IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *United States v. Meng,*
2021 BCSC 1253

Date: 20210624
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/Respondent

Before: The Honourable Associate Chief Justice H. Holmes

Ruling on Application for a Ban on Publication

Restrictions on publication: Pursuant to the Court's inherent jurisdiction, publication bans have been imposed restricting the publication, broadcasting or transmission in any way of any information that could identify HSBC Witness B and the individual referred to as the HSBC global relationship manager

Counsel for the Requesting State/Respondent:	J.M. Gibb-Carsley
Counsel for the Person Sought/Respondent:	T.C. Paisana
Counsel for the Media Consortium described in Exhibit "A":	D.H. Coles
Place and Dates of Hearing:	Vancouver, B.C. June 14, 2021
Place and Date of Judgment:	Vancouver, B.C. June 24, 2021

INTRODUCTION

[1] Wanzhou Meng applies for an order banning the publication of the content of documents she received from HSBC and has filed with the Court. In a fourth application under s. 32(1)(c) of the *Extradition Act*, filed on June 7, 2021, Ms. Meng will seek to adduce the documents in the hearing at which she is sought for extradition by the United States on charges of fraud.

[2] Ms. Meng applies for a ban on publication of the content of the documents because the terms on which she received the documents require her to do so. The ban she seeks would be based on the Court's inherent jurisdiction to so order.

[3] The Attorney General of Canada opposes, as do the members of a consortium of national and international news media organizations listed in Exhibit "A" to this ruling.

[4] Ms. Meng received the documents by virtue of an agreement with HSBC, as then reflected in an order of the High Court of Hong Kong. Some information about this process can be found in the reasons for judgment on an adjournment application: *United States v. Meng*, 2021 BCSC 935.

[5] For the reasons I will give below, I conclude that the circumstances do not meet the law's requirements for banning the publication of the content of these documents.

[6] I will begin by outlining the legal principles that apply to this application.

THE GOVERNING LEGAL PRINCIPLES

[7] The most recent authoritative expression of the governing legal principles is in *Sherman Estate v. Donovan*, 2021 SCC 25, issued shortly before the hearing of this application. There, the Supreme Court of Canada reviewed the legal requirements for any discretionary limit on the openness of courts to the public and the media, such a limit including a ban on publication based on a court's inherent jurisdiction.

[8] Justice Kasirer for the Court confirmed that the open court principle arises from the constitutionally protected right of freedom of expression. The open court principle also presumes that members of the media may report freely on matters before the courts, in order to carry out the important role of conveying information to the public. These effects help maintain and contribute to the fairness and accountability of the justice system: paras. 1-2.

[9] Nonetheless, there are circumstances that justify a restriction on openness, the Court confirmed. These arise where: there is a serious risk to a competing interest of public importance; the risk cannot be prevented through alternative means; and the benefit from restricting the openness outweighs its negative effects (para. 3):

> […] Where a discretionary court order limiting constitutionally-protected openness is sought — for example, a sealing order, a publication ban, an order excluding the public from a hearing, or a redaction order — the applicant must demonstrate, as a threshold requirement, that openness presents a serious risk to a competing interest of public importance. That this requirement is considered a high bar serves to maintain the strong presumption of open courts. Moreover, the protection of open courts does not stop there. The applicant must still show that the order is necessary to prevent the risk and that, as a matter of proportionality, the benefits of that order restricting openness outweigh its negative effects.

[10] Justice Kasirer thus recast the longstanding "*Dagenais/Mentuck* test" (for a discretionary limit on court openness), which had been expressed as a two-step inquiry. However, he emphasized that the essence or substance of the inquiry remains the same. The focus of the inquiry is on the former test's three core prerequisites (as described in such decisions as *Sierra Club of Canada v. Canada (Minister of Finance)*, 2002 SCC 41) in order to help clarify the burden on the applicant seeking an exception to the open court principle (at para. 38):

> The test for discretionary limits on presumptive court openness has been expressed as a two-step inquiry involving the necessity and proportionality of the proposed order (*Sierra Club*, at para. 53). Upon examination, however, this test rests upon three core prerequisites that a person seeking such a limit must show. Recasting the test around these three prerequisites, without altering its essence, helps to clarify the burden on an applicant seeking an exception to the open court principle. In order to succeed, the person asking

> a court to exercise discretion in a way that limits the open court presumption must establish that:
>
> > (1) court openness poses a serious risk to an important public interest;
> >
> > (2) the order sought is necessary to prevent this serious risk to the identified interest because reasonably alternative measures will not prevent this risk; and,
> >
> > (3) as a matter of proportionality, the benefits of the order outweigh its negative effects.
>
> Only where all three of these prerequisites have been met can a discretionary limit on openness — for example, a sealing order, a publication ban, an order excluding the public from a hearing, or a redaction order — properly be ordered. This test applies to all discretionary limits on court openness, subject only to valid legislative enactments (*Toronto Star Newspapers Ltd. v. Ontario*, 2005 SCC 41, [2005] 2 S.C.R. 188, at paras. 7 and 22).

[11] Justice Kasirer also explained that the determination of whether an asserted interest is of public importance can be done in the abstract by reference to general principles extending beyond the specific circumstances of the case. However, the determination of whether there is a serious risk to a public interest must be done in context because the answer involves a fact-based finding. These two inquiries are qualitatively distinct and therefore separate. An order may thus be refused if there is an important public interest at stake, but no serious risk on the facts, or, conversely, if there is a serious risk to an identified interest, but the interest does not have the necessary important public character as a matter of general principle: *Sherman Estate* at para. 42.

[12] I will next outline the positions of the parties and the media consortium concerning the application of these principles, before then explaining my conclusion that the principles do not support a ban on publication.

THE POSITIONS OF THE PARTIES AND THE MEDIA CONSORTIUM

Ms. Meng

[13] Ms. Meng's counsel made clear that a publication ban is not a pre-condition to Ms. Meng tendering the HSBC documents in the proceeding. Rather, the agreement with HSBC, and accordingly the order of the Hong Kong court, require

her to use reasonable efforts to keep the information in the documents confidential, including by making this application, but they do not require success in so doing. The application therefore does not itself engage Ms. Meng's rights to a fair extradition process or trial; the objective is, rather, to protect HSBC's interests.

[14] To that end, Ms. Meng submits that a publication ban is in the interests of justice because the broad dissemination of the contents of the HSBC documents would present a serious risk to HSBC's commercial privacy interests. She submits also that dissemination would have a chilling effect on HSBC's willingness to participate in the criminal justice process.

[15] Ms. Meng submits that, on balance, the benefits of a publication ban in maintaining some level of confidentiality over the HSBC documents outweigh any negative effects. This is in part because a publication ban would restrict freedom of expression only to a limited degree: the proceedings would remain open to the public to attend and for the media to report on, and the only restriction would be on reporting the contents of the HSBC documents themselves.

Attorney General of Canada

[16] The Attorney General opposes on the basis that Ms. Meng has not met the high bar required to limit freedom of expression. He submits that the first requirement of the test is not met because nothing in the HSBC documents or elsewhere indicates a serious risk to HSBC's privacy interests, and, indeed, redactions made by HSBC before release of the documents to Ms. Meng suggest that those interests have already been protected.

[17] The Attorney General submits also that the negative effects of a publication ban would outweigh any potential benefit. This is in large part because the content of many HSBC documents, including some of those now in issue, has already been published in relation to this case, such that compliance with a publication ban issued at this stage would be next to impossible.

Media Consortium

[18] The members of the media consortium join with the Attorney General in opposing the application, and adopt the submissions made on his behalf.

[19] The media consortium focuses in particular on the emphasis in *Sherman Estate* that a risk of individual embarrassment or distress, while engaging a privacy interest, will not usually have the exceptional and public character that supports a restriction on freedom of expression. The consortium submits that Ms. Meng's application includes no evidence or indication that the interests in issue here rise to the necessary public level.

[20] The media consortium submits further the media's ability to report on the HSBC documents is all the more important because of the potential significance of the documents, given Ms. Meng's position that the documents, if admitted as evidence in the extradition hearing, could result in her discharge from the extradition process.

ANALYSIS

[21] I will start by explaining that the first, and threshold, requirement of the *Sherman Estate* test is not met. This is because the evidence and circumstances do not establish that an important public interest is engaged in relation to the potential publication of the contents of the HSBC documents, or that publication would place such an interest at serious risk.

[22] As Ms. Meng noted, the Court in *Sherman Estate* at para. 41 recognized that commercial information may engage privacy interests that, in turn, may give rise to an important public interest. However, it is not at all clear that the documents now in issue do so.

[23] On their face, these documents include reports and high level communications within HSBC relating to strategy and decisions about its business with Huawei between 2011 and 2014. Ms. Meng submits that a risk to HSBC's privacy interests can be inferred from the documents themselves, as well as from

the undisputed facts that: the documents are not publicly available; HSBC evidently considers them confidential; and the terms on which Ms. Meng received the documents require this application to be made.

[24] The difficulty is that, as noted earlier, a privacy interest does not of itself meet the requirement of being an important public interest, and there is no basis on which to conclude that these documents engage that latter requirement. In *Sierra Club* at para. 55, Justice Iacobucci for the Court made clear that, to prevail over the public interest in openness, a commercial confidentiality interest must be more than merely specific to the applicant requesting the ban on publication. There must be a general principle at stake. No such general principle is shown to arise here.

[25] Nor do I find that a ban on publication would encourage HSBC's further participation in the proceedings in a way that engages an important public interest. Ms. Meng's submission to that effect has no evidentiary basis, and also runs counter to the evidence that HSBC voluntarily agreed to disclose the documents to Ms. Meng knowing that she wanted to use them in the extradition proceedings.

[26] However, even if HSBC's interest in preserving the confidentiality of its internal documents could be characterized as an important public interest, that interest is not shown to be at serious risk from publication of the documents' contents.

[27] This is in part because some of the contents have already been summarized in the proceedings without any limits on publication, and no harm as a result has been identified. Ms. Meng has not pointed to anything of concern in the contents that have not yet been publicized.

[28] But more significantly, HSBC redacted substantial portions of the documents before providing them to Ms. Meng. One can reasonably infer from the redactions themselves, coupled with the relevant paragraphs of the disclosure agreement to which they refer, that the redactions were designed to protect HSBC's commercial privacy interests, among others.

[29] The application also fails at the second and third *Sherman Estate* requirements.

[30] As a "blanket" ban on the publication of *any* of the content of any of the HSBC documents submitted in support of Ms. Meng's fourth application to adduce evidence, the proposed ban is not tailored to intrude only minimally on freedom of expression. This is particularly so given that some of the subject matter has already been publicized.

[31] Nor would the proposed ban be proportional, in the sense of matching what it seeks to achieve with, on the other side of the balance, the negative consequences.

[32] In this case, the potentially high public interest in the content of the documents is significant in the balance. The Court in *Sherman Estate* at para. 106 explained that the balancing of competing interests should take account of the centrality to the proceedings of the information sought to be protected. If the information is significant to the court's determination of the issues, the importance in conveying it to the public may outweigh the interests in protecting it:

> Further, the Trustees would have had to show that the benefits of any order necessary to protect from a serious risk to the important public interest outweighed the harmful effects of the order, including the negative impact on the open court principle (*Sierra Club*, at para. 53). In balancing the privacy interests against the open court principle, it is important to consider whether the information the order seeks to protect is peripheral or central to the judicial process (paras. 78 and 86; *Bragg*, at paras. 28-29). There will doubtless be cases where the information that poses a serious risk to privacy, bearing as it does on individual dignity, will be central to the case. But the interest in important and legally relevant information being aired in open court may well overcome any concern for the privacy interests in that same information. This contextual balancing, informed by the importance of the open court principle, presents a final barrier to those seeking a discretionary limit on court openness for the purposes of privacy protection.
>
> [Emphasis added]

[33] As I have noted, Ms. Meng is expected to argue, in her s. 32(1)(c) application, that the evidence in the HSBC documents is essential to her defence in the extradition proceedings, and that it may affect the ultimate decision on committal. Given the high public interest in the case as a whole, the potential centrality of the

documents suggests that banning publication of their contents would have heavy negative effects on freedom of expression. There is a strong interest in the public being informed of the contents in order to understand the positions of the parties and the reasons for the Court's decisions.

[34] I take into account also that the previous publication of some of the documents' content would make a publication ban near-impossible to craft in clear terms, and difficult to implement and enforce. A broad or imprecisely worded ban would place in an untenable situation those persons who have already published information found in HSBC documents, which may or may not be among the many documents now in issue, and yet there is no principled and workable way to tailor the ban to apply only to the content not already in the public domain.

[35] These effects would not serve the interests of justice. A court making an order restricting freedom of expression must do so in terms that the media and the public can be expected to follow, and that are practical to enforce.

[36] Finally, I emphasize that these conclusions should not be seen as out of accord with the order of the Hong Kong court reflecting the agreement between Ms. Meng and HSBC, or as offending the important principle of comity among courts. To the contrary, the agreement underlying the order of the Hong Kong court expressly contemplates that the HSBC documents may be filed in these extradition proceedings, and that an application for a ban on the publication of their content would be subject to applicable laws. These reasons explain that the laws of Canada do not support such a ban in these proceedings.

[37] The application for a ban on publication of the content of the documents to protect HSBC's commercial privacy interests therefore cannot be granted.

[38] The privacy interests of individual HSBC representatives stand on a somewhat different footing. To date, the similar interests of other individuals have been protected in two ways in these proceedings.

[39] First, a “media protocol” was developed by agreement among counsel, including Mr. Coles, at an early stage to provide for the efficient release of filed documents to accredited media representatives. The personal or identifying information of individuals is redacted by counsel before documents are released under the protocol or made available to the public.

[40] Second, some bans on publication have been requested by a party without opposition, and ordered, when names of certain individuals have been used by counsel in court during their oral submissions. For some, but not all, of those individuals, their names are not used at all in the written materials, such as the requesting state’s record of the case, and the individuals are referred to instead as HSBC Witness A or HSBC Witness B, for example.

[41] Subject to any further application, I expect that the identities and contact information of HSBC representatives in the HSBC documents now in issue will be redacted before the release of the documents to the media according to the existing protocol or to the public.

[42] As to a ban on the publication of any information that could identify an HSBC representative that may be disclosed in some other way (such as during oral submissions on Ms. Meng’s application to adduce the HSBC documents in the extradition hearing), the parties may apply as necessary. Unless Mr. Coles wishes to raise objection to this course of action for the future – in which case he should arrange to appear – the parties may do so informally, in the manner they did before.

CONCLUSION

[43] Ms. Meng’s application for a ban on the publication of the contents of the HSBC documents is dismissed.

[44] Counsel are asked to consult and, if they consent, advise in writing on what, if any, steps are appropriate to bring these reasons into compliance with the publication ban(s) concerning, respectively, the document marked as Exhibit 1 in the application (which is a portion of the Schedule to the Hong Kong order), and the full

Schedule itself, or, alternatively, to vacate the publication ban in full or in part. If counsel cannot agree, they should arrange to appear at their earliest convenience.

[45] In the meantime, these reasons should not be distributed beyond the parties, their counsel, and Mr. Coles, and are not to be published.

[46] [Per H. Holmes, ACJ on June 30, 2021: The publication bans referred to in para. 44 were vacated by consent on June 29, 2021. The restriction in para. 45 on distribution or publication of these reasons therefore no longer applies.]

"The Honourable Associate Chief Justice H. Holmes"

Exhibit "A"

MEDIA CONSORTIUM

1. Canadian Broadcasting Corporation (CBC)
2. New York Times
3. Canadian Press
4. Globe & Mail
5. Global News, a Division of Corus Entertainment Inc.
6. CTV News
7. The Vancouver Sun, a Division of Postmedia
8. South China Morning Post
9. The Wall Street Journal
10. Reuters