable Associate Chief Justice H. Holmes

Ruling re Privilege

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Appearing on August 17, 2020 only.

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Place and Dates of Hearing:

Vancouver, B.C.

August 17, 19 and 20, 2020

Place and Date of Judgment:

Vancouver, B.C.

October 1, 2020

INTRODUCTION

[1] In this application, Ms. Wanzhou Meng seeks a determination of whether claims of privilege are made out in documents (or portions of documents) withheld from disclosure by the Attorney General of Canada in the extradition proceedings on behalf of the United States of America.

- [2] These reasons will be released in this form only to counsel for the Attorney General and Amici Curiae (whose involvement is described below). Counsel's submissions are then requested concerning whether the reasons may then be released (either in full or in redacted form) to Ms. Meng and her counsel, and the public.

BACKGROUND

- [3] The issue arises from an order for disclosure following a Larosa application, granted on December 9, 2019: *United States v. Meng*, 2019 BCSC 2137. The order was for disclosure of documents relevant to the branch of Ms. Meng's abuse of process claim related to the events of her arrest at the Vancouver International Airport. It expressly recognized that the Attorney General may claim that some of the documents falling within the scope of the order may be subject to one or more privileges, and contemplated that a process such as led to this hearing would take place to determine whether any such claims should be upheld.
- [4] In the months following the order, the Attorney General disclosed a large number of documents to Ms. Meng. Many of the documents were redacted to reflect privilege claims of various types, as well as to remove irrelevant or non-responsive content. The Attorney General also withheld 162 documents entirely because of privilege claims, and gave Ms. Meng a Laporte list setting out brief descriptions of those documents.
- [5] Ms. Meng communicated various objections to the withholding of some of the documents on the Laporte list, and to many of the redactions from the other documents disclosed. Some of the objections were resolved between counsel, but many were not. In June 2020, counsel proposed the appointment of an amicus curiae to assist the Court in the determination of the outstanding disputes.
- [6] I appointed Mr. Anil Kapoor as amicus on terms agreed to by the parties. Later, Ms. Victoria Cichalewska was added as co-amicus to work with Mr. Kapoor on the same terms. Mr. Kapoor had served as amicus in parallel proceedings in the Federal Court of Canada concerning the Attorney General's claim of privilege based on s. 38 of the Canada Evidence Act, and was familiar with the issues relating to Ms. Meng's abuse of process claim.
- [7] So that the amici could most effectively assist the parties and the Court in resolving the disputes, the terms of their appointment allowed for extensive communication with both parties, while also ensuring that privileged material would not be revealed. In particular, the amici were permitted to communicate with Ms. Meng's counsel for the purposes of understanding areas of interest to Ms. Meng, and advising on whether her objections were worthy of dispute. The amici were also permitted to ask the Attorney General for further information to explain or justify the objections to disclosure. If disputes remained unresolved and a hearing became necessary, the amici would be invited to make submissions at both the public and any in camera (closed courtroom) portions of the hearing. The amici would also ensure that Ms. Meng was not excluded from the hearing any more than necessary to protect the privilege in issue.

- [8] When the amici were first appointed, the disputed privilege claims related to communications in a total of approximately 400 documents. The amici's participation was valuable in reducing that number to approximately 44, grouped into five categories, by the time the amici filed their Amici Curiae Record for the hearing. Further discussions among counsel reduced the areas of dispute still further to three categories by the time of the hearing, and then, during the hearing, to only one category involving 19 documents.
- [9] The hearing took place over three days. The first day took place in open court, with Ms. Meng present. Ms. Meng's counsel made submissions, as did counsel for the Attorney General on matters of broad principle. The second and third days of the hearing took place in camera, with only the Attorney General and the amici attending, to avoid disclosure of any privileged material under review in the hearing. I reserved judgment after the hearing.
- [10] I will note that the amici identified no issues or topics addressed in the in camera proceedings about which Ms. Meng should be invited to make further submissions.
- [11] As I will discuss, the Attorney General asserts, variously, solicitor-client privilege, litigation privilege, and public interest privilege in respect of the disputed communications. The amici submit that some of these communications never were subject to privilege, and, in respect to most or all of the disputed communications, that any privilege that may once have existed has been waived through the disclosure of other communications.
- [12] I propose to briefly outline the law that applies, given the parties' positions, and then discuss how it applies to the communications in issue. Before I do that, I will make some comments about the record in the in camera proceedings because it is potentially very confusing.

THE RECORD

- [13] For the in camera portion of the hearing, amici and the Attorney General tendered electronic and paper copies of the documents in issue. Claims of privilege were shown on the documents by colour-coded shading, different colours for each type of privilege claim or to show content redacted because irrelevant or outside the scope of the disclosure order. The Amici Curiae Record (consisting of three volumes) also included documents disclosed to Ms. Meng which the amici relied on in support of the position that certain privileges had been waived.
- [14] The colour-coding system led to some confusion in the hearing for various reasons. Red and pink, representing respectively solicitor-client and litigation privilege, printed as a similar shade, and sometimes did not print in colour at all. Coinciding claims of different privileges, represented by different colours, produced some mystifying shades such that the individual claims were difficult to discern or isolate.

- [15] To address these and other problems, the Attorney General kindly filed (on August 25) a revised Binder 1. This binder includes the disputed documents (at tabs 1-19) with the privilege claims represented by a new and different colour-coding system. It should therefore be noted that, for example, red in the original Record represented solicitor-client privilege, but red in the new Binder 1 represents litigation privilege (and green represents solicitor-client privilege).
- [16] Further clarity was still necessary.
- [17] This was in part because similar colour-related problems continued, and in part because the parties' positions changed in various ways and for various reasons. Some changes of position resulted from counsel's helpful discussions aimed at resolving the disputed issues. At least one change was to correct an earlier oversight. Significant changes resulted because the Attorney General's counsel learned only during the hearing that some of the documents in issue, or material to the dispute, had been disclosed in Ms. Meng's civil proceedings against CBSA officers and the Attorney General. This new information led not only to changes in the Attorney General's position concerning a number of documents, but also to changes in the evidentiary basis for the amici's position that certain privileges had been waived. There were resulting changes to the numbers used by counsel to identify some of the documents, to reflect the fact that they were now known to have been disclosed.
- [18] To clarify the parties' positions in relation to the documents in issue and the evidentiary record on which the privilege claims were to be assessed, the Court sent a series of memoranda to counsel for the Attorney General and the amici, and received their helpful joint responses. The in camera evidentiary record, which is maintained under seal, available only to the Attorney General and the amici, should be read as including these memoranda and responses:
- a) Letter from Mr. Gibb-Carsley, Department of Justice Canada, dated August 25, 2020;
 - b) Letter from Mr. Gibb-Carsley, Department of Justice Canada, dated August 26, 2020;
 - c) Memorandum to Counsel from the Court, dated September 9, 2020;
 - d) Letter from Mr. Gibb-Carsley, Department of Justice Canada, dated September 10, 2020;
 - e) Memorandum to Counsel from the Court, dated September 15, 2020; and
 - f) Letter from Mr. Gibb-Carsley, Department of Justice Canada, dated September 15, 2020.
- [19] The joint responses provided the necessary clarification, except on one point that the Court concludes must reflect a clerical error in the preparation of exhibits to an affidavit in the original Record. Documents that are appended as exhibit G to the Court's copy of the affidavit evidently appear as exhibit F to counsel's copy. However, a numbering system on the documents themselves allows them to be adequately identified for the record and for the purposes of these reasons.

- [20] Because the review of the privilege claims has therefore been a complicated task, counsel for the Attorney General and amici are invited to arrange to make further submissions at their earliest convenience if it appears that a privilege claim or a response to a claim may have been misunderstood. In such an event, the Court will reconsider the claim.

LEGAL PRINCIPLES

- [21] Privileges create exceptions to the usual rules requiring disclosure. If a document is protected by a privilege, a party cannot be compelled to disclose it, or the information it contains, unless an exception (usually rare and circumscribed) applies or the benefit of the privilege has been properly waived.
- [22] The types of privilege at issue in this application are solicitor-client privilege, litigation privilege, and public interest privilege. I will briefly outline the nature and scope of each of these, before then addressing whether and how their benefit may be waived.

Solicitor-Client Privilege

- [23] Solicitor-client privilege is based on the needs of the administration of justice. It reflects the fact that clients seeking legal advice must be able to speak candidly with their lawyers without fear that what they say will be disclosed without their consent. The privilege is thus essential to the functioning of the solicitor-client relationship, and to the administration of justice: *Smith v. Jones*, [1999] 1 S.C.R. 455 at paras. 45-46.
- [24] For a communication to be protected by solicitor-client privilege, three criteria apply: (a) the communication must be between lawyer and client; (b) it must involve the seeking or giving of legal advice; and (c) the parties must intend the communication to be confidential: *Pritchard v. Ontario (Human Rights Commission)*, 2004 SCC 31 at para. 15.
- [25] Communications between government "in house" lawyers and their clients may well attract solicitor-client privilege. However, the privilege does not necessarily apply to all communications within the scope of the employment relationship, or even to all advice given by the lawyer. Rather, whether solicitor-client privilege applies will depend on the nature of the relationship between the lawyer and the other government party, the content of the advice, and the circumstances in which the advice was sought and given: *R. v. Campbell*, [1999] 1 S.C.R. 565 at para. 50.
- [26] There are few bases on which solicitor-client privilege can be set aside, and none of them are suggested to apply in this case. Suffice it simply to note that, solicitor-client privilege, though not absolute, is nearly impenetrable (*R. v. McClure*, 2001 SCC 14 at paras. 34-35). The rare circumstances in which it may be set aside are clearly defined, and do not involve a balancing of interests on a case-by-case basis.

Litigation Privilege

- [27] Litigation privilege is intended to "ensure the efficacy of the adversarial process": *Blank v. Canada (Minister of Justice)*, 2006 SCC 39 at para. 27. It is not limited to lawyer-client communications, but extends to all communications or material for which the dominant purpose was litigation, ongoing or reasonably anticipated. This is in order to create a "zone of privacy" in which the parties may consider and prepare their cases without adversarial interference or a requirement of premature disclosure: *Blank* at paras. 27, 34.
- [28] Reflecting its purpose, the privilege protects communications between a solicitor and third parties, work-product materials, and otherwise non-confidential materials such as expert reports, if they are made or created for the dominant purpose of litigation. The privilege does not protect factual information: *R. v. Papasotiriou-Lanteigne*, 2016 ONSC 6145 at para. 31.
- [29] Although less absolute than solicitor-client privilege, litigation privilege too is a class privilege, not a privilege determined case-by-case after a balancing of other interests.
- [30] Where a party establishes that litigation privilege applies, a presumption of non-disclosure arises: *Lizotte v. Aviva Insurance Company of Canada*, 2016 SCC 52 at para. 33.
- [31] Once the litigation for which the material was prepared has ended, so too does the privilege (unless there is related litigation pending or reasonably apprehended). There is no longer a reason to shield the information from disclosure: *Blank* at paras. 34-36.

Public Interest Privilege

- [32] Solicitor-client and litigation privilege, described above, are class privileges, which means that any communications or documents falling within the scope of the criteria are protected by the privilege, absent one of the very limited exceptions: *Lizotte* at para. 4. Public interest privilege, by contrast, is considered on a case-by-case basis when a government or government official claims that disclosure of the indicated information would be contrary to the public interest. Common examples include police investigative techniques or the protection of an individual's identity.
- [33] Public interest privilege may be asserted under the common law or under s. 37 of the *Canada Evidence Act*.
- [34] The Crown bears the burden of establishing the basis for a claim of public interest privilege: *R. v. Cook*, 2014 ONCA 170 at para. 19. A determination of whether the privilege applies requires the careful weighing of the competing interests engaged by protecting the information, on one hand, or disclosing relevant evidence in the litigation, on the other: *Dudley v. British Columbia*, 2016 BCCA 328 at para. 104.

Waiver of Privilege

- [35] The protection of any of the privileges discussed above may be lost if the holder of the privilege is found to have waived it.
- [36] Waiver of a privilege may be explicit, where there is a voluntary intention to set aside the privilege. Or, waiver may be implicit, without a voluntary intention to waive, where the holder of the privilege conducts themselves in such a way that it would be unfair to allow the privilege to subsist. McLachlin J. (as she then was) explained this in *S. & K. Processors Ltd. v. Campbell Avenue Herring Producers Ltd.* (1983), 45 B.C.L.R. 218 at 220 (S.C.) as follows:

Waiver of privilege is ordinarily established where it is shown that the possessor of the privilege: (1) knows of the existence of the privilege; and (2) voluntarily evinces an intention to waive that privilege. However, waiver may also occur in the absence of an intention to waive, where fairness and consistency so require. Thus waiver of privilege as to part of a communication will be held to be waiver as to the entire communication. Similarly, where a litigant relies on legal advice as an element of his claim or defence, the privilege which would otherwise attach to that advice is lost *Rogers v. Hunter*, [1982] 2 W.W.R. 189, 34 B.C.L.R. 206 (S.C.).

- [37] Implicit waiver may take place where a party does not expressly waive privilege, but takes a position in relation to privileged materials that is inconsistent with maintaining the privilege. This may be by, for example, selectively disclosing part of a privileged document or a category of privileged documents on a particular subject, but withholding the remainder of the document or other documents on that same subject. In these circumstances, to uphold the privilege over the remaining communications would be unfair, because the opposing party and the court would be deprived of access to the full narrative. In *Huang v. Silvercorp Metals Inc.*, 2017 BCSC 795 at para. 143, Madam Justice Warren explained:

The common thread in the cases where implied waiver is found is that the privilege holder has attempted to use and, at the same time, to shelter behind privileged documents. In such cases, fairness and consistency require production because the privilege holder uses the privilege as a sword to justify or explain a position or action while also using the privilege as a shield to prevent the other party from testing the justification or explanation.

- [38] In a case of the selective disclosure of privileged documents, fairness and consistency require the disclosure of all documents on the same subject so to ensure that the partial disclosure does not give an unfair advantage or create a misleading picture: *McDermott v. McDermott*, 2013 BCSC 534 at paras. 113-117; *Huang* at para. 149.
- [39] Waiver will cause loss of privilege only in relation to the particular subject matter over which privilege has been waived. This limit ensures that waiver extends only as far as is necessary to ensure fairness: *R. v. Sipes*, 2012 BCSC 635 at para. 22; *Biehl v. Strang*, 2011 BCSC 213 at para. 47.

DISCUSSION

- [40] The communications in issue appear in 19 documents that counsel grouped as "category 2". All but one of these documents consist of chains of emails among or between lawyers and staff with the DOJ or the CBSA, typically including between about two and eight email messages.
- [41] For a few documents, privilege is claimed over the entirety of the document. For many other documents, privilege is claimed in respect of multiple portions of the document (in addition to the undisputed claims of irrelevance or non-responsiveness regarding, in the main, contact details of senders and recipients of the communications). In a few cases, different privileges are claimed over communications within a single document, those claims sometimes overlapping. Similarly, the position of the amici varies claim by claim, and sometimes redaction by redaction.
- [42] In most, perhaps all, instances, the amici contend that any privilege has been waived by the disclosure of other documents. In some instances, the amici contend that the claimed privilege never did apply. There is no suggestion, by the amici or in the documents, that the communications over which privilege is claimed themselves show improper conduct by Canadian officials. The amici instead focus on the argument that disclosure is necessary to provide a complete picture of the events, and ensure a fair process.
- [43] For these reasons, I will approach the task by grouping the documents in issue into further sub-groups, in order to address some general themes that arise from the claims and the parties' positions, and to indicate my conclusions on that basis.

Solicitor-client privilege claims regarding internal IAG communications after emergency oral MLAT Request

- [44] The documents listed below consist of emails among counsel and legal staff of the DOJ's International Assistance Group (IAG) following an emergency oral request under the Mutual Legal Assistance Treaty (MLAT) from the US Office of International Affairs (OIA) for copies of records created in the course of CBSA officers' dealings with Ms. Meng at the Vancouver International Airport around the time of her arrest:
- a) EXT_RESP-00116;
 - b) EXT_RESP-00117;
 - c) EXT_RESP-00240; and
 - d) EXT_RESP-00246.
- [45] The Attorney General asserts solicitor-client privilege in relation to the redacted portions of these emails on the basis that they relate to internal discussions between IAG lawyers and legal staff sharing advice, opinions, updates, and instructions about the incoming MLAT request. The amici submit that if any privilege once attached to these communications, it

was waived when the Attorney General disclosed an email outlining the content of the request, along with records of related communications between the IAG and the US Department of Justice illustrating efforts by the US to obtain the CBSA records by way of an MLAT request.

- [46] I agree with the Attorney General that the communications in issue are subject to solicitor-client privilege, and that the privilege has not been waived. Almost all of the communications are among IAG lawyers and, in broad terms, appear to be directed, though sometimes not immediately, to formulating legal opinions about how the IAG would respond to the MLAT request. By contrast, the disclosed communications on which the amici rely in support of the position that the privilege was waived, relate to a different aspect of the MLAT request. They set out the content and circumstances of the US's MLAT request, and some of them convey to the US the decision of IAG counsel rejecting the request, but they do not reflect the internal communications among IAG counsel relating to the legal evaluation of the request. I cannot agree with the amici that the withheld communications and the disclosed communications are all the same meatloaf, but in different "Tupperware" containers. If the MLAT request is the meatloaf, its legal evaluation is the separately served gravy.
- [47] I have considered whether one or both of two portions of emails each appearing in documents EXT_RESP-00240 and EXT_RESP-00246 reflect no more than factual narrative relating to the MLAT, and not communications for the purpose of giving or seeking legal advice. These are portions of emails sent by IAG Director General, Janet Henchey, to IAG Senior Counsel. On a review of the email chains as a whole, I conclude that although these portions do include background, they are nonetheless functionally intrinsic to the legal opinions expressed in other portions, and that they are therefore subject to the privilege. They are part of the "continuum of communications" in which the legal opinion is provided: *British Columbia (Attorney General) v. Lee*, 2017 BCCA 219 at para. 33.

Internal communications about an anticipated written MLAT request

- [48] The documents listed below, each consisting entirely of emails, reflect internal CBSA communications or communications between CBSA counsel and IAG counsel about the management of and response to a further MLAT request from the US, anticipated to be arriving in written form. For some of the documents, solicitor-client privilege is claimed over the entirety. For others, solicitor-client privilege and/or litigation privilege is claimed over one or more of the emails in a chain, or over certain portions of the text within an email:
- a) EXT_RESP-00241;
 - b) EXT_RESP-00244;
 - c) EXT_PRIV-00064_R01;

- d) EXT_PRIV-00066;
- e) EXT_PRIV-00068;
- f) EXT_PRIV-00069;
- g) EXT_PRIV-00070_R01.
- h) EXT_PRIV-00075;
- i) EXT_PRIV-00076;
- j) EXT_RESP-00126_R02;
- k) EXT_RESP-00129_R02; and
- l) EXT_RESP-00157_R01.

- [49] The Attorney General claims solicitor-client privilege over the entirety of documents EXT_PRIV-00068, EXT_PRIV-0069, EXT_PRIV-00075 and EXT_PRIV-00076. Solicitor-client privilege is also asserted over page one of EXT_PRIV-00064_R01, the first half-page of EXT_PRIV-00066 and page one of EXT_PRIV-00070_R01. I am satisfied that the withheld content in these seven documents is subject to solicitor-client privilege. The content shows internal information-sharing among CBSA counsel and their clients and the giving of direction, with the objective of developing and providing legal advice to CBSA.
- [50] I cannot agree with the amici that the privilege in these communications has been waived through the disclosure of other communications, either internal to CBSA or otherwise. The subject matter of those other communications relates to different aspects of the MLAT request, such as when US officials expected to send it, and when they would like to receive the requested records. I do not find that to maintain the privilege would be inconsistent or unfair.
- [51] For EXT_RESP-00241 and EXT_RESP-00244, solicitor-client privilege is claimed in respect of only small portions. These two documents are near-duplicate email message chains between CBSA legal counsel and CBSA senior staff, on one hand, and IAG legal counsel, on the other. I have considered whether some or all of the portions in issue relate only to the anticipated timing and management of the MLAT request, and not to a legal assessment of its content, or legal advice about how to deal with it. However, I have come to the view that, read in the full context of the email chains and other communications, they implicitly convey legal opinions or advice and are therefore subject to the privilege.
- [52] As disclosed to Ms. Meng, documents EXT_RESP-00126_R02 and EXT_RESP-00129_R02, which are overlapping internal email communications among CBSA staff and lawyers, are subject to extensive redactions for irrelevance or are non-responsiveness to Ms. Meng's abuse of process claims. The amici do not challenge these redactions, and I agree that the redactions are appropriate. Solicitor-client privilege is claimed in respect of some of the remaining content, and I agree that that claim is appropriate too. The short redactions on

pages one and two of EXT_RESP-00126_R02, and on pages two and three of EXT_RESP-00129_R02 consist of internal communications among CBSA staff regarding their legal counsel's strategy. The longer portion of redacted content on pages one and two of EXT_RESP-00129_R02 consists of communications that relate to the seeking and provision of legal advice.

- [53] For reasons similar to those given above in relation to other redactions, I conclude that the privilege in the redacted portions of EXT_RESP-00241, EXT_RESP-00244, EXT_RESP-00126_R02 and EXT_RESP-00129_R02 was not waived through the disclosure of other communications, and it would not be inconsistent or unfair in the circumstances to maintain the privilege.
- [54] Document EXT_RESP-00157_R01, consisting of one page of emails, is subject to a claim of litigation privilege over approximately two-thirds of its content. The first (chronologically last) email with redacted content is between CBSA counsel and is dated December 27, 2018. By that time, Ms. Meng's bail proceedings were complete, and CBSA must have been aware that litigation was looming on various fronts, including through this proceeding and through Charter breach allegations in a civil suit brought by Ms. Meng against CBSA officers shortly thereafter. I find that the redacted content was created for the dominant purpose of reasonably contemplated litigation, and that the privilege has not been waived.
- [55] The redacted content in the middle of EXT_RESP-00157_R01 does not appear to be subject to litigation privilege. However, the content reflects communications between a CBSA lawyer and client, and appears to be protected by solicitor-client privilege, which has not been waived. Indeed, the same content appears also in EXT_PRIV-00076, for which, as discussed above, solicitor-client privilege protects the entirety.

Other Documents

- [56] The remaining documents each require separate consideration:
- a) EXT_RESP-00236;
 - b) EXT_RESP-00237; and
 - c) EXT_RESP-00238.
- [57] Claims of public interest privilege and litigation privilege are made over some large portions and many smaller portions of EXT_RESP-00236.
- [58] The Attorney General made a public interest privilege claim under s. 37 of the Canada Evidence Act in relation to certain documents which are not at issue in this application. In accordance with that section, the Attorney General certified (through a document sworn by counsel from the IAG and marked as a sealed exhibit) that disclosure of certain indicated documents would be contrary to the public interest because of the public interest in protecting the confidentiality of state-to-state communications. The certificate explained that Canada's relationship with the United States depends on mutual trust, and that state-to-

state communications must therefore be open, candid, and unconstrained by possible disclosure.

- [59] Document EXT_RESP-00236 (previously named EXT_PRIV-0062) is not one of the documents listed in the Attorney General's certificate, and therefore common law principles, instead of the s. 37 framework for analysis, apply to the claim of public interest privilege. However, in submissions in the in camera portion of the hearing, the Attorney General explained that the basis for the public interest claim at common law is the same as the basis set out in the certificate.
- [60] The Attorney General explained that the public interest privilege in the state-to-state communications in EXT_RESP-00236 was waived in respect of certain communications relating directly to Ms. Meng's allegations, namely discussions between the IAG and OIA about the anticipated MLAT request by the US or about the actual request. However, the Attorney General submits that the waiver does not apply to the other communications in the document, because they are of a qualitatively different character. The amici disagree, and submit that, with the disclosure of the communications relating to the MLAT request, the privilege is waived in relation to the entirety of the narrative disclosed by the communications in the document.
- [61] Beginning with the redacted content on pages three to six of EXT_RESP-00236, I find that it is properly the subject of public interest privilege, and that the privilege has not been waived by the disclosure of other portions of the document. The communications in pages three to six relate to different topics than the subject matter of the portions over which privilege was expressly waived.
- [62] Page two of EXT_RESP-00236 requires more specific discussion. Claims of public interest privilege and litigation privilege are asserted over one line of an email from the IAG Director General, Ms. Henchey, to the Associate Director of the OIA at the US Department of Justice. In her email, Ms. Henchey is responding to a question posed by the OIA official, which has been disclosed. The official's question asks Ms. Henchey for her thoughts about making an MLAT request to CBSA to obtain CBSA information urgently in order to review it.
- [63] The Attorney General has disclosed the first sentence of Ms. Henchey's response: "You would have to have grounds to obtain the CBSA records". However, the second and final sentence in the response is redacted. Then follow emails in which the OIA official offers that they had other thoughts as well, and arrangements were made for a telephone call requested by the OIA official.
- [64] As to this portion of the narrative, I agree with the amici that the current disclosure presents Ms. Meng with an incomplete, and therefore potentially misleading, picture. Although Ms. Henchey's email in its entirety responded directly to the question asked of her, only part of the response has been disclosed. In this instance, and in the circumstances of this case, I conclude that the public interest relied on by the Attorney General in support of the privilege is outweighed in importance by the public interest in disclosure. Fairness and

consistency require the disclosure of the second sentence in Ms. Henchey's response. If the disclosure of the name mentioned in that sentence raises concerns, counsel may redact it, subject to the amici's review and further submissions of the parties, if necessary.

- [65] I should note that the Attorney General also claims litigation privilege in relation to this document. However, no details were provided and no submissions were made about this claim, and I do not determine it.
- [66] Document EXT_RESP-00237 is described as the notes of an IAG lawyer, and solicitor-client privilege is claimed over a short redacted portion. The handwritten notes are undated, and the context in which they were made was not described, and no submissions specific to the document were made in the hearing. Based on the Attorney General's assertion and the broad application of solicitor-client privilege, I am prepared to accept that the notes are privileged and that the privilege has not been waived. However, I will reconsider those conclusions if counsel wish to provide further details or make further submissions.
- [67] The redacted portion in issue in document EXT_RESP-00238 appears in a one-sentence email from Ms. Henchey to another IAG lawyer forwarding an email from CBSA counsel (which has been disclosed), and, I agree with the Attorney General, is properly subject to solicitor-client privilege. Was the privilege waived by the disclosure of an email (in EXT_RESP-00238) sent by Ms. Henchey one minute later to counsel in this proceeding? I conclude that it was not, because the statement was made in the context of a different relationship and for a different purpose. The statement to counsel in this proceeding was essentially a report of the state of affairs, while the statement to an IAG colleague was part of the continuum of directions and discussions aimed at formulating and providing legal advice about the sharing of information.

CONCLUSION

- [68] The privilege claims asserted by the Attorney General are upheld except for the portion of Ms. Henchey's December 4, 12:44 pm email in EXT_RESP-00236 over which litigation and public interest privilege was claimed.
- [69] For reasons given earlier, if it appears that a privilege claim or a response to a claim may have been misunderstood, counsel may arrange forthwith to make further submissions to clarify their final positions, and the Court will reconsider the claim to which the clarification relates.
- [70] Counsel for the Attorney General and the amici are asked to consider at their earliest convenience whether these reasons may appropriately be released to Ms. Meng and the public, and to jointly, if possible, recommend any necessary redactions.

"The Honourable Associate Chief Justice H. Holmes"

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Prepared on 28 October 2026 · Esheria