File No. 27761
Vancouver Registry

IN THE SUPREME COURT OF BRITISH COLUMBIA

IN THE MATTER OF THE *EXTRADITION ACT*, S.C. 1999, c. 18, AS AMENDED

BETWEEN:

THE ATTORNEY GENERAL OF CANADA
ON BEHALF OF THE UNITED STATES OF AMERICA

REQUESTING STATE/RESPONDENT

AND:

WANZHOU MENG, ALSO KNOWN AS CATHY MENG,
SABRINA MENG

PERSON SOUGHT/APPLICANT

REQUESTING STATE'S RESPONDING SUBMISSIONS
RE: SECOND BRANCH OF ALLEGED ABUSE OF PROCESS

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I. OVERVIEW

1. Assertions that foreign officials engaged in misconduct in seeking extradition and that Canadian agencies had ulterior motives for taking steps required by their mandates are serious allegations that must be supported by strong evidence. The Applicant's argument is supported only by speculation and innuendo. She has failed to establish the existence of the conspiracy she alleges.

2. The evidence tendered in connection with the "second branch" allegations of abuse of process fails to demonstrate misconduct by foreign authorities, the Canadian Border Services Agency (CBSA) or the Royal Canadian Mounted Police (RCMP). The evidence shows the opposite. U.S. officials made lawful requests of Canada, acted within the boundaries of the law, and did not seek to direct or influence the actions of Canadian agencies. The RCMP was transparent with the Court in seeking an arrest warrant, exercised appropriate discretion in executing that warrant at the port of entry, and did not share information inappropriately with the Federal Bureau of Investigation (FBI). The CBSA conducted an examination of the Applicant in furtherance of genuine inadmissibility concerns and for no other reason.

3. There is no evidence of conduct on the part of American or Canadian authorities that warrants putting an end to the Applicant's extradition proceedings. A stay of proceedings is the most drastic remedy a court can order and should only be granted in "exceptional", "rare" and the "clearest of cases". This is not such a case.

4. The application should be dismissed.

II. U.S. AUTHORITIES

A. Key Points

(i) The Court must apply a presumption of good in faith in assessing the conduct of Canada's treaty partner. The presumption is only rebutted when there is clear evidence to the contrary.

(ii) In this case, there is no evidence the U.S. masterminded a conspiracy with the RCMP and CBSA. There is no evidence of U.S. misconduct of any kind.

(iii) Unlike the cases of the cases of *Tollman* and *Bartoszewicz* upon which the Applicant relies, the evidence in this case shows that at all times the U.S. acted lawfully.

(iv) The information set out by U.S. authorities in the provisional arrest request was accurate and credible.

(v) The U.S. requested the Applicant's devices as permitted by both treaty and statute.

(vi) There is no evidence the U.S. sought to direct or influence the CBSA in its decision to examine the Applicant or what questions to ask her. There was, in fact, minimal contact between the U.S. and CBSA prior to or during the Applicant's examination.

(vii) There is no evidence the RCMP was guided by the U.S. in planning the arrest.

(viii) When the U.S. sought information, it did so transparently and pursuant to lawful and recognized modes of information sharing.

(ix) The U.S. sought the ESN information for the express purpose of particularizing an MLAT request for the devices. As there is no evidence to the contrary, this court must presume the U.S. sought the information for the stated purpose and not some other nefarious reason.

(x) The evidence demonstrates the U.S. never received the ESN information.

(xi) As there is no evidence of U.S. misconduct, this Court cannot conclude the U.S. masterminded a conspiracy. As that avenue of argument is closed, the Applicant can only contend that the RCMP and CBSA spontaneously decided to improperly obtain evidence to support a foreign investigation. Not only is this implausible, it is not supported by the evidence.

B. Overview

5. In general terms, a conspiracy is an agreement to engage in unlawful conduct. To prove the existence of a conspiracy, it must be established that the accused parties were in fact members of the conspiracy and agreed to carry out their unlawful intentions. As explained by the Ontario Court of Appeal in dismissing claims of abuse of process in *United States v. Lane*, "[o]ne cannot be said to conspire when one is complying with the law, and one cannot be part of a conspiracy without being aware of the purported object of the conspiracy."[1] In this case, there is no evidence to support the idea that there was any agreement as alleged by the Applicant, and no evidence that the alleged conspirators took the necessary steps to achieve their objective.

6. This is a critical flaw in the Applicant's claim of abuse of process. The Applicant's central allegation, that U.S. law enforcement masterminded a plot against the Applicant, and instructed the CBSA and RCMP as part of that plot to subvert her rights, has no evidentiary support. While the Applicant claims improper orchestration between the FBI, RCMP and CBSA to subvert the Applicant's rights, there is no evidence of the existence of a conductor.

7. The evidence demonstrates that at all times U.S. authorities acted lawfully. Their contact with Canadian authorities was for legitimate and lawful purposes. There is no evidence that U.S. authorities attempted to coerce, direct or even influence Canadian authorities on how to carry out their duties. There is no evidence of improper requests for information. Without evidence of a U.S.-led conspiracy, or any other U.S. misconduct, the Applicant's theory that the RCMP and CBSA misused their statutory and common law powers and procedures to gather information for a U.S. investigation concerning the Applicant must fail. Furthermore, in the absence of evidence of a conspiracy involving the U.S., there is no basis for this Court to interpret the actions of Canadian authorities through the lens of bad faith. Canadian authorities too, acted lawfully.

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[1] 2014 ONCA 506 at para. 34.

C. The Court Must Presume Foreign Officials Have Acted in Good Faith

8. The jurisprudence is clear that allegations of abuse of process based on the conduct of the requesting state in an extradition matter must be based on hard evidence. In *Wong,* the Court of Appeal noted that such allegations are particularly serious "because they impugn the motives and actions of a neighbouring and friendly power with whom Canada has an extradition treaty."[2] Such allegations, the Court held, should not be given credence without an evidentiary foundation.[3] As noted by Watchuk J. in *U.S.A. v. Fraser*:

> When abuse of process is alleged based on the actions of foreign authorities, there is a strong presumption that there has been no misconduct. An extradition judge must presume that foreign officials have acted in good faith unless there is clear evidence to the contrary.[4] [Emphasis added]

9. Justice Watchuk further noted, as did the Court of Appeal in *Wong*, that it is inappropriate in an extradition case to ask the Court to presume misconduct on the part of foreign authorities and effectively seek to reverse the burden of proof borne by the party levelling allegations of abuse of process.[5]

10. The Applicant's claim that the RCMP and CBSA served as agents for collecting evidence for the FBI requires either direct evidence that the FBI made such a request of those agencies, or evidence from which an inference can reasonably be drawn. Neither type of evidence exists; the Applicant's case rests on highly speculative inferences that are inconsistent with the actual evidence. The only evidence is that the U.S. made a lawful request in the *Request For Provisional Arrest To Canada* (the "PA Request") that the Applicant's electronic devices be secured and transmitted to the U.S. upon her extradition. The Applicant has failed to meet her evidentiary burden in demonstrating that the RCMP and CBSA were directed by foreign authorities in any way, or committed any misconduct that amounts to an abuse of process.

11. The evidentiary shortfall undermines the Applicant's reliance on the case law. The Applicant has provided this Court with no evidence of improper conduct, statements, or requests on the part of foreign officials. In the cases upon which the Applicant relies, including *U.S.A. v.*

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[2] *United States of America v. Wong*, 2017 BCCA 109 at para. 27.
[3] *Ibid.*
[4] 2014 BCSC 1132 at para. 33
[5] *Fraser* at para. 167; *Wong* at para. 88.

Cobb,[6] *U.S.A v. Tollman*[7], *Attorney General (Canada) v. Bartoszewicz*[8] and *U.S.A. v. Licht,*[9] there was such evidence. In the absence of such evidence, this Court must presume that the U.S. acted in good faith in seeking the Applicant's extradition and in its dealings with the CBSA and RCMP.[10]

D. The Conduct of U.S. Authorities in their Dealings with the RCMP and CBSA was Lawful and Appropriate

1. The Information in the Provisional Request was Accurate and Credible

12. The PA Request was the essential first step in the extradition proceedings. There is no evidence that it was tainted by impropriety. The "Summary of Facts", attached to the PA Request, and appended as an exhibit to the affidavit of Cst. Winston Yep, fairly describes the nature of the offence, the Applicant's alleged criminal conduct and the reasons that compliance with the request was urgent as required by the *Canada-U.S. Extradition Treaty*.[11] Statements made in the PA Request were based on belief and objective facts are provided to justify those beliefs. For example, the U.S. authorities expressed the belief that it will be difficult if not impossible to secure the Applicant's presence for trial other than through extradition.[12] This belief is credible based on the facts asserted in the PA Request including that the Applicant is a Chinese citizen normally residing in China, she has significant assets at her disposal and has the ability to travel and remain outside the U.S. indefinitely. Whether or not the U.S. has extradition treaties with other countries to which the Applicant travelled, as argued by the Applicant, has no bearing on the reasonableness of the assertion made by the U.S. about the need to rely on extradition to secure the Applicant's presence for trial. The U.S. is entitled to seek extradition from whichever country it chooses. The Applicant has no right to be extradited from a country other than Canada.[13]

13. Similarly, there was no misrepresentation in the Provisional Request concerning the Applicant's travel patterns. The PA Request contains facts supporting a reasonable inference that the Applicant, who had traveled to the U.S. multiple times in 2014, 2015 and 2016 and in March

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[6] 2001 SCC 19.
[7] 2006 CanLII 31731 (Ont. S.C.).
[8] 2012 ONSC 250.
[9] 2002 BCSC 1151.
[10] *U.S.A. v. Freimuth*, 2004 BCSC 154 at paras. 56-57; *Korea v Jung*, 2020 BCSC 1978 at paras. 93-96.
[11] *Treaty on Extradition between the Government of Canada and the Government of the United States of America*, December 3, 1971, Can. T.S. 1976 No. 3, art. 11 ("*Extradition Treaty*").
[12] Exhibit 1, AGC Yep Binder, Tab 2 (PA Request).
[13] *Tollman* at para. 49.

of 2017, had avoided the United States since becoming aware of the U.S. criminal investigation into Huawei in April of 2017. The fact that the indictment specifically naming the Applicant was sealed is irrelevant because as CFO and the daughter of Huawei's CEO, it is reasonable to believe the Applicant would be aware of the U.S. criminal investigation. The timing of the Applicant's altered travel pattern coincides with this awareness. Whether the Applicant knew she was personally charged does not change the reasonableness of the inference that she was avoiding U.S. jurisdiction.

14. Finally, the PA Request appropriately described the Applicant as a Chinese national, believed to be residing in China. There is no evidence to suggest otherwise and more importantly, no evidence to suggest that any of the beliefs expressed by the U.S. were unreasonable or asserted for the purpose of misleading the Minister of Justice or the Court.

2. The U.S. Request for the Applicant's Devices was Lawful

15. The U.S. made its request for the seizure of the Applicant's devices as part of the PA Request. It states:

> US authorities request that any electronic devices which are in the possession of the target at the time of the arrest be secured by law enforcement in an RFID or Radio Frequency blocking "Faraday Bag" to prevent wireless signals from remote wiping or altering the devices.[14]

16. Such a request is contemplated by the *Canada-U.S. Extradition Treaty*. According to Article 15 of the *Treaty*:

> (1) To the extent permitted under the law of the requested State and subject to rights of third parties, which shall be duly respected, all articles acquired as a result of the offense or which may be required as evidence shall, if found, be surrendered to the requesting State if extradition is granted.
>
> (2) Subject to the qualifications of paragraph (1) of this Article, the above-mentioned articles shall be returned to the requesting State even if the extradition, having been agreed to, cannot be carried out owing to the death or escape of the person sought.

[14] Exhibit 1, AGC Yep Binder at Tab 2, p. 1.

17. Similarly, upon the application of the Attorney General of Canada, s. 39 of the *Extradition Act*[15] permits an extradition judge to order the surrender of articles seized from the person sought for extradition upon their arrest that may be used to support the prosecution. Subsection 39(1) states:

> 39(1) Subject to a relevant extradition agreement, a judge who makes an order of committal may order that any thing that was seized when the person was arrested and that may be used in the prosecution of the person for the offence for which the extradition was requested be transferred to the extradition partner at the time the person is surrendered.

18. The purpose of s. 39 was interpreted by Mr. Justice Ehrcke in *United States of America v. Berke*[16] as being in some ways analogous to a "sending order" under the *Mutual Legal Assistance in Criminal Matters Act*.[17] In that case, arresting officers seized flash drives from the person sought for extradition upon his arrest pursuant to a warrant under the *Extradition Act*. Justice Ehrcke concluded that a cursory search of the devices by the police, revealing evidence of a connection between the contents of the devices and the fraud that was the basis for the extradition request, was a sufficient nexus to the offence to meet the low threshold for a sending order under s. 39.

19. The request by the U.S. for the Applicant's devices was therefore transparent, legitimate and expressly contemplated by the *Extradition Treaty*, the *Extradition Act* and the jurisprudence. The U.S. had lawful means of obtaining the devices, and they used them.

3. <u>The U.S. Made No Attempt to Influence the CBSA's Decision Making</u>

20. The Applicant's assertion that the CBSA examined her to collect evidence on behalf of the FBI is not supported by any evidence. U.S. officials did not request that the CBSA collect information nor is there any evidence that U.S. officials had inappropriate contact with the CBSA. In fact, the evidence only shows lawful, legitimate contact between the CBSA and FBI, well within the boundaries set out in the jurisprudence.

21. The jurisprudence demonstrates that there is nothing improper about the CBSA and foreign law enforcement officials sharing information about individuals who may be of interest to the

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[15] S.C. 1999, c. 18.
[16] 2013 BCSC 619.
[17] R.S.C. 1985, c. 30 (4th Supp.)

CBSA, even where the individual is wanted by the foreign state for prosecution. In fact, such communications, whether initiated by the CBSA or foreign authorities, are legitimate and vital to the work of the CBSA performing its duties and enforcing the *IRPA*.

22. For example, in *Canada (Attorney General) v. Kissel*,[18] Canadian immigration proceedings were initiated upon information provided by U.S. authorities, alerting Canadian officials to the applicant's presence in Canada and the existence of outstanding fraud and conspiracy charges against him in the U.S. Following three years of deportation proceedings, the U.S. submitted a request to Canada for the applicant's extradition. In dismissing the arguments that the communications between the CBSA and U.S. law enforcement were improper and abusive, Beaulieu J. explained that such communications are "necessary in order for Canadian authorities to successfully pursue the objectives of Canadian immigration law."[19] Furthermore, Beaulieu J. observed that "there is nothing improper about American authorities notifying Canadian authorities of the presence of a person wanted for criminal charges, thereby effectively initiating a process of investigation under Canadian immigration law."[20]

23. Similarly, in both *Korea v. Jung*[21] and *Attorney General of Canada v. Cho*,[22] CBSA initiated investigations on the basis of information provided during meetings with Korean officials about individuals present in Canada and wanted for fraud in Korea. In both cases, immigration investigations into serious criminality allegations ensued and were ultimately followed by immigration proceedings and then extradition proceedings. In dismissing allegations of abuse of process as unfounded, Justices Silverman and Maisonville each held that the communications between the CBSA and Korean officials were entirely proper and legitimate.

24. Mr. Justice Silverman held in *Cho*:

> [T]here is absolutely no question that the procedure was started on May 10 by Korean authorities. Canadian authorities had no idea who Ms. Cho was or even if she was in the country, but the mere initiating of it by providing information or even asking questions does not create an abuse. There is no evidence of bad faith. There is no suggestion that Korea even asked that immigration procedures be taken.

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[18] [2006] O.J. No. 5020 (S.C.J.)
[19] *Kissel* at para. 152.
[20] *Kissel* at para. 153.
[21] 2019 BCSC 199.
[22] Unreported (August 28, 2008) Vancouver 24454 (S.C.)

> They merely asked if the officer in the agency might be interested in the person. It is a perfectly appropriate kind of international cooperation which goes on all the time and is condoned by the courts. If there is bad faith, that is a different matter. Here, there is absolutely no suggestion that the immigration procedures that followed were initiated because of any request from the Korean authorities.

25. Madam Justice Maisonville echoed Mr. Justice Silverman's conclusions, stating: "Of note is that the CBSA and foreign officials are expected to communicate and cooperate. […] This comprises legitimate cooperation and communication which has been sanctioned by the courts…"[23]

26. Unlike the cases noted above where the contact between foreign authorities and the CBSA was extensive and substantial, resulting in the initiation of CBSA investigations, the evidence in this case reveals minimal contact between the FBI and CBSA prior to the Applicant's arrival and the conclusion of the CBSA examination. The contact between the FBI and CBSA on November 30 and December 1, 2018, was limited to the following:

- On November 30, 2018, Supt. Bryce McRae received a phone call from FBI Assistant Legal Attache Sherri Onks in which Agent Onks requested the best number at which to contact the superintendent's office the following day. Supt. McRae provided the number. Supt. McRae received no information about the Applicant or the charges she was facing.[24]
- On November 30, 2018, Chief Nicole Goodman received a phone call from Agent Onks in which she was told that "there may be a traveller arriving at YVR the next day who may be the subject of a provisional arrest warrant."[25] Agent Onks provided no other information, nor did she make any requests of Chief Goodman.[26] The information Chief Goodman received from Agent Onks about a possible incoming traveller who was the subject of U.S. charges was so devoid of detail that Chief Goodman did not believe it was necessary to convey it to her team.

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[23] *Jung* at para. 108.
[24] McRae, Oct. 30, p. 62, ll. 34-37; p. 63, ll. 1-29.
[25] Goodman, Dec. 8, p. 52, ll. 25-36.
[26] Goodman, Dec. 8, p. 53, ll. 8-41.

- The emails sent by Agent Onks on November 30 and December 1, 2018, to Chief Goodman contained no instruction, suggestion or request of the CBSA.[27] While Chief Goodman did receive an email from Agent Onks on December 1, 2018 at 10:03 a.m., setting out identifying information about the Applicant, Chief Goodman did not become aware of the email until later that day[28] and did not provide it to the frontline CBSA officers until 12:27 p.m., when the CBSA examination was already underway.[29]

27. None of the frontline CBSA officers had any advance knowledge of the Applicant's arrival or the allegations of criminality.[30] With the exception of Supt. McRae, whose contact with the FBI was minimal, none of the frontline CBSA officers had any contact with the FBI.[31] The frontline CBSA officers never learned about the Applicant's arrival or the allegations of criminality from the U.S. That information came from the RCMP. Unlike *Kissel*, *Jung* and *Cho*, in which appropriate contact between foreign officials and the CBSA resulted in the CBSA launching inadmissibility investigations, the Applicant in this case cannot even point to evidence to suggest any significant contact between the FBI and the CBSA before her arrival or during her examination.

28. Unlike the cases of *Tollman* and *Bartoszewicz*, the only Canadian cases in which allegations of "disguised extradition" were established, there is no evidence to suggest that foreign authorities placed pressure on the CBSA to take action or that they even made a request to the CBSA for assistance in connection with the Applicant.[32] Also absent from the evidence, unlike the *Tollman* case, are communications suggesting that the CBSA agreed to do something contrary to their mandate: provide assistance in handing over a fugitive to a foreign state.[33] In this case, the

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[27] Exhibit 18, AGC Binder Goodman, Tab 2; Tab 4, pp. 1-2.
[28] Goodman, Dec. 8, p. 65, ll. 36-47; p. 66, ll. 1-29.
[29] Exhibit 18, AGC Binder Goodman, Tab 4, p. 1.
[30] While Chief Goodman received an email from Cst. Christine Larsen of the RCMP on November 30, 2018, at 6:07 p.m., setting out the Applicant's name and expected time of arrival, Chief Goodman testified that she did not see this email until she prepared to testify in these proceedings. Exhibit 18, AGC Binder Goodman, Tab 3, p. 3. See also Goodman, Dec. 8, 2020, p. 59, ll. 27-47; p. 60, ll. 1-38.
[31] Kirkland, Oct. 28, p. 87, ll. 13-17; Dhillon, Nov. 18, p. 19, l. 47; p. 20, ll. 1-4; Katragadda, Nov. 19, p. 19, ll. 32-35; Nov. 20, p. 12, ll. 37-41.
[32] See *Tollman* at paras. 51-60; 73; 75-84 and *Bartoszewicz* at paras. 24-25.
[33] *Tollman* at paras. 6, 52 and 69.

Applicant cannot reasonably argue that the U.S. improperly influenced the decision of the CBSA to conduct an examination or how to conduct the examination.

4. There is No Evidence that the RCMP was Guided by the U.S. in Planning the Arrest

29. The Applicant's claim that the FBI and RCMP engineered an arrest process by which the CBSA could obtain information from the Applicant to support the U.S. criminal investigation is pure speculation and finds no support in the evidence. The evidence reveals no discussion between the FBI and RCMP about how the arrest would be conducted or how the devices would be seized. The decisions that determined those matters were made exclusively by the RCMP and CBSA on the morning of December 1, 2018. Their decisions were shaped by the port of entry context and the CBSA's immigration and customs mandates, not by foreign influence.

30. The frontline RCMP officers – Yep, Dhaliwal, Vander Graaf and Lundie – had minimal contact with U.S. authorities prior to and on the day of the Applicant's arrest. Cst. Dhaliwal had no contact with U.S. authorities concerning the Applicant at any point.[34] Cst. Yep's contact was limited to an email with Agent Onks identifying the Applicant and her travel companion.[35] Sgt. Vander Graaf did not have contact with U.S. authorities until after the Provisional Arrest Warrant had been executed.[36] Sgt. Lundie's contact was also limited and did not involve discussions about the mechanics of the arrest or the devices.[37]

31. Furthermore, there is no evidence that senior RCMP officers who were in contact with the FBI received any direction or even a suggestion about the sequencing of events at Vancouver International Airport (YVR) or how the arrest would be conducted. For example, the email exchange between RCMP Insp. Benoit Maure and Agent Onks on November 30, 2018, contains no discussion about the mechanics of the arrest or the sequencing of CBSA and RCMP processes.[38]

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[34] Dhaliwal, Nov. 23, p. 11, ll. 9-15; Nov. 24, p. 30, ll. 35-39.
[35] Yep, Oct. 26, p. 39, ll. 11-43; Oct. 27, p. 41, ll. 10-16; Oct. 28, p. 19, ll. 15-22; Exhibit 1, AGC Yep Binder, Tab 7.
[36] Vander Graaf, Nov. 25, p. 9, ll. 9-45, p. 19, ll. 26-31.
[37] Lundie, Nov. 26, p. 51, ll. 23-47; p. 52, ll. 1-3; p. 65, ll. 35 – p. 66, ll. 1-27.
[38] Exhibit 18, AGC Goodman Binder, Tab 2, pp. 2-3.

32. There is no evidence of improper discussions between the FBI and RCMP. This lack of evidence belies any suggestion of improper U.S. influence or that the RCMP served as an agent to gather information for U.S. authorities.

5. The U.S. Sought Information Directly from the CBSA as Contemplated by the Memorandum of Understanding

33. There is no evidence that the U.S. sought to gain information about the Applicant surreptitiously. On the contrary, U.S. requests for information from Canadian authorities were made transparently in accordance with recognized information sharing protocols.

34. The first request by the U.S. for information from the CBSA was made on December 4, 2018, and was addressed to Chief Goodman. In an email from Agent Onks to Chief Goodman at 3:04 p.m., Agent Onks requested the CBSA examination report.[39] Chief Goodman, in a reply email, requested more detail on the "specific use of the information in order for us to legally determine how we / if we can share the information."[40] FBI Legal Attache John Sgroi responded to Chief Goodman's email, stating:

> I am the Attache handling this in Ottawa. The FBI had a criminal investigation. Meng is a subject of that investigation hence the request from the US DOJ to Justice Canada for assistance in her arrest. There are multiple charges to this investigation, however the indictment is sealed. The charges include conspiracy to commit money laundering along with other financial crimes. The use of the examination report will be to corroborate the information she provided in order to facilitate out [sic] Justice Department's process with regards to her upcoming court hearings. Further, we would like to request her travel records into Canada for the past two years. This will be used to articulate what ties, if any, she has in Canada. She has a detention hearing tomorrow and this information is vital.[41]
>
> I checked out MOU today and our sharing agreement covers this request. Please let me know if you want to chat.

35. Contrary to the Applicant's claim,[42] there is no indication that the U.S. authorities were already in receipt of information about the contents of the examination report or how it would be

[39] Exhibit 18, AGC Goodman Binder, Tab 8, p. 5.
[40] Exhibit 18, AGC Goodman Binder, Tab 8, p. 4.
[41] Exhibit 18, AGC Goodman Binder, Tab 8, p. 4.
[42] Applicant's Submissions at para. 309.

relevant to their investigation. This is hardly surprising as there is no evidence to suggest that information about the examination was shared by the CBSA with U.S. authorities.

36. The "MOU" to which Agent Sgroi referred is the *Framework Memorandum of Understanding Concerning Cooperation and Information Sharing* ("*MOU*").[43] According to the preamble, the parties recognize "that an enhancement to their understanding of the threat environment through the sharing of information and intelligence in support of law enforcement and national security is to their benefit."[44] The *MOU* provides a framework for sharing information between the two agencies in relation to a wide scope of criminal activity and contemplates the sharing of information regarding the "identity, location, structure, financing and methods and means of any person or group suspected of engaging in transnational criminal activity."[45]

37. The fact the U.S. made its information request pursuant to the *MOU* is further evidence that the U.S. followed normal procedures in seeking information about the Applicant. Rather than trying to recruit CBSA officers as agents to gather information to support an American criminal investigation, the evidence only shows that U.S. officials made formal requests for the Applicant's travel history and the examination record when CBSA processes had concluded.

6. The U.S. Sought CBSA Records Pursuant to a Mutual Legal Assistance Treaty (MLAT) Request

38. As will be further discussed below, the CBSA provided the Applicant's traveller records (a log of entries and exits from Canada) pursuant to the *Customs Act* and the *MOU*. However, the CBSA declined to provide the examination report to the FBI, and insisted upon the U.S. making an MLAT request for that record.[46] The commitment to go through lawful channels is inconsistent with any suggestion that American or Canadian officials attempted to deprive the Applicant of her rights.

39. The U.S. complied with the CBSA's direction and made an MLAT request to Canada to obtain the CBSA's examination report. That request, made on December 6, 2018, requested

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[43] *Framework Memorandum of Understanding between the Federal Burea of Investigation of the United States of America (FBI) and the Canada Border Services Agency (CBSA), hereinafter referred to as the Participants*, signed in Ottawa on May 2, 2016 ("*MOU*"). AGC Book of Additional Documents, Tab 7.
[44] AGC Book of Additional Documents, Tab 7, at Preamble, para. 3.
[45] *Ibid.*, Article 3.
[46] Exhibit 19, Defence Goodman Binder, Tab 20; AGC Book of Additional Documents, Tab 1 (CAN-11).

"records related to MENG's travel to Canada, any transits through Canada, records of statements and documents provided by MENG to CBSA related to her applications for entry to Canada, as well as reports and documents related to her examination on December 1, 2018."[47] According to the MLAT request, the U.S. was aware of an affidavit sworn by the Applicant on December 3, 2018, sworn in support of her bail application, in which she claimed she was formerly a permanent resident of Canada and that she visited Canada regularly.[48] The U.S. indicated that the information sought through the MLAT request was relevant to the criminal investigation in various ways, including to "corroborate the government's evidence regarding Meng's modes and methods of communication with various international financial institutions."[49]

40. There is no information in the MLAT request to suggest that U.S. authorities had any knowledge about the information provided by the Applicant to the CBSA in the examination. The U.S. confirmed this fact in an email sent on December 4 when a U.S. official asked the IAG "I wonder, for example, if we can find out what she told the CBSA when she was examined?"[50] IAG counsel responded, "You would have to have grounds to obtain the CBSA records. I don't think you have them…"[51] The use of the word "corroborate" in the MLAT request provides further clarity to the email communication from Agent Sgroi to Chief Goodman noted above. The U.S. sought to corroborate statements the Applicant had made in connection with the offence, collected by the U.S. in their criminal investigation. The Applicant has failed to put forward evidence that the U.S. was seeking to corroborate information provided by the CBSA or other Canadian authorities.

41. The International Assistance Group of the Department of Justice rejected the MLAT request on December 6, 2018, on the basis that it did not provide a sufficient connection between the Applicant's alleged criminal conduct and the records sought. An IAG lawyer advised U.S. authorities that in order to address the deficiency, "the request would have to indicate what information that [sic] she provided to CBSA, the source of that information (how you know that the material information is with the CBSA or contained in the records / reports) and how it is

[47] Defence Book of Additional Documents, Tab 16, p. 1 (RESP-156).
[48] *Ibid*, p. 8.
[49] *Ibid.,* p. 10.
[50] AGC Book of Additional Documents, Tab 17, p. 3 (RESP-236).
[51] *Ibid.*, p. 2.

material to the U.S. investigation – evidence of the offence, or that assists in locating the person."[52] It is clear that it was the lack of information the U.S. had about what transpired during the CBSA examination that led to the IAG's rejection of the U.S. MLAT request. It is reasonable to conclude that had the U.S. had more information about the contents of the CBSA examination report, it would have supplemented its MLAT request to meet IAG's demands.

42. Even as late as December 27, 2018, the U.S. still had no information about the contents of the CBSA's examination of the Applicant. This is confirmed by the Supplemental MLAT request made by the U.S. in which it sought any documents relating to the CBSA's interview of the Applicant relating to her electronic devices.[53] The fact that the U.S. also requested the identities of the CBSA officers who interviewed the Applicant at YVR confirms that the U.S. had no contact with any of the frontline CBSA officers prior to or following the examination concerning the information obtained by the CBSA.[54]

7. The U.S. Lawfully Sought Descriptive Information About the Applicant's Devices to Particularize a Supplemental MLAT Request

43. On December 4, 2018, Agent Sgroi contacted Staff Sergeant (S/Sgt.) Lea to discuss the prospect of the Applicant's release on bail, concerns about flight risk and the Applicant's electronic devices. During the call, Agent Sgroi and S/Sgt. Lea discussed the possibility of the RCMP imaging the devices, but S/Sgt. Lea indicated that such a course of action would require judicial authorization. They also discussed that proper identification of the devices, including make, model and serial number would be required to permit the U.S. to make an MLAT request for the devices.[55] Later that same day, Agent Sgroi contacted RCMP S/Sgt. Ben Chang for "descriptions and lists of the devices (with ESN#, make and model)" seized from the Applicant by the RCMP incident to arrest.[56]

44. There is no evidence to suggest that the U.S. sought this information for any other purpose other than to particularize an anticipated MLAT request, as discussed with S/Sgt. Lea, seeking the

[52] Exhibit 19, Defence Goodman Binder, Tab 21, p. 2.
[53] AGC Book of Additional Documents, Tab 20, p. 5 (RESP-261).
[54] *Ibid.*, p. 6.
[55] Defence Book of Additional Documents, Tab 22, paras. 9-12; Exhibit A.
[56] Exhibit 12, AGC Dhaliwal Binder, Tab 6, p. 1.

devices. This was made abundantly clear when on December 20, 2018, Agent Sgroi wrote to RCMP Supt. Mark Flynn and expressed the following:

> I received a query from my HQ regarding the devices, media and any other electronics seized from Meng. Would it be possible to get a list of that which was seized? Could you also advise who has possession of these items? The purpose is to assist in properly drafting an MLAT request.[57]

45. The request for information by Agent Sgroi was legitimate and well within the bounds of police-to-police information sharing recognized by the Supreme Court as essential to combating transnational crime. In *Wakeling v. United States of America*,[58] the Court was supportive of general practices of sharing information between jurisdictions, without the need for formal pre-authorizations or MLAT proceedings. Moldaver J. explained:

> Multi-jurisdictional cooperation between law enforcement authorities furthers the administration of justice in all of the jurisdictions involved. It must not be forgotten that Canada is often on the receiving end of valuable information from foreign law enforcement authorities.
>
> …
>
> Common sense would suggest that similarly unremarkable and entirely reasonable instances of law enforcement cooperation to combat cross-border criminal activity occur on a daily basis between Canadian and U.S. authorities. Saddling police with the obligation of imposing boilerplate caveats on even the most routine disclosures poses an unnecessary burden. It would do little to safeguard the interests protected by s. 8 while impeding legitimate law enforcement operations.[59]

46. The MLAT process is not the exclusive means by which information relevant to a foreign criminal investigation can be shared by Canadian police.[60] This principle is recognized explicitly by s. 3(2) of the *Mutual Legal Assistance in Criminal Matters Act*:

> 3(2) Nothing in this *Act* or an agreement shall be construed so as to abrogate or derogate from an arrangement or practice respecting cooperation between a Canadian competent authority and a foreign or international authority or organization.

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[57] AGC Book of Additional Documents, Tab 15.
[58] 2014 SCC 72.
[59] *Wakeling* at paras. 57, 78.
[60] *Viscomi v. Ontario (Attorney General)*, 2014 ONSC 5262 at paras. 41-43; *R. v. Ritter*, 2004 ABQB 332 at paras. 27-35; *U.S.A. v. Hollaus*, 2020 BCSC 1600 at paras. 22-26.

47. As noted by Madam Justice Allan of this Court, "police agencies in different countries customarily exchange and provide information to aid in the investigation of criminal investigations."[61] The lawfulness of police-to-police sharing between Canadian and foreign law enforcement without judicial authorization has been upheld in numerous contexts including:

- The sharing of photographs supporting allegations of child pornography obtained by Canadian police from computers searched pursuant to a search warrant later deemed unconstitutional;[62]
- The sharing of evidence supporting allegations of fraud obtained by Canadian police from electronic devices searched pursuant to a search warrant;[63] and
- The sharing of a "booking-in" photograph taken by the RCMP post-arrest.[64]

48. The Applicant has no legal basis to support the contention that it was improper for U.S. authorities to request, on a police-to-police basis, the ESN information relating to the devices for the purpose of particularizing an MLAT request. Furthermore, the Applicant has no evidence to support the argument that U.S. authorities sought the ESN information for a purpose other than the one stated by Agent Sgroi to RCMP Supt. Mark Flynn. As noted above, in the absence of evidence to the contrary, this Court must presume that Canada's extradition partner conducted itself in good faith.

8. When the RCMP Did Not Provide the Descriptive Information about the Devices, U.S. Authorities Properly Made a Supplemental MLAT Request

49. U.S. authorities again resorted to the MLAT process when it became clear that they could not obtain information about the Applicant's devices from the RCMP through police-to-police channels. The relevant correspondence between U.S. and Canadian officials leading up to the supplemental MLAT request demonstrates the good faith of the Requesting State:

- December 19, 2018 – The IAG advised the U.S. that the Applicant's counsel had indicated they would seek the return of the Applicant's electronic devices.[65]

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[61] *United States of America v. Pavlicevic*, 2008 BCSC 410 at para. 68.
[62] *U.S. v. Hibbert*, 2021 ONSC 80 at paras. 88-91.
[63] *United States v. Mathurin*, 2015 ONCA 581 at paras. 30, 41-43.
[64] *Pavlicevic* at paras. 64-70. See also *U.S.A. v. Graham*, 2005 BCSC 54 at para. 25.
[65] AGC Book of Additional Documents, Tab 13 (RESP 145).

- December 20, 2018 – Agent Sgroi requested a list of the seized devices from RCMP Supt. Flynn.[66]

- December 20, 2018 – The U.S. asked the IAG "if CBSA/RCMP" have custody of the electronic devices seized – does CBSA or RCMP have any authority, outside the MLAT process to image the devices."[67]

- December 27, 2018 - The U.S. sent an MLAT request to IAG for information about the devices, the actual devices and/or forensic images of the devices.[68]

- February 9, 2019 – The IAG denied the second MLAT request.[69]

50. As will be explained, the evidentiary record only supports the conclusion that the RCMP never shared any information with U.S. authorities about the Applicant's devices. There is no evidence to the contrary. The fact that U.S. authorities made an MLAT request on December 27, 2018, requesting a list of the devices seized from the Applicant, including "make and model of the device, and any visible serial numbers" is in itself evidence that the RCMP never provided this information. Why would the FBI seek this information in an MLAT request if they already had received it from the RCMP? The answer is clear: the RCMP never shared the ESN information. The U.S. did not even have a list of the devices that were seized. After the MLAT request was denied by the IAG in February of 2019, there is no evidence the U.S. made any further attempt to obtain information about the devices from the RCMP or by MLAT request.

E. Conclusion

51. Where the allegation is that foreign authorities conspired with Canadian authorities to achieve an unlawful goal, the Court must carefully review the evidence of foreign conduct, as in *Tollman* and *Bartoszewicz*, to determine whether it possible to infer misconduct. The fact that there is no evidence of foreign misconduct can be a factor, in itself, that the conduct of Canadian officials is not an abuse of process.[70]

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[66] AGC Book of Additional Documents, Tab 15 (RESP 148).
[67] AGC Book of Additional Documents, Tab 14 (RESP 147).
[68] AGC Book of Additional Documents, Tab 19 (RESP 260), Tab 20, p. 7 (RESP 261).
[69] Defence Book of Additional Documents, Tab 17 (RESP 169).
[70] *United States v. Talashkova*, 2014 ONCA 74 at para. 11, affirming 2013 O.J. No. 1283 at para. 79; *R. v. Wilson*, 2014 ONSC 2994 at para. 54; *United States v. Latina*, 2015 ONSC 842 at para. 54.

52. The evidence overwhelmingly demonstrates that the U.S., in its dealings with Canadian authorities concerning the Applicant's arrival, arrest and the sharing of information, acted lawfully at all times. All communications between U.S. and Canadian authorities were appropriate. There was no attempt by U.S. authorities to control or even influence the conduct of the RCMP or CBSA. Where information was sought, it was requested transparently and through recognized processes. There is simply no basis upon which the presumption of good faith, applied by the courts in assessing the conduct of Canada's treaty partners, could be displaced.

53. There is no evidence to support the Applicant's argument that the U.S. recruited the RCMP and CBSA to inappropriately act as agents in gathering evidence to support a criminal investigation. As that avenue of argument is closed, the Applicant's only remaining theory must be that the RCMP and CBSA, spontaneously and without direction or request from any third party, were motivated to use their respective arrest and examination powers, not for the purpose of fulfilling their statutory mandates, but to gather evidence for the FBI. Not only is such a theory illogical and highly implausible, as will be explained below, it is not supported by the evidence.

III. THE PROVISIONAL ARREST WARRANT

A. Key Points

(i) Unlike the context of a obtaining a domestic arrest warrant, there was no RCMP investigation of the Applicant. As such, the Affidavit in support of seeking the Provisional Arrest Warrant was necessarily based on information provided by the Requesting State.

(ii) The Affidavit included the material information contained in the PA Request and attached a Summary of Facts setting out the relevant and complete factual background for the issuing judge.

(iii) The Applicant's access to two homes in Vancouver is irrelevant to whether it was in the public interest to issue the Provisional Arrest Warrant because it does not create ties to Canada or negate the following facts:

- the Applicant was a foreign national;
- residing in China;
- facing serious charges in the United States;
- with access to significant financial resources; and
- on a brief layover in Vancouver before travelling to Mexico.

(iv) It is not reasonable to expect that Cst. Yep could accurately determine if the Applicant owned property in Canada. Especially given the property was not listed in the Applicant's name.

(v) The fact the American charges against the Applicant were sealed and that fact was not included in the PA Request or the Affidavit is irrelevant because it could not change whether the Provisional Arrest Warrant could issue. In any event, it is reasonable to infer the Applicant knew of a criminal investigation into Huawei and its executives and, as such, was avoiding the U.S. In any event, avoiding the jurisdiction seeking your extradition is not a prerequisite for the issuance of a provisional arrest warrant.

(vi) It is irrelevant that the Applicant visited Canada since her U.S. arrest warrant was issued and that she visited other countries with extradition treaties with the U.S. A requesting state is free to choose the time and location that it makes an extradition request.

(vii) The RCMP actions in obtaining the Provisional Arrest Warrant were not improper.

B. Overview

54. There is no evidence to support the Applicant's assertion that the RCMP acted abusively in respect of obtaining the Provisional Arrest Warrant for the Applicant on November 30, 2018. The Affidavit in support of the warrant set out the facts provided by the Requesting State in support of obtaining a provisional arrest warrant under s. 13 of the *Extradition Act*. The Applicant argues that the affidavit misled the issuing judge by minimizing the Applicant's ties with Canada and overstating concerns that she posed a flight risk. The affidavit is not misleading, nor are any of the facts the Applicant says are omitted material to the decision of the judge, because they could not possibly change the result of whether a provisional arrest warrant would issue.

C. Key Facts

55. On November 30, 2018, the United States submitted the PA Request to Canada.[71] The PA Request sets out a summary of the Applicant's alleged conduct underpinning request for extradition and states that the Applicant was to arrive at YVR on December 1, 2018 at 11:30 a.m. aboard Cathay Pacific Flight 838. The PA Request sets out that on August 22, 2018, the Honourable Roanne L. Mann, Magistrate Judge for the Eastern District of New York, United States, issued a warrant for the Applicant's arrest.[72]

56. In the PA Request, the Requesting State also requests that electronic devices in the possession of the Applicant at the time of arrest be secured by law enforcement in an RFID or radio frequency blocking "Faraday Bag" to prevent wireless signals from wiping or altering the devices remotely.[73]

57. Based upon the information contained in the PA Request, on November 30, 2018, the AGC applied to this Court for a provisional arrest warrant for the Applicant pursuant to s. 13 of the *Extradition Act*. In support of the application, the AGC submitted the affidavit of RCMP member, Cst. Winston Yep, which provided evidence on the three requirements under s. 13 of the *Extradition Act* for the issuance of a provisional arrest warrant. First, there were reasonable grounds to believe that there was an outstanding American arrest warrant for the Applicant.[74] Second, the Applicant was believed to be travelling into Canada from Hong Kong on December

[71] Exhibit 1, AGC Yep Binder, Tab 2, The PA Request.
[72] Exhibit 1, AGC Yep Binder, Tab 2, p. 2.
[73] Exhibit 1, AGC Yep Binder, Tab 2, p. 1.
[74] Exhibit 1, AGC Yep Binder, Tab 1, p. 3.

1, 2018, for a short layover *en route* to Mexico.[75] Third, it was in the public interest to issue an arrest warrant for the Applicant.[76] At approximately 5:30 p.m. on November 30, 2018, the Honourable Madam Justice Fleming of this Court issued a provisional arrest warrant for the arrest of the Applicant (the "Provisional Arrest Warrant").[77]

D. The RCMP's Affidavit Was Not Misleading

58. As a starting point in analyzing the conduct of the RCMP, it is important to acknowledge that, since it was dealing with an extradition request, the RCMP was not investigating the Applicant for Canadian offences. Accordingly, the RCMP did not have an open investigation as a source of information regarding the Applicant in advance of her arrest, as would be the case in obtaining a *Criminal Code* arrest warrant. The RCMP relied upon the information provided in the PA Request as a basis for the Affidavit in support of the *ex parte* application for the Provisional Arrest Warrant.

59. As held by the Supreme Court in *R v. Morelli* there is a high duty on an informant in an *ex parte* application. The Court held:

> In failing to provide these details, the informant failed to respect his obligation as a police officer to make full and frank disclosure to the justice. When seeking an *ex parte* authorization such as a search warrant, a police officer — indeed, any informant — must be particularly careful not to "pick and choose" among the relevant facts in order to achieve the desired outcome. The informant's obligation is to present *all material facts, favourable or not*. Concision, a laudable objective, may be achieved by omitting irrelevant or insignificant details, but not by material non-disclosure. This means that an attesting officer must avoid incomplete recitations of known facts, taking care not to invite an inference that would not be drawn or a conclusion that would not be reached if the omitted facts were disclosed.[78]

60. Cst. Yep's affidavit in support of the application for the Provisional Arrest Warrant did not selectively "pick and choose" facts. He set out what was contained in the PA Request and provided relevant facts upon which the issuing judge could determine whether the requirements of s. 13(1) of the *Extradition Act* were satisfied. As there was no Canadian police investigation into the

[75] Exhibit 1, AGC Yep Binder, Tab 1, p. 3.
[76] Exhibit 1, AGC Yep Binder, Tab 1, p. 3.
[77] Exhibit 1, AGC Yep Binder, Tab 6.
[78] *R v. Morelli*, SCC 2010 8 at para. 58.

Applicant, it is the PA Request that was the source of the information upon which Cst. Yep based his belief.[79]

61. In *Federal Republic of Germany v. Ebke*[80] the person sought brought an abuse of process application, in part, on the basis that there were insufficient grounds to support the provisional warrant upon which he was arrested. Justice Vertes upheld the validity of the warrant, and further held that even if the grounds supporting the warrant were insufficient, he would not have granted a judicial stay as the fairness of the proceedings was not compromised, nor was the integrity of the court's process sufficiently tainted to warrant a draconian remedy. Mr. Justice Vertes considered the prerequisites to the issuance of a provisional warrant and the role of the affiant:

> It will also be remembered that the general principle underlying the power of arrest is that there must be reasonable and probable grounds to believe that the person has committed a crime. In the context of extradition this becomes somewhat problematic since, of course, Canadian authorities do not have direct involvement in the investigation of a crime committed in another country. So how is this standard to be satisfied?
>
> Section 13(1) of the *Act* requires a judicial assessment of the information presented so as to satisfy the criteria set out therein. It is the judge who must be "satisfied" that there are reasonable grounds to believe that it is necessary in the public interest to arrest the person, that the person is ordinarily resident in Canada and that a foreign warrant for the person's arrest has been issued. "Satisfied" in this context means simply that the judge makes up his or her mind, comes to a conclusion, based on the evidence presented: see *Blyth v. Blyth*, [1966] A.C. 643 (H.L.) at 676. There is an obligation on the Applicant to present evidence so as to enable the judge to be satisfied that there are those reasonable grounds.
>
> The police officer swearing the Information, on the other hand, can only provide whatever information has been provided by the requesting state as to the commission of the crimes. The officer may have conducted some direct investigation, such as determining the residence of the person sought, but by necessity the bulk of the officer's information is hearsay. It depends on material provided by someone else and already reviewed by the executive branch (since the Minister is the one who decides whether to authorize the Attorney General to apply for a provisional arrest warrant).[81]

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[79] Reliance on the belief of other law enforcement officers is proper in justifying Canadian police actions, See *R v. Debot*, [1989] 2 SCR 1140 at p. 1166.
[80] (2001), 158 C.C.C. (3d) 253 (NWTSC).
[81] *Ebke* at paras. 32-33.

62. The Applicant's argument is that the Court was misled because it was not made aware that the Applicant had access to two homes in Vancouver and that because the American charges against the Applicant were sealed, the Applicant could not have been purposely avoiding U.S. jurisdiction to evade arrest. Given the duty to disclose material facts, the Applicant's argument must be that these facts are material such that, had the issuing judge been aware of them, the issuing judge may not have issued the Provisional Arrest Warrant.

63. The Applicant's argument is not supported by the evidence or the law. The issue for a warrant-issuing judge was whether a provisional arrest warrant for the Applicant would be in the public interest. The judge was provided with the following accurate information regarding the Applicant:

- the Applicant is a foreign national;
- the Applicant was residing in China;
- the Applicant had access to large amounts of money; and
- the Applicant was travelling through Canada on a short stop-over *en route* to Mexico.

64. All of these materials facts put before the Court in the application for the Provisional Arrest Warrant were subsequently confirmed as accurate by the following facts:

- the Applicant was not listed on title to any property in Canada;[82]
- the Applicant conceded at her bail hearing that she was not ordinarily resident in Canada under the *Criminal Code* and so was in a reverse onus on bail;[83]
- the Applicant was granted bail after a four-day bail hearing which resulted in the risk of flight being sufficiently mitigated by extraordinary bail conditions, including a $10 million recognizance, five sureties, electronic monitoring and 24-hour guards; and

[82] AGC Book of Additional Documents, Tab 21, Exhibits A and B.
[83] *United States v. Meng*, 2018 BCSC 2255 at para. 24; Transcript of Bail Proceedings, Dec. 7, 2018, p. 3.

- the Applicant was deemed to be a continued flight risk on January 29, 2021, when this Court upheld the initial conditions imposed to mitigate the risk of her flight.[84]

65. Cst. Yep's affidavit sets out that the Applicant was scheduled to fly to Vancouver, British Columbia on December 1, 2018, and make a brief stopover *en route* to Mexico.[85] While this fact was not listed in the section of Cst. Yep's affidavit as a reason that issuing a provisional arrest was in the public interest, it was before the issuing judge and supports the public interest ground due to the brevity of the Applicant's stop in Canada on December 1, 2018. The following additional evidence in Cst. Yep's affidavit supports that the Applicant's arrest was in the public interest:

- the Applicant faces serious charges in the United States;
- the Applicant had access to large amounts of resources to escape the jurisdiction;
- Huawei executives appear to have altered their travel plans to avoid the United States jurisdiction since becoming aware of the United States' criminal investigation into Huawei in April 2017; and
- the Applicant made multiple trips to the United States in 2014, 2015 and 2016, but has not made a single trip to the United States since March 2017, prior to Huawei becoming aware of the criminal investigation.

66. An additional factor supporting the issuance of the Provisional Arrest Warrant is implicit in any application for an extradition arrest warrant: Canada's international obligations triggered by the PA Request and the Minister's Authorization. Canada has a duty to assist its treaty partners and participate in the fight against transnational crime by respecting requests for extradition.

67. The Applicant incorrectly interprets the public interest provision of s. 13(1)(a) of the *Extradition Act* by limiting the grounds supporting the public interest criterion to only those that relate to preventing an individual from escaping the jurisdiction. That an individual may escape the jurisdiction is not a prerequisite for a provisional arrest warrant being in the public interest. Section 13(1)(a) provides that a judge may issue a provisional arrest warrant if there are reasonable grounds to believe that it is necessary in the public interest to arrest the person *including* to prevent

[84] *United States v. Meng*, 2021 BCSC 137.
[85] Exhibit 1, AGC Yep Binder, Tab 1, Affidavit of Yep, at p. 10, para. 9.

the person from escaping or committing and offence. Escaping the jurisdiction is but one of the factors in a constellation of factors to determine if the warrant is in the public interest.

68. Rules of statutory interpretation require that when a general word or concept (in this case "public interest") is followed by a more specific word or concept (in this case "risk of escape"), the more specific word expands, not limits the general words.[86] The Supreme Court considered the statutory interpretation of the word "include" or "including" and held:

> Whatever the particular document one is construing, when one finds a clause that sets out a list of specific words followed by a general term, it will normally be appropriate to limit the general term to the genus of the narrow enumeration that precedes it. But it would be illogical to proceed in the same manner when a general term precedes an enumeration of specific examples. In this situation, it is logical to infer that the purpose of providing specific examples from within a broad general category is to remove any ambiguity as to whether those examples are in fact included in the category. It would defeat the intention of the person drafting the document if one were to view the specific illustrations as an exhaustive definition of the larger category of which they form a part.[87] [emphasis added]

69. The Court concluded that it would be erroneous to consider specific words after a general word to be exhaustive. The Applicant interpretation of s. 13(1)(a) of the *Extradition Act* - to only require that a provisional arrest warrant will be in the public interest to prevent the person from escaping or committing an offence – makes the interpretation error identified by the Court. Proper interpretation requires a holistic approach to the factors that make the issuance of a provisional arrest warrant in the public interest. As stated above, these factors also will include Canada's international treaty obligations and the seriousness of the alleged offence.

70. In *Ebke*,[88] Vertes J. also provided insight into the meaning of "public interest" as that term is used in s. 13(1)(a) of the *Extradition Act*:

> The *Criminal Code* also does not define what is meant by "public interest". Presumably the risk of flight would be a factor. Reasonable grounds to believe that the person sought committed the alleged crimes would be another factor. In the extradition context, it seems to me that ensuring Canada's compliance with its international obligations respecting the apprehension of alleged foreign criminals would also be in the public interest.

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[86] *National Bank of Greece (Canada) v. Katsikonouris, [1990] 2 SCR 1029 (SCC) at p. 1040.*
[87] *Ibid*.
[88] (2001), 158 C.C.C. (3d) 253 (NWTSC).

71. The Applicant contends that Cst. Yep's affidavit was misleading because it stated that the Applicant was "not ordinarily resident in Canada and appears to have no ties to Canada."[89] Cst. Yep's description of the Applicant as not ordinarily resident in Canada is factually accurate, given that the Applicant is a foreign national who is not ordinarily resident in Canada. Cst. Yep's statement that the Applicant had "no ties" to Canada, although more nuanced due to ambiguity in the word "ties", is also accurate. The fact is supported by the materials presented by the Requesting State to Cst. Yep, namely that the Applicant was a citizen of China, who was believed to reside in China.[90] Cst. Yep testified that the source of his information for the Affidavit was contained in the PA Request, which included the Summary of Facts that set out that the Applicant was a citizen of China and was believed to reside in China.[91]

72. The Applicant seems to suggest that her access to two homes in Vancouver establishes "ties" to Canada. Even had Cst. Yep been aware that the Applicant's husband owned property in Canada at the time he swore the Affidavit, the Applicant's ownership of Canadian vacation property is not material in the assessment of her ties to Canada for the purposes of deciding whether it is in the public interest for the Court to issue a provisional arrest warrant. A visitor to Canada, regardless of the value or number of properties he or she owns, does not have ties that could be material to a decision of whether the public interest is served by issuing a provisional arrest warrant. The Applicant was only transiting through Canada *en route* to Mexico, having an interest in property does not change that fact.

73. As set out above, the facts set out in the Affidavit were subsequently proven to be accurate. The Affidavit accurately described the Applicant's lack of connection to Canada given that the Applicant is a Chinese national, residing in China. As a foreign national, the Applicant's immigration status in Canada was that of a visitor. The Applicant conceded at her bail hearing that she was not ordinarily resident in Canada pursuant to s. 515(6)(b) of the *Criminal Code*.

74. Moreover, a person's ties to Canada are not dispositive under the test for issuing a provisional arrest warrant under s. 13 of the *Extradition Act*. Section 13(1)(b) of the *Extradition Act* provides that a resident or even a citizen of Canada can be the subject of a provisional arrest warrant. The public interest should be determined with regard to the totality of circumstances and

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[89] Applicant's submissions at para. 147.
[90] Exhibit 1, AGC Yep Binder, Tab 2, p. 5 of Summary of Facts.
[91] Exhibit 1, AGC Yep Binder, Tab 1, para. 11; Yep, Oct. 26, p. 20, ll. 38-45; Yep, Oct. 28, p. 17, ll. 6-23.

the specific context of the individual. In this case, the fact that the Applicant was travelling through Canada "in transit to a third country, believed to be Mexico" is a relevant factor for a judge issuing a provisional arrest warrant.

1. The Applicant's Home "Ownership" In Vancouver

75. The Applicant's focus on her "ownership" of two properties in Vancouver as information that Cst. Yep should have included in the Affidavit or alerted the Court to its existence after the Provisional Arrest Warrant issued, requires specific attention. It is difficult to understand how Cst. Yep could discover with an independent search that the Applicant "owned" two properties in Vancouver considering that title to both properties are held solely in the name of the Applicant's husband and the Applicant is not listed on title.[92]

76. In the evening of November 30, 2018, during his visit to YVR, Cst. Yep heard a "CBSA intelligence person" make the comment that the Applicant owned two homes in Vancouver.[93] The Applicant asserts that upon hearing that information, Cst. Yep should have alerted the Court that his affidavit omitted this information. Respectfully, there are two problems with the Applicant's position. First, that information could not have changed the outcome of whether a provisional arrest warrant was issued and so is immaterial. Second, the information was casually overheard and ultimately turned out to be incomplete, given that the Applicant was not technically the owner of any properties in Vancouver as the properties were held in her husband's name.[94] Cst. Yep had no obligation to advise the Court of this new information as the fact was not material to the issuance of the warrant in that it could not have led to a different outcome as to whether the Provisional Arrest Warrant issued.

77. The provisional arrest warrant section of the *Extradition Act* exists for the circumstances in which the Applicant's extradition request occurred: on short notice, a person wanted for prosecution by one of Canada's extradition treaty partners is in, or passing through, Canada. The public interest, including international comity and the ability to combat transnational crime, is served by issuing the Provisional Arrest Warrant. Even if upon learning of the Applicant's connection to Vancouver real estate, Cst. Yep was convinced that the information was reliable, it

[92] AGC Book of Additional Documents, Tab 21, Exhibits A and B.
[93] Yep, Oct. 27, p. 60, ll. 18-47.
[94] AGC Book of Additional Documents, Tab 21, Exhibits A and B.

would not be a material fact that could have altered whether the Provisional Arrest Warrant should issue. As set out above, the material facts supporting that the issuance of the warrant was in the public interest were that it was a *Treaty* request for an extradition, the Applicant was a Chinese citizen, residing in China, facing serious criminal charges, with no immigration status in Canada, transiting briefly through Canada on the way to another country. There is nothing factually inaccurate that the Applicant was going to be in Canada for a short period of time and then leaving the jurisdiction a short time later. As such, a provisional arrest warrant was necessary and in the public interest if the Applicant was to be arrested in Canada on December 1, 2018.

2. The Applicant's Avoidance of the United States Since Huawei Became Aware of An American Criminal Investigation

78. The Applicant also takes issue with what she says is Cst. Yep's characterization of her as a fugitive and points to the assertions in the PA Request that Huawei executives, including the Applicant, altered travel plans to avoid the United States since becoming aware of the American criminal investigation into Huawei in April 2017.[95] The Applicant has provided no evidence to contradict the evidence in the PA Request that Huawei executives began altering their travel patterns to avoid any travel to or through the United States since Huawei became aware of a U.S. criminal investigation. The Applicant's travel patterns are not determinative of whether it is in the public interest to issue a provisional arrest warrant, but form part of the constellation of facts.

79. The summary of facts sets out that the Requesting State believes that, in or about April 2017, Huawei became aware of a U.S. criminal investigation of Huawei when Huawei's U.S. subsidiaries were served with grand jury subpoenas.[96] After Huawei became aware of criminal investigations into it and its employees by U.S. law enforcement, it is alleged that the Applicant and at least one other Huawei executive changed their travel plans to avoid travelling to, or through, the United States. The Applicant's travel patterns changed from frequent trips to the U.S. in 2014, 2015 and 2016 to zero trips after March 2017.[97]

80. It is irrelevant that the indictment specifically naming the Applicant was sealed on December 1, 2018. As the CFO of Huawei and the daughter of its founder, it is a reasonable

[95] Exhibit 1, AGC Yep Binder, Tab 2, at p. 5 of Summary of Facts.
[96] Exhibit 1, AGC Yep Binder, Tab 2, at p. 5 of Summary of Facts.
[97] Exhibit 1, AGC Yep Binder, Tab 2, at pp. 5-6 of Summary of Facts.

inference that she would be aware of the criminal investigation of Huawei and its employees and, as a result, changed her travel patterns to avoid the United States. The relevant fact was that the Applicant's travel pattern indicated she was avoiding the jurisdiction that sought her extradition. As such, it was reasonable for the affiant to state in the Affidavit that the Applicant's avoidance of the U.S. jurisdiction establishes a reasonable belief by the Requesting State that, without issuance of the provisional arrest warrant, it would be "extremely difficult if not impossible to secure her attendance at an American prosecution." Further, the fact of the pending indictment against the Applicant, whether sealed or not, provides evidence of the seriousness of the allegations against the Applicant, which, is also a relevant consideration as to whether issuing the provisional arrest warrant would be in the public interest.

3. Alleged Omissions in the Affidavit in Support of the Provisional Arrest Warrant Were Not Material to the Issuance of the Provisional Arrest Warrant

81. At most, the Applicant's access to homes in Vancouver or whether she altered her travel plans to avoid the United States are neutral facts, as defined by the Court of Appeal in *R. v. Readhead*.[98] The inclusion of those facts would not have undermined the existence of the three grounds required by s. 13 of the *Extradition Act*. None of the so-called omissions alleged by the Applicant would have had any bearing on the considerations of the issuing judge or rendered the evidence presented in Cst. Yep's affidavit incapable of supporting the issuance of the Provisional Arrest Warrant. In respect of whether or not the Applicant was avoiding the United States jurisdiction, it is important to note that it is not a pre-requisite for the issuance of a provisional arrest warrant that the person sought is avoiding the requesting state's jurisdiction.

82. Cst. Yep made full and frank disclosure, as defined by the Supreme Court of Canada in *R. v. Araujo*:

> The legal obligation on anyone seeking an *ex parte* authorization is full and frank disclosure of material facts: So long as the affidavit meets the requisite legal norm, there is no need for it to be as lengthy as A la recherché du temps perdu, as lively as the Kama Sutra, or as detailed as an automotive repair manual. All that it must do is set out the facts fully and frankly for the authorizing judge in order that he or she can make an assessment of whether these rise to the standard required in the legal test for the authorization. Ideally, an affidavit should be not only full and

[98] *R. v. Readhead*, 2008 BCCA 193 at paras. 8 and 9.

> frank but also clear and concise. It need not include every minute detail of the police investigation over a number of months and even of years.[99]

83. Ultimately, an affiant's candour will be determined by asking whether the issuing judge would have reason to be concerned had she or he been made aware of the facts that were omitted from the affidavit.[100] It is well-established that when considering omissions in an affidavit, the Court should only be concerned with material facts. The material facts related to the Applicant's ties to Canada in the context of the risk of flight are that she is a foreign national who resides in China, has access to large amounts of money, and was on a short layover *en route* to Mexico.

84. There is no evidence of material non-disclosure as suggested by the Applicant. This case bears no resemblance to the situation in *Tollman*. In that case, Molloy J. took issue with "strategic omissions" in the affidavit in support of the provisional warrant including that the requesting state was lying in wait for Mr. Tollman to leave the United Kingdom, that he did not have access to his passport as a result of the Immigration Division bail order, and that he was not a fugitive. Importantly, the affidavit in *Tollman* did not clearly set out the fact that there was no real danger of Mr. Tollman escaping the jurisdiction (as a result of the Immigration Division bail order), and that the Immigration Division had already considered the issue of Mr. Tollman's detention. Finally, Molloy J. held that the integrity of the judicial process was affected by the fact that the extradition warrant was obtained while Mr. Tollman was being held in custody in violation of an Immigration Division bail order. Thus, Molloy J. concluded, the process by which the extradition proceeding was commenced was tainted. None of these circumstances exist in the case before this Court.

85. Even in cases where errors and omissions are present in a supporting affidavit, such circumstances do not automatically vitiate the validity of the warrant, and certainly do not amount to abuse of process, except in extremely rare cases. In *Kissel*, the Applicant challenged the extradition warrant, alleging that it contained gross inaccuracies. The Court found that the affidavit in support of the arrest warrant contained errors and facts that had not been fully established, including the allegation that the person sought had a criminal record and used aliases. Still, Justice Beaulieu held that the decision to seek an arrest warrant, while the person sought was

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[99] *R. v. Araujo*, 2000 SCC 65 at para. 46.
[100] *R. v. Alizadeh*, 2014 ONSC 1624 at para. 13.

complying with immigration bail conditions, was not an abuse of process. His Lordship held that the affidavit was not purposely misleading and did not contain "strategic omissions."[101]

86. As in *Kissel*, the Applicant has failed to demonstrate that Cst. Yep's affidavit contains misleading evidence or strategic omissions that could amount to an abuse of process. The Affidavit accurately sets out the information provided by the Requesting State in the PA Request. The Affidavit was prepared in good faith and set out the material and relevant facts for the judge's consideration. The "Summary of Facts" provided by the Requesting State was attached to the Affidavit as an exhibit. There can be no serious argument that the Affidavit was prepared in a manner to mislead the Court. The claim that the preparation of the Affidavit was abusive is without merit.

E. The United States Is Free to Choose When And To Which Country It Makes an Extradition Request

87. There is nothing improper or that prevents a party to an extradition treaty from choosing to which country it makes a request for an individual's extradition or when it makes that request. There is no obligation on foreign authorities to move promptly to seek a person's extradition rather than to wait for a more opportune time or do so. In fact, questioning a requesting state's decision on the timing of making an extradition request, is tantamount to interfering in prosecutorial discretion because the timing of the request impacts the investigation, the prosecution strategy and potentially the location of other co-accused in any given case.

88. There is also no right for a person sought to be extradited from the country of his or her choice.[102] Simply put, the Applicant's assertion that her previous travel to countries with extradition treaties with the United States, including Canada, is irrelevant. That information could have no bearing on the issuing judge's determination as to whether to issue the warrant. There is no merit to the Applicant's claim that the Affidavit is misleading because it fails to disclose steps the Requesting State *could have taken* to request the Applicant's extradition, either earlier from Canada or at another time from a different country.

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[101] *Kissel* at para. 168.
[102] *Tollman* at para. 49.

F. Conclusion

89. The affidavit in support of obtaining the Provisional Arrest Warrant was not misleading. Any facts that were not included were not material to the issue before Madam Justice Fleming in that they could not have changed the decision whether to issue the warrant. Cst. Yep included the information he received from the Requesting State in support of the warrant in his affidavit, and relied upon that information in good faith. There is no abuse that can be founded on the actions of the RCMP seeking the Provisional Arrest Warrant.

IV. PRIORITY OF CBSA PROCESSES AT THE PORT OF ENTRY

A. Key Points

(i) The jurisprudence recognizes the port of entry to be a "unique context" in which the state is expected and required to interfere with the personal autonomy and privacy of persons seeking entry to Canada in order to secure the border. In this "unique context", CBSA processes have priority.

(ii) Every person entering Canada must present themselves without delay for customs and immigration examinations. The CBSA is expected to conduct their examinations immediately upon a traveller presenting themselves for examination.

(iii) The RCMP had no arrest plan until they met with the CBSA at YVR on the morning of December 1, 2018. There is no evidence that the RCMP altered a previously set plan.

(iv) The CBSA decided that their processes would take priority. They did not take direction from the RCMP.

(v) The CBSA officers had no experience in delaying their processes in the unique context of the port of entry. It was reasonable for them to give priority to customs and immigration processes over the execution of the arrest warrant.

(vi) The RCMP officers recognized that they were operating within the unique context of the port of entry. They appropriately exercised discretion in executing the warrant by deferring to customs and immigration processes.

(vii) The RCMP gained no advantage in deferring the arrest until the CBSA completed its processes.

B. Overview

90. On December 1, 2018, one of two procedures, relating either to immigration or extradition, had to take precedence at YVR. The CBSA had jurisdiction at the port of entry, had an interest in examining the Applicant for both immigration and customs purposes and was compelled by statute to proceed with their examinations without delay. CBSA officers carried out their procedures in relation to the Applicant without delay. They did not participate in an alleged conspiracy with the RCMP to subvert the Applicant's *Charter* rights. In the absence of any law or regulation that governs the priority of these processes, the decision to proceed with CBSA processes prior to the execution of the Provisional Arrest Warrant was appropriate.

C. The Relevant Legal Context

91. The CBSA is charged with "providing integrated border services that support national security and public safety priorities and facilitate the free flow of persons and goods."[103] Its responsibilities include the administration and enforcement of the *IRPA*[104] and the *Customs Act*.[105]

92. The reasonableness of the CBSA's decision to proceed with customs and immigration processes ahead of the execution of the Provisional Arrest Warrant must be assessed in the context of the port of entry.[106] Canada's effective control over its borders is considered a principle of fundamental of justice, serving numerous crucial social interests from national defence to public health.[107] The Supreme Court has recognized that border control is conducted by the state for "the general welfare of the nation" and that it is "a crucially important function."[108] As a result, the Supreme Court has repeatedly described border crossings as a "unique context" in which Canada's national interests are directly engaged and in which constitutional issues must be examined differently than in other scenarios.[109] It is within this "unique context" that "the state is expected

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[103] *Canada Border Services Agency Act*, S.C. 2005, c. 38, ("*CBSA Act*") s. 5.
[104] S.C. 2001, c. 27.
[105] R.S.C. 1985, c. 1 (2nd Supp).
[106] By analogy, in *R. v. Simmons*, [1988] 2 SCR 495 at para. 47, the Supreme Court of Canada held that the reasonableness of a search must depend to some degree on the circumstances in which a search is performed.
[107] *R. v. Jones*, 2006 CanLII 28086 ONCA at para. 31, cited with approval in *R. v. Nagle*, 2012 BCCA 373 at para. 33.
[108] *Simmons* at para. 49.
[109] *Simmons* at para. 47-49, 52; *R. v. Jacques*, [1996] 3 SCR 312 at para. 18 ; *R. v. Monney*, [1999] 1 SCR 652 at para. 42.

and required to interfere with the personal autonomy and privacy of persons seeking entry to Canada."[110]

93. Part of Canada's border control regime is met through a requirement that all persons entering Canada are subjected to customs and immigration related exams immediately. The *IRPA Regulations* confirm that a person seeking entry to Canada must appear "without delay" before an officer at the port of entry for examination.[111] The *Customs Act* imposes an identical requirement to present themselves "without delay" for a customs examination and to answer all questions truthfully.[112] These provisions help to ensure the integrity of Canada's border.[113]

94. There is no legal authority for the proposition that an arrest warrant must be executed before a person passes immigration and customs inspection. At most, an arrest warrant containing an immediacy requirement demands no greater or lesser immediacy in its execution than the requirement for CBSA processes to be conducted at the port of entry "without delay".[114]

95. In addition to the obligation upon the Applicant to present herself to customs officers without delay, the Applicant was also under a host of other related legal obligations upon entering Canada. As a foreign national, the Applicant was required to make an application to enter the country.[115] Once that application was made, CBSA officers were authorized to proceed with an examination of the Applicant to determine her admissibility.[116] The Applicant, as a foreign national, was required to satisfy CBSA officers that she is not inadmissible to Canada under *IRPA*.[117]

96. The Applicant's examination for immigration and customs purposes was not optional. Every person seeking to enter Canada must appear for an examination to determine whether they

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[110] *Jones* at para. 30.
[111] *IRPA* s. 18(1), Regulations s. 27(1).
[112] *Customs Act*, s. 11(1).
[113] See *R. v Shenandoah*, 2015 ONCJ 541 at para. 86.
[114] *R. v. Suberu*, 2009 SCC 33 at paras. 40-43.
[115] *IRPA* s. 11; *IRPA Regulations* s. 28.
[116] *IRPA* s. 15.
[117] *IRPA* s. 22(1).

may be admitted to this country.[118] Further, a person making an application is required to answer all questions put to them truthfully as part of the examination.[119]

97. The Applicant's goods were also subject to the same inspection regime as those of every other person who enters Canada. The *Customs Act* requires that every person arriving in Canada present themselves to an officer and answer truthfully any questions asked by the officer as part of the customs examination, and to report all goods being imported.[120]

D. The CBSA Appropriately Prioritized Customs and Immigration Processes

1. There Was No Formal Arrest Plan Until the RCMP and CBSA Met at YVR on the morning of December 1

98. The Applicant erroneously asserts that the RCMP settled on an arrest plan on November 30 to arrest the Applicant on the jetway or the airplane, only to change that plan the following day for the purpose of subverting her *Charter* rights.[121] There was only one plan, set by the CBSA and RCMP on the morning of December 1 at YVR: that the CBSA would conduct its statutorily required border processes before permitting the RCMP to execute the warrant. The Applicant's claim that the CBSA and RCMP changed the original plan in order to effect a covert criminal investigation finds no support in the evidence.

99. RCMP Constables Yep and Dhaliwal were assigned to assist the Department of Justice in obtaining and executing a warrant for the Applicant on November 30, 2018, while they were heading to Vancouver to transport the subject of another provisional arrest warrant to the Law Courts.[122] They had no knowledge about the nature of the provisional request or the identity of the target.[123] As the Department of Justice lawyers were not ready to meet with the RCMP, the officers went for lunch.[124] They RCMP officers were at the DOJ offices from 2:15 p.m. to 4:45

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[118] *IRPA* s. 18(1).
[119] *IRPA* s. 16(1).
[120] *Customs Act* s. 11(1). See also ss. 12(1), 12(3) and 13.
[121] Applicant's submissions at para. 94.
[122] Yep, Oct. 26, p. 17, ll. 2-31; Dhaliwal, Nov. 20, p. 30, ll. 3-34.
[123] Yep, Oct. 27, p. 34, ll. 39-45; Dhaliwal, Nov. 20, p. 33, ll. 25-40; p. 35, ll. 10-38.
[124] Yep, Oct. 27, p. 34, ll. 39-45.

p.m. for the purpose of reviewing the PA Request and swearing an affidavit in support of the warrant.[125] When they left the offices of the DOJ, the officers had no arrest plan.[126]

100. The RCMP officers proceeded to YVR that evening to try to confirm with the CBSA whether the Applicant would be on the flight from Hong Kong the next day as set out in the provisional request.[127] They attended the CBSA superintendent's office where they met with Supt. Louie and a CBSA intelligence officer at approximately 6:50 p.m.[128] The CBSA was unable to confirm for the RCMP whether the Applicant was on the flight, as it had not yet departed Hong Kong.[129] Constable Yep did not recall any discussion with Supt. Louie about a plan to execute the arrest warrant.[130] Constable Dhaliwal, on the other hand, recalled various ideas being discussed about how the warrant could be executed, but he considered the meeting with Supt. Louie to be nothing more than a "brainstorming session" in which nothing was "set in stone".[131]

101. The constables left the meeting with Supt. Louie without an arrest plan as they still did not know whether the Applicant would be arriving at YVR on December 1.[132] They decided to return to YVR the next morning, confirm the Applicant was on the flight and then set an arrest plan after speaking with the CBSA officers who were on shift the next morning.[133]

102. On numerous occasions on the evening of November 30, Constable Dhaliwal was in touch with his supervising officer, Sgt. Janice Vander Graaf.[134] They discussed options for how the arrest would be conducted.[135] One option that was discussed was that the CBSA would conduct its process upon the Applicant's arrival, after which the RCMP would execute the arrest warrant. Sergeant Vander Graaf explained her discussions with Cst. Dhaliwal about this idea in these words:[136]

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[125] Yep, Oct. 26, p. 18, ll. 22-24; p. 22, ll. 22-25.
[126] Yep, Oct. 26, p. 22, ll. 42-47.
[127] Yep, Oct. 26, pp. 22-23; p. 67, ll. 36-47; p. 68, ll. 1-11; Dhaliwal, Nov. 23, p. 6, ll. 10-15.
[128] Yep, Oct. 26, p. 22, ll. 22-31; p. 24, ll. 7-13.
[129] Dhaliwal, Nov. 23, p. 7, ll. 10-18.
[130] Yep, Oct. 26, p. 24, ll. 44-47; p. 25, ll. 1-2.
[131] Dhaliwal, Nov. 23, p. 7, ll. 45-47.
[132] Yep, Oct. 26, p. 25, ll. 1-2; p. 26, ll. 41-47; Dhaliwal, Nov. 23, p. 7, ll. 10-29; p. 9, ll. 1-3.
[133] Yep, Oct. 26, p. 26.
[134] Dhaliwal, Nov. 23, p. 76.
[135] Vander Graaf, Nov. 24, pp. 78-79.
[136] Vander Graaf, Nov. 24, p. 78, ll. 23-30.

> Q – And what is -- what is the nature of the conversation?
>
> A – So Constable Dhaliwal and I discuss the logistics of the arrest and how that will occur, and we discuss that CBSA would -- would conduct their process and then, when completed, the RCMP would arrest Ms. Meng.
>
> Q – How did that idea come up in -- in -- how did that idea come up in the conversation?
>
> A - Well, I -- I believe that Constable Dhaliwal has experience at the airport, and also that was -- that seemed like a -- good way to approach -- to allow CBSA to conduct their process. And then when completed, the RCMP would effect -- effectively arrest Ms. Meng.[137]
>
> …
>
> Q – And just again so I understand your testimony, when you say that CBSA would do their process first, what do you mean by that?
>
> A – CBSA, my understanding it they have Customs and Immigration processes when people come in -- enter into the country, and they do -- that's their jurisdiction as the first point of entry at the border, and they would have to do what they do when travellers enter. I'm not entirely familiar with Canada Customs processes, I just understand that they have a process that they have to follow and -- and a job and a role and a responsibility.[138]

103. Another option discussed later in the evening, after the constables left YVR, was suggested to Sgt. Vander Graaf from RCMP S/Sgt. Peter Lea. This option involved the RCMP going onto the plane to the conduct the arrest.[139] Sgt. Vander Graaf understood the idea of going onto the plan to be a suggestion from S/Sgt. Lea[140] and she passed it on to Constable Dhaliwal as a suggestion of how to proceed.[141] Cst. Yep also recalled hearing about the idea offered by S/Sgt. Lea of going onto the plane to conduct the arrest, but in his mind "it was just a suggestion, but we still had to go talk to the CBSA because – because the airport's their jurisdiction, and we wanted to – to advise them, and – and basically let them know that there's this arrest warrant."[142]

104. The constables ended their shift that night without an arrest plan. Cst. Dhaliwal explained the state of affairs at the end of his shift on November 30:

> So the end -- end of November 30th, we were -- it was confirmed that myself and Winston Yep would be the -- the two members who would be attending, and Winston would be –

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[137] Vander Graaf, Nov. 24, p. 78, ll. 16-30.
[138] Vander Graaf, Nov. 24, p. 80, ll. 12-23.
[139] Vander Graaf, Nov. 24, pp. 80-81.
[140] Vander Graaf, Nov. 24, p. 81, ll. 32-41.
[141] Vander Graaf, Nov. 24, p. 82, ll. 36-44.
[142] Yep, Oct. 26, p. 26, ll. 29-33.

> would be the arresting officer, and that I would be the exhibit person. That's the only thing confirmed. And the fact that we were going to meet in the morning at the airport.[143]

105. The evidence demonstrates that the frontline RCMP officers had no knowledge of the Applicant's arrival or the nature of the offences with which she was charged in the U.S. until the afternoon of November 30, 2018. They sought to confirm that the Applicant was in fact going to arrive at YVR on December 1. They were cognizant of the fact that the Applicant was arriving at a port of entry, the jurisdiction of the CBSA, and that the CBSA had its own processes to conduct. They considered different possibilities for how an arrest would be conducted, but did not have confirmation that the Applicant would be arriving in Vancouver the following day. The formation of an arrest plan was left for the morning of Saturday, December 1, when the constables would return to YVR to confirm the Applicant's arrival and meet with the CBSA officers on duty. Therefore, the arrest plan settled upon on the morning of December 1 was not a deviation from anything that had been decided the previous day. Until the morning of December 1, there was no plan to speak of.

2. Customs and Immigration Processes Take Precedence at the Port of Entry

106. On the Applicant's reasoning, the RCMP and CBSA should have used their time on morning of December 1 to conduct an analysis of the provisional warrant, the *Customs Act* and *IRPA*, determine which immediacy requirements should be given priority and which sequence of events would cause greater prejudice to the processes of the CBSA. Such an expectation is not realistic or even appropriate. The function of RCMP and CBSA officers is to respond to situations within their respective mandates based on their understanding of the law, and to rely on their training, experience and common sense in their decision-making. In this case, the RCMP and CBSA officers acted reasonably.

107. The RCMP met with the CBSA to decide on a practical process to execute an extradition warrant at the port of entry context, a situation for which there is no specific guidance in CBSA operational manuals or in the jurisprudence. All the officers recognized and were guided by a crucial fact ignored in the Applicant's submissions: the process decided upon had to respect the

[143] Dhaliwal, Nov. 23, p. 10, ll. 42-47, p. 11, ll. 1-2.

unique context of the port of entry and the CBSA's duty to secure the border. The understanding between the officers was explained succinctly by BSO Kirkland:

> A - We would do our job and then they would execute the warrant.
>
> Q – Did the RCMP push back or object to this decision that was arrived at?
>
> A – No, because they knew it was a port of entry and that we had the final say.
>
> Q – Why do you have the final say?
>
> A – Because it's a port of entry.[144]

108. It was the CBSA's decision that they would proceed with customs and immigration processes first.[145] The RCMP accepted the CBSA's assertion that CBSA processes should take priority.[146] The decision was based on the experience of the CBSA officers and their normal routines and procedures at the port of entry. They believed they had a duty to address their concerns about inadmissibility on the basis of criminal and national security inadmissibility. As explained by Supt. Dhillon, whose eleven years in passenger operations gave him the most experience of any officer involved in the examination of the Applicant:

> Q – Did the RCMP have any plan to proceed?
>
> A – Initially they had mentioned that they wanted to intercept her at the gate themselves, and myself and other members, like…Supt. McRae, suggested that we wouldn't – that wouldn't occur and that we would intercept her first and – do our customs and immigration process, and then they could take over.
>
> Q – Why did you say that?
>
> A – Because that's – normally that's exactly how it goes.
>
> Q – When you say normally that's how it goes, what do you mean by that?
>
> A – That's how I've been trained to do it.
>
> Q – To do what specifically?
>
> A – To intercept the traveller. We would proceed first before the RCMP takes over with the client.[147]

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[144] Kirkland, Oct. 28, p. 56, ll. 33-40.
[145] Kirkland, Oct. 28, p. 56, ll. 35-40; McRae, Oct. 30, p. 74, ll. 21-44; Dhillon, Nov. 16, p. 79, ll. 29-44; Katragadda, Nov. 18, p. 50, ll. 5-12; Lundie, Nov. 26, p. 56, ll. 10-47.
[146] Yep, Oct. 26, p. 33, ll. 14-32; Dhaliwal, Nov. 23, p. 16, pp. 5-10; Vander Graaf, Nov. 25, p. 51, ll. 5-7. Lundie, Dec. 7, p. 73, ll. 34-47.
[147] Dhillon, Nov. 16, p. 79, ll. 28-44.

109. None of the CBSA officers had experience with delaying customs and immigration processes to permit the police to conduct an arrest. The CBSA officers testified that when a traveller arrives at a port of entry, they are required to present themselves for examination without delay.[148] As explained by Supt. Dhillon, "I've never seen a case where the examination was delayed in any way."[149] Nicole Goodman, Chief of YVR Passenger Operations, testified along the same lines, explaining that in her experience, CBSA processes are never delayed at the airport to give priority to an RCMP process.[150]

110. It was not open to the CBSA officers to execute the Provisional Arrest Warrant as part of their dealings with the Applicant. CBSA officers do not have the legal authority to execute warrants under the *Extradition Act*. Section 138 of the *IRPA* gives designated CBSA officers the authority of peace officers for the purpose of enforcing *IRPA*. Section 163.5 of the *Customs Act* gives specially designated CBSA officer certain powers of peace officers in relation to a criminal offence under any other Act of Parliament. As the execution of the Provisional Arrest Warrant did not relate to the administration or enforcement of *IRPA*, the *Customs Act*, or any offence under an Act of Parliament, the Provisional Arrest Warrant could only be executed by the police. None of the CBSA officers believed that they had the authority to execute the Provisional Arrest Warrant.[151] Rather, they believed the RCMP had jurisdiction to execute the Provisional Arrest Warrant and because they were present, it was would be appropriate for the RCMP to execute their warrant when the CBSA had completed its processes.[152]

111. The Applicant concedes that every person arriving in Canada is required under the *Customs Act* and *IRPA* to present themselves for inspection immediately upon arrival.[153] The Applicant argues however, without reference to authority or justification, that the immediacy of the obligation on a passenger to present themselves for an examination can be divorced from the

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[148] McRae, Oct. 30, p. 43, ll 43-47; Dhillon, Nov. 16, p. 70, ll. 3-24; p. 79, ll. 29-47; Nov. 17, p. 37, ll. 22-42; Katragadda, Nov. 18, p. 49, ll. 45-47, p. 50, l. 1; Nov. 19, p. 27, ll. 16-19.
[149] Dhillon, Nov. 16, p. 70, ll. 23-24.
[150] Goodman, Dec. 8, p. 42, ll. 22-28.
[151] Kirkland, Oct. 28., p. 43, ll. 24-32; p. 56, ll. 31-34; McRae, Oct. 30, p. 58, ll. 19-30; Dhillon, Nov. 16, p. 73, ll. 42-47; p. 74. ll. 1-3, p. 80, ll. 7-16; Katragadda, Nov. 18, p. 42, ll. 11-29; Goodman, Dec. 8, p. 40, ll. 27-33.
[152] Kirkland, Oct. 28, p. 56, ll. 31-34; McRae, Oct. 30, p. 74, ll. 9-17; Dhillon, Nov. 16, p. 80, , ll. 7-16; Katragadda, Nov. 18, p. 49, ll. 12-19.
[153] Applicant's submissions at para. 91.

examination itself. The requirement imposed on every person at the port of entry to present themselves immediately for examination goes hand in hand with the obligation of the CBSA to conduct an examination of that person. The function of the CBSA is to determine the admissibility of people and goods into this country. Unless they initiate that examination the question of admissibility cannot be determined. The duty on the passenger to present immediately is inextricably linked to the obligation on the CBSA to conduct an immediate examination upon the arrival of a person to Canada.

112. In this case, the Applicant, as a foreign national, was subject to the same customs and immigration regime imposed by *IRPA* and the *Customs Act* on all persons and goods seeking entry to this country. The existence of the Provisional Arrest Warrant was immaterial to the fact that the Applicant, and the goods in her possession, could not be authorized to enter Canada until she was examined by CBSA officers. While the existence of the Provisional Arrest Warrant heightened the CBSA officers' concerns about the Applicant's admissibility, it has no bearing on whether they should subject the Applicant to standard border processes. The CBSA officers carried out their duties under the *Customs Act* and *IRPA*. Performance of statutory obligations lends no support to the Applicant's argument that the CBSA participated in a conspiracy to subvert her *Charter* rights.

113. The Applicant points to the fact that the CBSA officers were empowered to adjourn the examination as support for the argument that there is no immediacy requirement for an examination to be held. While CBSA witnesses confirmed that examination are sometimes suspended after several hours of questioning,[154] none of the CBSA witnesses suggested that, in their experience, the initiation of an exam could be delayed. Similarly, no such suggestion is found in the CBSA operational manual concerning port of entry examinations.[155] The CBSA operational manual only provides support for the approach taken by the CBSA:

> While Passenger Analysis Units provide strategic information about the arrival of persons linked to terrorist organizations, criminal activity and other factors that render them inadmissible, DART acts on this intelligence information <u>to intercept inadmissible persons immediately on arrival</u>. Passengers who pose security or

[154] Kirkland, Oct. 28, p. 31. ll. 20-32; McRae, Oct. 30, p. 52, ll. 22-33; Katragadda, Nov. 18, p. 39, ll. 17-24.
[155] CBSA Operational Manuals, Tab 2, ENF-4, Port of Entry Examinations, pp. 96-97, s. 18, 18.1.

> flight risks can be quickly intercepted and maintained in a controlled environment pending their examination. [emphasis added].[156]

114. The CBSA never endorsed, as argued by the Applicant,[157] the RCMP's suggestion that the arrest would precede customs and immigration processes. As noted above in the testimony of Sergeant Vander Graaf, the RCMP had already contemplated on November 30 that CBSA processes could take priority. CBSA Supt. Louie's suggestion, reported by Constable Dhaliwal, that the CBSA "wouldn't get involved in this whole process"[158] was offered during what Constable Dhaliwal called a "brainstorming session"[159] and does not amount to an endorsement. Similarly, while BSO Kirkland contemplated the possibility of the CBSA standing aside and allowing the RCMP to arrest, Supts. McRae and Dhillon and BSO Katragadda never entertained any possibility that did not involve the CBSA proceeding with an examination before the RCMP executed their warrant. In fact, the CBSA explicitly rejected the RCMP's ideas offered at the December 1 meeting that the arrest could precede CBSA processes and take place on the jetway[160] or the airplane.[161]

3. The RCMP Officers Recognized that the Unique Context of the Port of Entry Must Be Respected

115. The RCMP officers were prepared to defer to the CBSA because they recognized the unique context of the port of entry. They perceived the port of entry as the CBSA's jurisdiction. None of the RCMP witnesses had experience with proceeding with an arrest ahead of customs and immigration processes. The question for this Court in assessing the reasonableness of the RCMP conduct is not whether the RCMP gave sufficient attention to the precise wording of the Provisional Arrest Warrant in formulating their arrest plan, as suggested by the Applicant;[162] the question is whether the RCMP officers conducted themselves reasonably in the unique context of the port of entry.

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[156] CBSA Operational Manuals, Tab 2, ENF-4, Port of Entry Examinations, p. 106, s. 22.4.
[157] Applicant's submissions at paras. 94-101.
[158] Dhaliwal, Nov. 23, p. 7, ll. 43-47, p. 8, ll. 1-7.
[159] Dhaliwal, Nov. 23, p. 7, ll. 43-47.
[160] Dhillon, Nov. 16, p. 79, ll. 29-35.
[161] Katragadda, Nov. 18, p. 49, ll. 26-47; p. 50, ll. 1-12.
[162] Applicant's submissions at para. 111.

116. All of the RCMP officers who attended the airport on December 1 for the purpose of executing the warrant accepted that CBSA processes take priority at the port of entry.[163] As explained by Cst. Yep, "we were mindful that it was CBSA's jurisdiction".[164] Sgt. Lundie described the CBSA as the "gatekeeper to Canada" and as "the first individuals that interact with someone entering the country."[165] He explained that the airport presented a unique context and special considerations for conducting an arrest for the RCMP because "you're dealing with an international border, you're dealing with a port of entry, you're dealing with a customs-controlled area, and we're dealing with the CBSA as well."[166]

117. It was the unique context of the port of entry that determined the sequence of processes between the CBSA and RCMP on December 1, 2018. The Applicant mischaracterizes Cst. Yep's officer safety concerns as the basis for why the CBSA proceeded first, and then attacks the legitimacy of his concerns.[167] While Constable Yep testified he didn't think conducting the arrest on the plane was the safest course of action because of the unknown variables presented by an arrest in that context,[168] he rejected the notion that safety was the reason the CBSA proceeded first.

> Q – And at that 9:30 meeting this plan or idea that the RCMP could go on the plane and arrest her was raised but the safety concerns were in your mind, so you didn't think it was a good idea.
>
> A – Yeah, we suggested it, and the CBSA did indicate it's – it's – it's their jurisdiction and they would -- they would take her in first. That would be – and when she's taken into the secondary, when they're done their process, they'd put her in a room and I would come in and – and – and effect my arrest, and that would be the safest way.
>
> Q – That would be the safest way.
>
> A – Yes.
>
> Q – So it's another reason why it wasn't a good idea for the RCMP to do what Peter Lea had suggested.

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[163] Yep, Oct. 26, p. 30, ll. 45-47; p. 53, ll. 21-29, 39-43; Dhaliwal, Nov. 23, p. 13, ll. 45-47; Vander Graaf, Nov. 24, p. 63, ll. 30-35; p. 78. ll. 40-43; Nov. 25, p. 51, ll. 5-7; Lundie, Nov. 26, p. 41, ll. 30-34; p. 56, ll. 38-47; p. 61, ll. 34-47.
[164] Yep, Oct. 26, p. 30, ll. 45-47.
[165] Lundie, Nov. 26, p. 22, ll. 14-20.
[166] Lundie, Nov. 26, p. 28, ll. 33-43.
[167] Applicant's submissions at para. 144, 151-156.
[168] Yep, Oct. 26, p. 58, ll. 9-21.

> A – No, CBSA indicated normally that's – we – we – we talked – we discussed with CBSA, and CBSA said, "Well, this is – this is our jurisdiction. We normally just have people when they first come into the country," and – and that was the process that we were going to – that was going to be the process, that they intercept her, take her into secondary, do their – they had concerns about her – immigration status, and they were going to process her first.[169]

118. Whether or not the warrant required the RCMP to conduct an immediate arrest in this case was inconsequential. The RCMP officers reasonably recognized that they were operating within the unique context of the port of entry. They understood that their arrest plan would ultimately await CBSA carrying out their necessary border procedures. Constable Yep, who was tasked with executing the arrest warrant and who was aware of the immediacy requirement within the warrant explained:

> To me, "immediately" was as soon as practicable, and I always operated under that notion. And we – we discussed about – about going on the plane, but CBSA – we understood that was CBSA's territory, jurisdiction, and we wanted to work with CBSA to – to, I guess – I guess to make – formulate a plan to – to arrest her the most – the safest and most efficient way I guess. [170]

119. This recognition of the unique circumstances presented by the port of entry context was not only reasonable, but what is expected of RCMP officers in executing arrest warrants. The Applicant's argument that the RCMP ought to have mechanistically pre-empted or interfered with normal CBSA border processes is contrary to well-established authority. In executing their duties, whether authorized by court order or statue, police are to consider the specific exigencies of the situation and to exercise appropriate discretion.

120. As noted by the Court of Appeal in *R. v. Bacon*,[171] police officers and police services are "afforded independent discretion to adapt to individual circumstances presented."[172] The Court of Appeal quoted from the following passage in *R. v. Beaudry*[173] to explain the importance of police discretion to the functioning of the justice system:

> Applying the letter of the law to the practical, real-life situations faced by police officers in performing their everyday duties requires that certain adjustments be made. Although

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[169] Yep, Oct. 26, p. 54, ll. 39-47; p. 55, ll. 1-16.
[170] Yep, Oct. 26, p. 42, ll. 34-41.
[171] 2020 BCCA 140.
[172] *Bacon* at para. 46.
[173] 2007 SCC 5.

> these adjustments may sometimes appear to deviate from the letter of the law, they are crucial and are part of the very essence of the proper administration of the criminal justice system, or to use the words of s. 139(2), are perfectly consistent with the "course of justice". The ability — indeed the duty — to use one's judgment to adapt the process of law enforcement to individual circumstances and to the real-life demands of justice is in fact the basis of police discretion. What La Forest J. said in *R. v. Beare*, [1988] 2 S.C.R. 387, at p. 410, is directly on point here:
>
> > Discretion is an essential feature of the criminal justice system. A system that attempted to eliminate discretion would be unworkably complex and rigid.

121. With respect to immediacy, guidance is found in the context of an individual's "immediate" right to counsel. The Court of Appeal in *R. v. Fan*,[174] clarified the concept of "without delay:" holding:

> However, immediate is not necessarily synonymous with "instantaneous". Sometimes practical considerations play a role in what is immediate for purposes of s. 10(b), particularly with respect to the implementational duty. For example, in some cases a police officer's implementational duty may be limited by urgency or legitimate concerns for safety: *R. v. Ashby*, 2013 BCCA 334 (CanLII) at paras. 70-72. As Fitch J.A. emphasized in *R. v. Patrick*, 2017 BCCA 57 (CanLII), it is incumbent on a judge to give meaningful consideration to the exigencies of a situation in a s. 10(b) ruling: paras. 111-114.

122. The exigencies of the situation of the Applicant's arrest, including that she was a foreign national seeking entry into Canada at an international airport, provides context to what is reasonable and appropriate in this case. Any individual entering Canada has an obligation to report to the CBSA at the port of entry without delay. It was reasonable for the RCMP to wait until the CBSA concluded the Applicant's examination process to execute the Provisional Arrest Warrant.

123. Section 511(c) of the *Criminal Code*, which provides that an arrest warrant is to be executed "forthwith" is not incorporated into the *Extradition Act* specifically.[175] However, judicial interpretation of this section provides some clarification as to how prompt peace officers must be in executing arrest warrants. Courts do not slavishly apply the requirement for immediacy. The requirement to execute a warrant forthwith must be regarded as what is reasonable in the specific

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[174] 2017 BCCA 99 at para. 53.

[175] Section 19 of the *Extradition Act* provides that Part XVI of the *Criminal Code* applies, with modifications that the circumstances require, in respect of a person arrested under s. 13 or 16… As such, *Criminal Code* provisions related to the issues prior to arrest in Part XVI would not apply.

circumstances.[176] Given the context of the circumstances of the Applicant's arrival into Canada as a foreign national, the RCMP's actions were reasonable.

124. Exercising powers of arrest requires judgment. For example, it would generally be improper for police to execute a provisional arrest warrant under the *Extradition Act* during court proceedings.[177] Rather than evidence of an abuse of process, the fact that the RCMP delayed the execution of the Provisional Arrest Warrant until immigration and customs procedures had concluded is an example of the reasonable exercise of police discretion.

4. The RCMP Gained No Advantage By Waiting to Execute the Warrant

125. There was no advantage to the RCMP in waiting to arrest the Applicant. The RCMP officers patiently waited in the superintendent's office while the CBSA completed its processes. Other than to ask the CBSA to secure the Applicant's electronics (which would have been seized by the RCMP incident to arrest had they proceeded first) and to maintain visual continuity of the Applicant, the RCMP made no other request of the CBSA.[178] The RCMP did not ask the CBSA to conduct an examination, suggest lines of questioning, ask for the electronic devices to be examined or seek any of the information from the examination said to be obtained in violation of the *Charter*.[179]

126. The Applicant's claim that the RCMP was planning to use the CBSA "as its proxy in their investigation of the Applicant"[180] finds no support in the evidence. The examples used by the Applicant as a basis for this dramatic claim do not support the existence of a conspiracy. The text message exchange between Sgt. Vander Graaf and Cst. Dhaliwal concerning an "assistance order" was fully explained by Sgt. Vander Graaf in her testimony. Sgt. Vander Graaf testified that she considered that an assistance order under s. 487.01 of the *Criminal Code* might be required if the RCMP was going to seek the CBSA's assistance in preserving the Applicant's electronic devices. Ultimately, she dismissed the idea as there was no need for a covert action.[181] As noted above,

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[176] *R. v. Thind*, 2018 ONSC 1337 at paras. 74-75.
[177] *U.S.A. v Alfred-Adekeye*, unreported (May 31, 2011) Vancouver 25413 (S.C.) at para. 27.
[178] Kirkland, Oct. 26, p. 59, ll. 22-24; McRae, Oct. 30, p. 76, ll. 10-12.
[179] Yep, Oct. 26, p. 34, ll. 45-47, p. 35, ll. 1-9; p. 42, ll. 12-30; Dhaliwal, Nov. 23, p. 15, ll. 7-28. Vander Graaf, Nov. 25, p. 4, ll. 3-17; Lundie, Nov. 26, p. 57, ll. 39-45.
[180] Applicant's submissions at para. 103.
[181] Vander Graaf, Nov. 24, pp. 84-85.

Sgt. Vander Graaf and Cst. Dhaliwal had discussed various possibilities of how the arrest could unfold, including that the RCMP would execute the Provisional Arrest Warrant after the CBSA had completed its processes. The discussion of an assistance order in that context is hardly evidence of a conspiracy.

127. The Applicant's reliance on hearsay statements in the CSIS situation report (SITREP)[182] is equally incapable of showing that the RCMP permitted the CBSA's processes to take precedence in the hope of gaining an advantage. The Applicant selectively quotes from the synopsis of the CSIS document, which states "the RCMP, with likely CBSA assistance, will effect an arrest of Meng…"[183] The body of the document, however, uses different language to describe the CBSA's involvement: "On 2018 11 30 the Service [redacted] received word from the FBI that an arrest warrant had been issued requiring Canadian DoJ, RCMP, and possibly CBSA assistance. A BC judge validated the warrant just before the closure of court."

128. The use of the word "assistance" in this context is entirely vague. Considering that the "Canadian DoJ" is included in the list of parties supposedly providing assistance after the warrant has already been issued, it is unlikely that the author intended to suggest that the "assistance" to be provided by the Department of Justice or the CBSA would have anything to do with the arrest itself. More importantly, there is no indication that the "assistance" referred to in connection with the CBSA was promised by the CBSA itself or that it involved anything other than the cooperation and communication between the CBSA and law enforcement which is expected of border officials in lawfully performing their duties.

129. The Applicant's allegation that the RCMP manipulated the sequence of processes at the port of entry to gain an advantage over the Applicant is entirely speculative. There is no evidence that the RCMP sought to collect any evidence against the Applicant, other than the electronics specified in the PA Request. Why then would the RCMP be interested in manipulating the sequence of processes at the border as alleged by the Applicant? The Applicant has failed to address the incoherence of its central claim.

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[182] Applicant's submissions at para. 104.
[183] Defence Additional Book of Documents, Tab 3 (AGC0001).

E. Conclusion

130. Under the Applicant's analysis, a CBSA officer presented with a provisional warrant under the *Extradition Act* containing an immediacy requirement is caught in a deadlock between two statutes and a warrant containing identical legal demands for immediate action. Logic and common sense support the decision made by the CBSA and endorsed by the RCMP in the "unique context" of the port of entry: immigration and customs procedures should take priority, as these processes determine whether people can be authorized to enter and goods imported into this country, and are applicable to every single person who seeks entry to Canada. Once those processes have taken place "without delay", the person who is the subject of the warrant should be arrested "immediately."

131. In the absence of any law or regulation that governs the priority of these processes, the decision to proceed with routine border processes prior to the execution of a warrant cannot be characterized as having been made in bad faith. The very fact that CBSA officers carried out their procedures in relation to the Applicant immediately and in the normal course, rather than waiting for an arrest warrant to be executed before initiating their examinations, lends support to the view that CBSA officers were carrying out their duties, and not participating in an alleged conspiracy with the FBI and RCMP.

V. THE CBSA PURSUED ITS BORDER SECURITY MANDATE

A. Key Points

(i) It takes "very strong evidence" to show that there is a disguised reason for immigration officials to do what is ordinarily considered their duty.

(ii) The jurisprudence establishes that CBSA officers must treat information raising security related inadmissibility concerns with utmost seriousness. All of the CBSA's conduct served to further a legitimate inquiry into national security and criminal inadmissibility concerns.

(iii) The CBSA superintendents were of the view, even before the RCMP arrived at YVR, that the Applicant should be examined for potential security related inadmissibility because of the CBSA issued "lookout". Whether or not the RCMP appeared at YVR on December 1, the Applicant would have been subjected to a secondary examination.

(iv) All of the CBSA frontline officers had criminal inadmissibility concerns about the Applicant on the basis of the lookout and the Provisional Arrest Warrant. All of the CBSA frontline officers had national security inadmissibility concerns about the Applicant on the basis of open source information linking Huawei, of which she was the CFO, to espionage.

(v) The Applicant's *Charter* rights were never engaged while under examination. She was never subjected to anything more than routine border screening processes.

(vi) The CBSA made independent decisions on how to fulfill its border security mandate. It did not take direction from the RCMP or FBI.

(vii) The CBSA met the Applicant at the gate in accordance with standard CBSA procedures for persons who are the subject of "lookouts".

(viii) The CBSA had an independent and legitimate interest in the Applicant's electronic devices. They believed the devices could potentially have information relevant to their inadmissibility concerns.

(ix) The CBSA officers obtained the Applicant's passwords lawfully for a potential device examination, before they knew that the NSU had no further guidance to offer.

(x) The passwords were shared with the RCMP in error. Neither the FBI nor the RCMP requested them.

(xi) The CBSA continued to demonstrate interest in investigating its inadmissibility concerns after the examination.

B. Overview

132. The CBSA is charged with enforcing the *IRPA* and ensuring that access to Canada is denied to those who are inadmissible to this country. The evidentiary record relied upon by the Applicant fails to demonstrate that CBSA officers were involved in a conspiracy to improperly assist a foreign state and to misuse their authority under the *IRPA* or the *Customs Act*. Rather, the record strongly supports the view that at all times, the CBSA had a *bona fide* interest in the Applicant's admissibility to Canada and were only motivated by legitimate immigration and customs purposes. In short, the only evidence is that the CBSA officers did their job.

133. An allegation that border officials have misused their statutory powers to facilitate a criminal investigation is a serious allegation and will only be accepted by the courts where there is concrete and compelling evidence that immigration officials flouted normal practices or were motivated by improper considerations. The party seeking to substantiate such an allegation has been described as being under "a heavy onus" and that the evidence must "go so far as to show that the immigration proceedings are a sham".[184] In *Rogan*, Fitch J. (as he then was), recognized that when immigration officials appear to have a good faith basis in carrying out their duties, "then it takes very strong evidence to show that there is some disguised reason for the immigration officials to do what it is ordinarily their duty to do."[185] Similarly, in *United States of America v. Welch*,[186] Bennett J. (as she then was) rejected allegations of disguised extradition where immigration officials had a legitimate basis to proceed with deportation. Her Ladyship stated, "[w]hen Canada has a clear and legitimate purpose to proceed deportation proceedings, it cannot be said that Canada has initiated the deportation proceedings as a disguised extradition."[187]

134. On December 1, 2018, the CBSA received and obtained compelling information raising both national security and criminal inadmissibility concerns in relation to the Applicant, a foreign national arriving into Canada. Upon receiving such information, the CBSA carried out its mandate to secure Canada's borders. The decision to examine the Applicant was made by the CBSA

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[184] *U.S. v. Rogan*, 2014 BCSC 1016 at para. 117; *Bembenek v. Canada (Minister of Employment and Immigration)* (1991), 69 C.C.C. (3d) 34 (Ont. Ct. (Gen Div.) at p. 49; *Halm v. Canada (Minister of Employment and Immigration*, [1996] 1 F.C. 547 (F.C.T.D.) at p. 12.
[185] *Rogan* para. 35, citing *Bembenek* at p. 50.
[186] *United States v. Welch*, 207 BCSC 1567.
[187] *Welch* at para. 39.

officers alone, in pursuance of their mandate. All of the CBSA's actions, including the use of DART procedures, securing the electronic devices, asking questions, checking baggage and requesting passwords were pursuant to lawful authority. The actions served to further a legitimate inquiry into national security and criminal inadmissibility concerns. There is no evidence that the CBSA had any other interest or motivation. There was no infringement of the Applicant's constitutional rights.

C. The Applicant's *Charter* Rights Were Never Engaged

135. A traveller entering Canada must be screened at the border. Standard practices related to this screening include questioning and a search of the traveller's luggage.[188] As explained by the B.C. Court of Appeal, this screening "is expected and tolerated by anyone wishing to travel internationally."[189] A person's liberty and freedom of movement will be restricted, sometimes for lengthy periods of time.[190] Indeed, Canada's effective control over its border has been held to be of such great interest to society that it is a principle of fundamental justice.[191] Furthermore, such routine practices "do not engage constitutional rights, including detention, the right to counsel or a reasonable expectation of privacy."[192] In this case, the Applicant was at all times, even despite the existence of the Provisional Arrest Warrant, subject to routine questioning and searches by the CBSA, none of which caused her to be detained (under the *Charter*), or triggered rights relating to self-incrimination, counsel or search and seizure.

136. In *R. v. Simmons*, the Supreme Court recognized three categories of border examinations, ranging from routine questioning to highly intrusive searches. The Court explained the constitutional implications of each category:

> It is, I think, of importance that the cases and the literature seem to recognize three distinct types of border search. First is the routine of questioning which every traveller undergoes at a port of entry, accompanied in some cases by a search of baggage and perhaps a pat or frisk of outer clothing. No stigma is attached to being one of the thousands of travellers who are daily routinely checked in that manner upon entry to Canada and no constitutional issues are raised. It would be absurd to suggest that a person in such circumstances is detained in a constitutional sense and

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[188] *R. v. Nagle*, 2012 BCCA 373 at para. 34.
[189] *Nagle* at para. 34.
[190] *Nagle* at para. 35.
[191] *R. v. Jones* (2006), 81 O.R. (3d) 481 (C.A.) at para. 31.
[192] *Jones* at para. 1.

> therefore entitled to be advised of his or her right to counsel. The second type of border search is the strip or skin search of the nature of that to which the present appellant was subjected, conducted in a private room, after a secondary examination and with the permission of a customs officer in authority. The third and most highly intrusive type of search is that sometimes referred to as the body cavity search, in which customs officers have recourse to medical doctors, to X-rays, to emetics, and to other highly invasive means.[193]

137. In this case, all of the CBSA's actions in relation to the Applicant remained with the first *Simmons* category. The fact that the CBSA took a particular interest in her admissibility upon learning of the foreign indictment and the Provisional Arrest Warrant does not change this fact. As explained by the Ontario Court of Appeal, "the mere fact that a person has attracted the suspicion of a Customs official, thereby causing that official to ask routine questions and conduct a routine search, should not give that individual any enhanced constitutional protection against self-incrimination."[194] The Applicant's "lookout" status, her referral to secondary examination, the search of her luggage, and questioning on issues related to her business were routine border enforcement measures, none of which placed her in an adversarial relationship with the CBSA or triggered enhanced *Charter* protection beyond what is afforded in the "first category."[195]

D. The CBSA's Conduct Was Lawful and Appropriate

1. The CBSA Had Genuine Inadmissibility Concerns

138. The CBSA had a clear and legitimate interest in examining the Applicant to determine her admissibility to Canada. The Applicant is a foreign national who was seeking to enter Canada. She did not have an unqualified right to enter Canada,[196] and was required to satisfy officers that she is not inadmissible.[197] Furthermore, the CBSA had legitimate criminality and national security inadmissibility concerns. In the face of information raising such inadmissibility issues, the CBSA was under a duty to examine the Applicant. There is no evidence to suggest that the CBSA was motivated by anything other than legitimate immigration and customs concerns. There is no

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[193] *R. v. Simmons*, [1988] 2 SCR 495 at para. 27.
[194] *Jones* at para. 40.
[195] *Dehghani v. Canada (Minister of Employment and Immigration)*, [1993] 1 SCR 1053 (SCC)*; R. v. Peters*, 2016 ONSC 2230 at para. 38, aff'd 2018 ONCA 493; *R. v. Sinclair*, 2016 ONSC 877 at paras. 42, 58, aff'd 2017 ONCA 287 at para. 6; *R. v. Darlington*, 2011 ONSC 2776 at para. 76; *R. v. Sahota*, [2009] O.J. No. 3519 at para. 47.
[196] See also *Medovarski v. Canada*, 2005 SCC 51 at para. 46.; *Chiarelli v. Canada (Minister of Employment and Immigration)*, [1992] 1 SCR 711 at p. 733.
[197] *IRPA* s. 11; *IRPA Regulations* s. 28.

evidence that the CBSA was asked by the RCMP or foreign authorities to conduct immigration and customs examinations of the Applicant or to attempt to elicit prejudicial information from her. At all times, the CBSA's interest was in whether the Applicant and her goods were admissible to Canada.

139. Two of the objectives of the *IRPA*, set out in s. 3(1)(h) and (i), are driven by the importance of securing the border against criminality and threats to national security: "to protect the health and safety of Canadians and to maintain the security of Canadian society;" and "the promotion of international justice…by denying access to Canadian territory to persons who are criminals or security risks." Thus the objectives of *IRPA* "indicate an intent to prioritize security."[198]

140. Under *IRPA*, the criminality of non-citizens is a "major concern" that warrants removal from Canada.[199] Under *IRPA* ss. 36(1)(c) and 36(2)(c), foreign nationals are inadmissible to Canada if there is a sufficient basis to believe they have engaged in criminal conduct that, if committed in Canada, would be, respectively, punishable by a term of imprisonment of at least 10 years or would constitute an indictable offence. A foreign national becomes inadmissible to Canada where they are reasonable grounds to believe they have engaged in such conduct.[200]

141. The jurisprudence recognizes the duty of immigration officials to remove persons threatening Canada's national security as "one of the fundamental responsibilities of a government."[201] Under s. 34(1) of the *IRPA*, a foreign national is inadmissible to Canada on national security grounds for engaging in various activities, including an act of espionage against a democratic government or being a member of an organization that has engaged in such conduct. A foreign national becomes inadmissible to Canada where there are reasonable grounds to believe they have committed such an act.[202]

142. Upon receiving information raising inadmissibility concerns of a serious inadmissibility, the CBSA must take action under *IRPA*. In *Kissel*, Mr. Justice Beaulieu explained that the receipt

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[198] *Medovarski* at para. 10.
[199] *Cha v. Canada (Minister of Citizenship and Immigration),* 2006 FCA 126 at para. 24. See also *Medo*.
[200] *IRPA*, s. 33.
[201] *Jaballah (Re)*, 2010 FC 79 at para. 36.
[202] *IRPA*, s. 33.

of information concerning foreign criminality of a person in Canada or seeking entry to Canada obliges the CBSA to carry out its border enforcement mandate:

> Indeed, it is clear that, upon receipt of such information, Canadian authorities are obliged to act in the public interest. It is not plausible to claim that Canadian authorities should sit idly by, rather than to investigate and act upon such information, because of the "risk" of effectuating a disguised extradition. This type of situation engages the public interest in the Canadian context.[203]

143. The same principle was expressed by Dambrot J. in *Quintin*, who stated:

> While allegations of fraud are less compelling than allegations of murder, and while only Quintin stands convicted, it would be most difficult to establish that the immigration officials, once they learned of the status of the American charges, were not pursuing an obvious and legitimate duty to discourage fleeing American convicts, or Americans charged with serious offences from using Canada as a safe haven. It would be most difficult to establish that the immigration proceedings were not taken for a legitimate Canadian objective.[204]

144. CBSA officers are directed by the CBSA operational manuals to treat allegations of criminality and national security with utmost seriousness and to be mindful of "Parliament's intention in drafting the *IRPA* to make the security of Canadians a top priority."[205] Because of the importance given to security-related inadmissibilities, the operational manual makes clear that that the limited discretion normally given to officers in determining whether to write a s. 44(1) inadmissibility report is "very narrow" in cases involving s. 36 or s. 34 and that officers are encouraged to prioritize the IRPA objectives of "public safety and security."[206]

145. The CBSA officers testified they had criminality concerns on the basis of the CBSA issued "lookout" received early on the morning of December 1 and the information from the RCMP about the issuance of the Provisional Arrest Warrant relating to fraud charges in the U.S.[207] The mere existence of the CBSA issued lookout in relation to the Applicant was enough to prompt a CBSA examination to explore inadmissibility issues.[208] Indeed, the CBSA superintendents had already made the decision that the Applicant required an examination for potential inadmissibility on the

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[203] *Kissel* at para. 153.
[204] *United States of America v. Quintin*, [2000] OJ No 791 (QL), at para. 50.
[205] CBSA Operational Manuals, Tab 3, "ENF-5 Writing 44(1) Reports" at s. 8.2.
[206] *Ibid.*
[207] Kirkland, Oct. 28, p. 52, ll. 1-17; Dhillon, Nov. 16, p. 79, ll. 20-47; p. 80, ll. 1-3; Katragadda, Nov. 18, p. 47, ll. 1-11; 46-47; p. 48, ll. 1-3.
[208] CBSA Operational Manuals, Tab 2, ENF-4 Port of Entry Examinations, p. 32, s. 7.6.

basis of the lookout before learning of the details of the Provisional Arrest Warrant.[209] Coupled with information about the alleged fraud and the existence of a foreign warrant (as demonstrated by the issuance of the Provisional Arrest Warrant) the CBSA had compelling reasons to conduct an examination of the Applicant. The CBSA operational manual specifically lists examples of evidence that can lead to criminal inadmissibility as including evidence of an outstanding arrest warrant, pending charges, or an indictment.[210]

146. In addition to criminality concerns, all frontline CBSA officers testified that they had national security inadmissibility concerns on the basis that the Applicant is the CFO of one of the world's largest telecommunications companies, about which the governments of Canada and other allied countries had expressed concerns of espionage, as reported in open source news articles at the time.[211] The officers testified that they had become aware of reports in open source articles that Huawei equipment had been banned by Canada's allies;[212] that Huawei was working on behalf of the Chinese government;[213] and that the integrity of Huawei's 5G technology had been called into question by the Five Eyes.[214] The online article referenced by Supt. Dhillon on the morning of December 1, describes concerns of the Canadian government and other members of the "Five Eyes" intelligence community, including the U.S., Australia and New Zealand that the use of Huawei telecommunications equipment, particularly 5G networks, poses "significant security risks."[215] The CBSA operational manual specifically lists "media articles" as examples of evidence that can lead to inadmissibility for national security reasons.[216]

147. The existence of credible information giving rise to both criminality and national security concerns in relation to a foreign national obliged the CBSA officers to conduct an examination. The CBSA officers confirmed their understanding that under *IRPA*, they were not permitted to

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[209] McRae, Oct. 30, p. 70, ll. 26-35; Dhillon, Nov. 16, p. 76, ll. 36-47; p. 77, ll. 1-35.
[210] Operational Manuals, Tab 1, ENF-1 Inadmissibility, p. 40, s. 7.13; p. 43, s. 7.16.
[211] Kirkland, Oct. 28, p. 52, ll. 18-47; Oct. 29, p. 30, ll. 21-32; McRae, Oct. 30, p. 69, ll. 1-40; Dhillon, Nov. 16, p. 83, ll. 25-47; pp. 84-85; Katragadda, Nov. 18, p. 47, ll. 12-34, p. 48, ll. 3-7.
[212] Kirkland, Oct. 28, p. 52, ll. 23-36.
[213] Dhillon, Nov. 16, p. 84, ll. 19-23; Katragadda, Nov. 18, p. 47, ll. 19-21.
[214] Katragadda, Nov. 18, p. 47, ll. 16-27.
[215] Exhibit 8, AGC Dhillon Binder, Tab 2, pp. 8-10.
[216] Operational Manuals, Tab 1, ENF-1 Inadmissibility, p. 36, s. 7.1.

ignore evidence of serious security-related inadmissibilities.[217] In their experience, an examination was the appropriate course of action.[218]

a. The Applicant's "Eleven Arguments"

148. None of the eleven arguments raised by the Applicant[219] detract from the *bona fides* of the CBSA's inadmissibility concerns:

> (1) Whether or not Supt. Louie had inadmissibility concerns in relation to the Applicant based on the information provided on the night of November 30, 2018, is unknown from the evidence and irrelevant to the *bona fides* of the concerns of the front line officers that were present on December 1.
>
> (2) The Applicant's claim that CSIS and the RCMP had no national security concerns relating to the Applicant is not supported by evidence. There is no evidence before the Court from either CSIS or the RCMP that they did not consider Huawei and the Applicant to pose a national security threat. On the contrary, an FPNS report issued on November 29, 2018 concerning the Applicant's expected arrival in Canada notes that "FPNS is aware that Huawei is a concern to the security of Canada and other western countries."[220] The report goes on to describe many of the same national security concerns held by the CBSA officers relating to espionage, including Huawei's close connection to the Chinese government, concerns about the integrity of its telecommunication equipment and its potential use for spying, and concerns raised about Huawei by countries allied with Canada.
>
> (3) The fact that the CBSA's officers did not explicitly set out their inadmissibility concerns is not surprising considering that examinations are a routine practice conducted by the CBSA which do not require grounds of any kind. The officers had no reason to justify the fact that they subjected the applicant to questioning and baggage searches which did not result in a s. 44(1) report on admissibility. The fact that the CBSA officers did not

[217] Kirkland, Oct. 28, p. 36, ll. 22-47; McRae, Oct. 30, p. 46, ll. 19-41; Goodman, Dec. 8, p. 47, ll. 5-14.
[218] Kirkland, Oct. 28, p. 37, ll. 38-43; McRae, Oct. 30, p. 46, ll. 27-36; Goodman, Dec. 8, p. 47, ll. 15-34.
[219] Applicant's submissions at para. 159.
[220] AGC Book of Additional Documents, Tab 9.

make any mention of the FBI is also not surprising. It is only further evidence that the CBSA officers had no dealings with the FBI.

While the officers did not specifically notate their inadmissibility concerns in the documents they generated on December 1, those documents contain multiple indicators, obvious to CBSA personnel, about the nature of their examination, the basis for their concerns, the interest of U.S. authorities, and presence of the RCMP:

- BSO Kirkland's statutory declaration indicates that BSO Katragadda (as the examining officer) intercepted the Applicant due to inadmissibility concerns.[221]
- BSO Katragadda's statutory declaration indicates the existence of a warrant for fraud over $5000 in relation to the Applicant and that the Applicant left the airport under the care and control of the RCMP.[222] All of this information alludes to potential criminal inadmissibility.
- BSO Katragadda's Immigration EOD report[223] notes that the Applicant is of interest to U.S. authorities. This information clearly raises an issue of criminal inadmissibility. The report notes that NSU was consulted, indicating that there was a national security inadmissibility issue. As clearly indicated in the witness testimony, the primary function of the NSU is to handle and give advice on national security inadmissibility cases.[224] Finally, the report confirms that the Applicant was arrested by the RCMP on a provisional warrant.
- Supt. Dhillon's Significant Event Report[225] noted that the Applicant was the subject of a secondary examination, that she was the CFO of Huawei, that she was the subject of a provisional warrant for fraud, that members of RCMP FSOC were present to execute the warrant, that the charges were from the U.S. which was seeking the Applicant's extradition. Like BSO Katragadda's report, this information suggests criminal inadmissibility concerns. Finally, Supt. Dhillon

[221] Exhibit 4, Defence Kirkland Binder, Tab 26, p. 1, para. 2.
[222] Exhibit 11, Defence Katragadda Binder, Tab 25, pp. 2-3.
[223] Exhibit 10, AGC Katragadda Binder, Tab 2.
[224] Kirkland, Oct. 28, p. 35, ll. 45-47; p. 36, ll. 1-21; McRae, Oct. 30, p. 46, ll. 1-18; Dhillon, Nov. 16, p. 71, ll. 13-21; Katragadda, Nov. 18, p. 40, ll. 3-17; Goodman, Dec. 8, p. 71, ll. 20-36.
[225] Exhibit 8, AGC Dhillon Binder, Tab 4, p. 3.

notes that NSU "provided guidance throughout", indicating the existence of a national security inadmissibility concern.

- The Immigration Warrant Checklist[226] completed by BSO Katragadda indicates that investigation priority for further examination was "pending criminal charges". He also noted that the Applicant was arrested by the RCMP for fraud over $5000.

(4) As noted, the documentation created by the CBSA on December 1 had numerous indications of national security and criminal inadmissibility concerns. With respect to the Immigration Warrant Checklist, BSO Katragadda testified that he checked the box corresponding to "pending criminal charges" because he had seen the Provisional Arrest Warrant and that was the most applicable inadmissibility concern at the time.[227] The fact that he did not check the other boxes in no way precluded the CBSA from continuing to pursue national security inadmissibility concerns,[228] which was still very much a live issue in the minds of the officers.[229] The officers' statutory declarations and reports had numerous indicators of both criminality and national security inadmissibility concerns including mention of the foreign charges as well as their contact with the NSU.

(5) Officer Katragadda appreciated, as the examining officer, that he was in a unique situation. On the one hand, the CBSA had *bona fide* national security and criminal inadmissibility concerns. On the other hand, the RCMP was standing by with a warrant that would commence an extradition process. He further recognized that by questioning the Applicant directly about the alleged foreign criminality might raise the perception that the CBSA was engaging in a criminal investigation for another agency.[230] While he was fully entitled to proceed with a full examination, his decision to complete a customs exam and initiate a basic immigration exam, adjourning the full determination of the inadmissibility issues to another time, cannot be said to be unreasonable. He explained:

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[226] Exhibit 10, AGC Katragadda Binder, Tab 1, p. 3 (see p. 4 for explanation of the checklist).
[227] Katragadda, Nov. 19, p. 10, ll. 34-39.
[228] Katragadda, Nov. 19, p. 10, ll. 39-43; Kirkland, Oct. 29, p. 41, ll. 45-47; p. 42, ll. 1-5.
[229] Kirkland, Oct. 30, p. 32, ll. 36-39; Katragadda, Nov. 18, p. 64, ll. 27-38; p. 72, ll. 35-43; Nov. 19, p. 34, ll. 16-46.
[230] Katragadda, Nov. 18, pp. 62-63.

> A- I knew that if I were to conduct a fulsome exam at that point I would have to address any concern that we may have, and part of these concerns may lead us to the outstanding charges Ms. Meng is facing, and I was concerned that if we obtained that information it may be perceived that we're doing so on behalf of another agency or for another purpose, and I wanted to deliberately focus on what I had to conduct in that examination to get it to another stage.
>
> Q – Were you obtaining that information for another agency or another purpose?
>
> A – I was not.
>
> Q - Why were you concerned that that perception might arise?
>
> A – Because there had been concerns in – in the past with other cases that have occurred, and that was my goal with keeping everything separate, keeping the immigration, Customs Act, separate from the RCMP process. I didn't want it to even seem like we were working together on this because we really weren't.[231]

Supt. Dhillon's questions moved closer to the heart of the national security and criminality concerns. He asked the Applicant where Huawei sold products around the world and whether they sold products in the United States. He already knew, based on his open source queries, that Huawei was not permitted to sell products in the U.S. due to espionage concerns relating to its technology. In explaining his reasoning in asking those questions, he testified:

> Because specifically I wanted to get to the security concern that was outlined in the open source query, and it stated there were specific countries that didn't want -- didn't want Huawei to be selling products there because of that security concern, that espionage concern. So I wanted her to tell me where she does and doesn't sell products and the reason for that.[232]
>
> […]
>
> Because they're unable to sell their products in the United States because there are security concerns with the product. And specific security concern is they're used for espionage on behalf of the Chinese government.[233]

Supt. Dhillon went on to ask the Applicant about the specific security concerns the U.S. government had about Huawei's products. After receiving no response, Supt. Dhillon also asked the Applicant a question about whether Huawei sold products or did business in Iran,

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[231] Katragadda, Nov. 18, p. 63, ll. 26-47; p. 64, ll. 1-4.
[232] Dhillon, Nov. 16, p. 91, ll. 30-37.
[233] Dhillon, Nov. 16, p. 92, ll. 4-8.

based on the information he read in the same open source article about a U.S. Department of Justice investigation into Huawei's alleged violation of U.S. sanctions against that country.[234] Although Supt. Dhillon did not know specifically that the allegations of fraud in the U.S. related to the alleged violation of sanctions, he did consider whether the warrant was related to that alleged conduct.[235] Had Supt. Dhillon not been advised that the examination was to be adjourned, he testified that he would have turned his questions directly to the foreign charges and the existence of the warrant.[236] All of the questions Supt. Dhillon posed were logically connected to his inadmissibility concerns. It cannot be said that posing such questions was in anyway unreasonable or contrary to his duties.

(6) The questions asked by Supt. Dhillon had a clear nexus to inadmissibility based on national security concerns. He specifically asked the Applicant about whether her company sold products in the United States because he already knew that the U.S. government had banned Huawei products on the basis of national security concerns. An admission from the Applicant about those security concerns would be of significant interest to Canada, which according to the article reviewed by Supt. Dhillon, was in the process of "carrying out its own security review" in relation to the use of Huawei equipment, particularly in 5G networks.[237] Even evidence of espionage against a Canadian ally would be sufficient to raise concerns about national security inadmissibility.[238]

(7) The fact that the CBSA did not examine the Applicant's devices is not evidence of a covert criminal investigation. Had the CBSA actually been engaged in gathering evidence to support a foreign investigation, one would reasonably expect that the Applicant's devices would have been examined. The CBSA officers testified that when they secured the devices in signal blocking bags at the gate, they believed it was possible they would examine the devices as part of their examination into their inadmissibility concerns.[239] Officer Katragadda chose not to examine the devices on December 1 after NSU confirmed

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[234] Dhillon, Nov. 16, p. 84, ll. 19-31; p. 85, ll. 13-14; Nov. 17, p. 2, ll. 23-33; Nov. 18, p. 18, ll. 5-7. See also Exhibit 8, AGC Dhillon Binder, Tab 2, p. 10.
[235] Dhillon, Nov. 17, p. 2, ll. 23-33.
[236] Dhillon, Nov. 16, p. 93, ll. 20-43.
[237] Exhibit 8, AGC Dhillon Binder, Tab 2, p. 10.
[238] *Weldemariam v. Canada (Public Safety and Emergency Preparedness)*, 2020 FC 631 at para. 74.
[239] Kirkland, Oct. 29, p. 57, ll. 22-36; Katragadda, Nov 18, p. 51, ll. 45-47; p. 52, ll. 1-22.

it had no more questions, and concluded that any examination of the devices by the CBSA would take place at a later time.[240]

(8) The Applicant did not seek to call BSO Tse as a witness and there is no basis upon which the Applicant can impugn BSO Tse's decision to conduct an examination of the device belonging to the travel companion.

(9) The CBSA decision to request the passcodes was made while the examination was still in progress and before BSO Katragadda knew whether NSU would have further questions and whether he would be performing a full national security examination.[241] There is nothing remarkable about the timing of the request for the passcodes. As will be discussed below, the evidence clearly establishes that the passcodes were shared with the RCMP in error. There is no evidence to the contrary.

(10) There is no evidence to suggest that the customs examination was unusual. The Applicant was asked standard questions about her baggage, whether she packed them herself and whether she was aware of the content. As indicated by BSO Kirkland, these are "standard questions that get asked by essentially every BSO before they do a baggage exam."[242] BSO Katragadda described those questions as "mandatory questions we're required to ask prior to examining people's luggage."[243] As for the Applicant's complaint that the CBSA did not ask questions about the value of the Applicant's goods or the legitimacy of her unmarked medication, there is no evidence that the officers had or should have had concerns about these matters.

(11) As noted above, BSO Katragadda recognized that a full examination into the national security and criminality issues would have been lengthy and could possibly take days. In his view, a delay of that length was unreasonable. His intention was to complete a customs examination and initiate his *IRPA* examination. When NSU indicated that it had no further questions at that time, he adjourned the examination, with the intention of continuing his inquiries at a later time. There is nothing unusual about the length of the examination in

[240] Katragadda, Nov. 19, p. 2, ll. 46-48; pp. 3-4
[241] Katragadda, Nov. 19, p. 2, ll. 45-47; p. 3, ll. 1-18; p. 4, ll. 6-47; p. 5, ll. 1-6.
[242] Kirkland, Oct. 28, p. 68, ll. 14-23.
[243] Katragadda, Nov. 18, p. 66, ll. 36-44.

light of BSO Katragadda's reasonable approach to seeking balance between CBSA and RCMP considerations.

b. The Timing of the Calls to NSU

149. The Applicant also tries to cast doubt on the CBSA's national security concerns by attempting to point out discrepancies in the officer's testimony about the times at which NSU was contacted. The Applicant argues that because Supt. McRae spoke with NSU at 13:35 and 14:00, as recorded in his notes, BSO Katragadda could not have asked the Applicant questions provided by NSU at 12:01 and 13:09 p.m.[244] The Applicant's claim has no basis in fact or law for numerous reasons:

- According to the timeline established through the officers' testimony, the examination questions started at counter 21 at 11:35.[245] BSO Katragadda left counter 21 on two occasions to receive further guidance from NSU. The first time he departed at 12:20 and returned at 13:09.[246] At 13:09 BSO Katragadda asked the Applicant additional questions. He left the counter again at 13:13 and did not return until 14:11 to adjourn the *IRPA* examination.[247] BSO Katragadda never testified that he asked the Applicant questions from NSU at 12:01. At that point in the examination he had not yet left counter 21 to seek guidance from NSU.[248]
- Supt. McRae recorded in his notes that he spoke with NSU at 13:35 and 14:00. The Applicant, however, has ignored Supt. McRae's testimony that he spoke with NSU "two or three times" and when asked whether he recorded the times he spoke with NSU he responded "I recorded some of them".[249] There is no evidence to suggest that Supt. McRae did not have more than two conversations with NSU, the times of which were not recorded. Furthermore, Supt. Dhillon also had contact with NSU to receive guidance and questions.[250] Therefore, there is no evidence that contradicts BSO

[244] Applicant's submissions at para. 235.
[245] Kirkland, Oct. 28, p. 67, ll. 35-42.
[246] Kirkland, Oct. 28, p. 73, ll. 42-47; p. 74, ll. 1-16.
[247] Kirkland, Oct. 28, p. 75, ll. 23-31.
[248] Katragadda, Nov. 18, pp. 68-74; Nov. 20, p. 4, ll. 3-7.
[249] McRae, Oct. 30, p. 81, ll. 37-44.
[250] Dhillon, Nov. 16, pp. 88-89.

Katragadda's assertion that he received questions from NSU through one of the superintendents after he proceeded to the superintendent's officer between 12:20 and 13:09.

- If the Applicant intended to make the claim that the CBSA officers did not in fact contact NSU to receive guidance and did not put questions from NSU to the Applicant, the Applicant had to comply with the rule in *Browne v. Dunn,*[251] and should have challenged Supts. McRae and Dhillon with this allegation to permit them to respond. As the Applicant never did so, the evidence of the superintendents regarding their contact with NSU is uncontradicted. If the Applicant's challenge to the veracity of the contact with NSU was serious, the Applicant would have also sought to cross-examine Janice Lof, the manager of the NSU, to inquire about the discussions she had with the superintendents and Chief Goodman on December 1. The Applicant's failure to comply with these basic rules of fairness underscores the spurious nature of her allegation.

c. Supt. Dhillon's Involvement in the Examination

150. The Applicant's attempts to undermine the credibility of Supt. Dhillon[252] are similarly without merit. The suggestion that Supt. Dhillon created his statutory declaration hoping that the U.S. would ultimately obtain it defies logic and reason. Why would Supt. Dhillon set out his interactions with the Applicant for the benefit of a U.S. audience when the Applicant did not make any incriminating statements? How could Supt. Dhillon's statutory declaration, as written, possibly be of assistance to the United States? The Applicant speculates about Supt. Dhillon's motives, but fails to explain why he would pursue such a futile course of conduct. Supt. Dhillon categorically rejected the suggestion that his statutory declaration was written for the United States.[253] He explained that it was intended for inclusion in the Applicant's immigration file because the *IRPA* examination had been adjourned and a determination would need to be made

[251] 1893 CanLII 65 (FOREP), 6 R. 67 (H.L.).
[252] Applicant's submissions at para. 237.
[253] Dhillon, Nov. 17, p. 11, ll. 32-36; Nov. 18, p. 13, ll. 32-35; p. 14, ll. 31-33.

about the Applicant's inadmissibility by another CBSA officer.[254] There is no evidence before the Court suggesting that the creation of the statutory declaration was either unusual or improper.

151. The Applicant's challenge to Supt. Dhillon's review of the open source article providing information about numerous national security concerns relating to Huawei is baseless. Supt. Dhillon testified he reviewed the article on December 1, before the Applicant's arrival. The review of open source information about lookouts and persons of interest to the CBSA is normal CBSA practice.[255] It is not unusual that the information about alleged violations of sanctions would be of interest to Supt. Dhillon as it was one of only three headings under the "Controversies" section of the article that set out concerns about Huawei's conduct.[256] It is also notable that the only mention of a U.S. Department of Justice investigation in the article is in reference to the violation of sanctions by Huawei in relation to various countries, the first of which that is listed is Iran. This only supports the credibility of Supt. Dhillon's testimony that after reviewing the article and the sanctions violation information, he wondered if the U.S. fraud charges described by Cst. Dhaliwal related to sanctions violations.[257]

152. Supt. Dhillon provided a copy of the article on December 19, 2018, to YVR Director John Linde,[258] after they had a debriefing meeting together.[259] The Applicant's suggestion that Supt. Dhillon concocted his review of the article to respond to a challenge from CBSA officials on his truthfulness is baseless. Supt. Dhillon confirmed there was no such challenge to his evidence by his superiors:

> Q – Superintendent Dhillon, my learned friend put it to you that you were specifically challenged by Director Linde on the questions that you asked Ms. Meng, do you recall that?
>
> A – I was asked questions about the examination, and how it went that day, and why it went the way it did. I wasn't – I don't really understand the word "challenge" and the way it's being used in this context. I didn't feel – I didn't feel like my – my conduct was being questioned in any way.

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[254] Dhillon, Nov. 18, p. 14, ll. 5-14.
[255] Kirkland, Oct. 28, p. 34, ll. 12-13; McRae, Oct. 30, p. 68, ll. 21-30; Goodman, Dec. 8, p. 47, ll. 23-34.
[256] Exhibit 8, AGC Dhillon Binder, Tab 2, p. 10.
[257] Dhillon, Nov. 17, p. 2, ll. 23-33; Nov. 18, p. 17, ll. 45-47; p. 18, ll. 1-23.
[258] Exhibit 8, AGC Dhillon Binder, Tab 6.
[259] Dhillon, Nov. 17, p. 13, ll. 2-20.

> Q - Did Director Linde ever indicate to you in any way that he disbelieved any information you provided to him about what you did in the exam?
>
> A – No.[260]

153. This Court heard clear, uncontradicted evidence that the CBSA officers had national security and criminal inadmissibility concerns which led them to conduct an examination, in accordance with their duties under the *IRPA*, the jurisprudence and CBSA operational manuals. As stated in *Rogan*, where CBSA officers have legitimate reasons to carry out their duties, as they did here, only "very strong evidence" to the contrary is capable of leading the Court to conclusion that they had nefarious ulterior motives in doing "what it is ordinarily their duty to do". The Applicant has failed to adduce the "very strong evidence" capable of leading to such a conclusion.

2. The CBSA Made Independent Decisions to Fulfill Its Border Security Mandate

154. The CBSA extended a reasonable level of cooperation and professional courtesy to the RCMP, but reached its decisions independently about how it would fulfill its border protection mandate. The CBSA officers asserted authority and jurisdiction at the port of entry in their dealings with the RCMP, providing further evidence that the CBSA officers acted in pursuit of genuine inadmissibility concerns. As for the CBSA's dealings with the FBI, there is simply no evidence that the U.S. guided the CBSA officers' decision-making.

155. There is no resemblance between this case and *Tollman* or *Bartoszewicz*, upon which the Applicant heavily relies. *Tollman* involved positive evidence that the CBSA had no *bona fide* interest in Mr. Tollman's admissibility to Canada and instead acted to facilitate his transfer into U.S. custody.[261] Similarly, in *Bartoszewicz* there was evidence that immigration officials, who had already closed their immigration file on Mr. Bartoszewicz's status in Canada, only took steps to initiate removal proceedings at the insistence of Polish officials who requested his deportation.[262] In this case, not only is there no evidence of improper foreign pressure, it is evident from the CBSA's conduct that they independently sought to fulfill their border security mandate, without influence from any other agency. This independence was demonstrated in three distinct

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[260] Dhillon, Nov. 18, p. 33, ll. 10-23.
[261] *Tollman* at paras. 6, 51-60; 69; 73; 75-84.
[262] *Bartoszewicz* at paras. 18-19; 23-27.

ways: (1) the CBSA made the decision that the Applicant would be subjected to an examination before they had any dealings with the RCMP on December 1; (2) the CBSA determined the sequence of the CBSA and RCMP processes at the port of entry; and (3) the CBSA took steps to keep CBSA and RCMP processes separate.

156. Even before Supts. Dhillon and McRae had spoken to the RCMP at the 9:30 meeting on December 1, they were already aware of the Applicant's arrival and an outstanding warrant for her arrest because of the receipt of a CBSA lookout they received early that morning.[263] The lookout caused Supt. McRae to do an open source check on the Applicant, in accordance with his usual practice.[264] From his checks, he became aware of her association with Huawei and the national security / espionage concerns other countries, such as United States and United Kingdom, have expressed about the company.[265] In Supt. McRae's mind, this raised a national security inadmissibility concern relating to the Applicant.[266] Before he had even met with the RCMP, he was of the view that the combination of the lookout and the inadmissibility concern necessitated a secondary examination.[267]

157. Like Supt. McRae, Supt. Dhillon also reviewed the lookout in the early morning of December 1, before the RCMP's arrival.[268] After reviewing the lookout, he concluded that the Applicant would be subjected to a secondary examination. He explained that as a result of the lookout, the Primary Inspection Kiosk would automatically refer the Applicant to secondary and failing that, the CBSA would intercept her and refer her to secondary.[269]

158. Referring foreign nationals to a secondary examination on the basis of a lookout is standard CBSA procedure, as confirmed by all the CBSA witnesses.[270] The jurisprudence provides many examples of CBSA officers conducting secondary examinations simply on the basis of a

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[263] A "lookout" or "target" is an internal CBSA notification indicating that a traveller may be of interest to CBSA BSOs for a secondary examination. See CBSA Operational Manual, Tab 2, ENF-4, p. 35, s. 7.9. See also Dhillon, Nov. 16, p. 66, ll. 22-38. The lookout received by the Superintendents is at Exhibit 5, NTC lookout and Exhibit 8, AGC Dhillon Binder, Tab 1.
[264] McRae, Oct. 30, p. 39, ll. 2-15; p. 68, ll. 21-30.
[265] McRae, Oct. 30, p. 68, ll. 21-47; p. 69, ll. 1-27.
[266] McRae, Oct. 30, p. 68, ll. 28-34.
[267] McRae, Oct. 30, p. 70, ll. 26-35.
[268] Dhillon, Nov. 16, p. 75, ll. 21-45.
[269] Dhillon, Nov. 16, p. 76, ll. 45-47; p. 77, ll. 1-35.
[270] Kirkland, Oct. 28, p. 26, ll. 23-47; McRae, Oct. 30, p. 39, ll. 2-32; Dhillon, Nov. 16, p. 66, ll.26-47; p. 67, ll. 1-7; Katragadda, Nov. 18, p. 36, ll. 5-9; Goodman, Dec. 8, p. 48, ll. 29-47; p. 49, ll. 1-11.

lookout.[271] When asked whether the CBSA ever ignores lookouts, Supt. McRae categorically confirmed this does not happen:

> Q – Do lookouts ever get ignored by the CBSA?
>
> A – No.
>
> Q – Why not?
>
> A – Because we need to examine that person to determine their admissibility to Canada. And / or their goods.[272]

159. On the basis of the lookout alone, the Applicant would be referred for a secondary examination. This uncontradicted evidence, in itself, refutes any suggestion that the CBSA had ulterior motives in conducting an examination or were acting as an agent for the RCMP. The evidence unequivocally demonstrates that had the RCMP not appeared with their warrant on the morning of December 1, the Applicant would have still been the subject of a CBSA secondary examination on the basis of the lookout. The Applicant's submissions fail to address this reality that directly contradicts her allegations of a conspiracy.

160. As discussed in the previous section, it was the CBSA that decided the important question of the priority of CBSA over RCMP processes at the December 1 meeting.[273] The RCMP had offered ideas to the CBSA of performing the arrest on the jetway and on the plane, both of which the CBSA rejected.[274] Supt. Dhillon told the RCMP "that wouldn't occur and that we would intercept her first and do our customs and immigration process, and then they could take over."[275] As already discussed, the RCMP accepted the CBSA's authority to determine the process because the CBSA had primary jurisdiction in the unique context of the port of entry.

161. Finally, while the CBSA officers extended professional courtesies to their RCMP colleagues, they were cognizant that customs and immigration procedures were not to be utilized for gathering information to support a criminal investigation. For that reason, they sought to keep

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[271] *R. v Peters*, 2016 ONSC 2230 at para. 13; *R. v. Moroz*, 2012 ONSC 5642 at para. 5; *R. v. Darlington*, 2011 ONSC 2776 at para. 7, 14; *R. v. Ceballo*, 2019 ONSC 4617 at para. 15.
[272] McRae, Oct. 30, p. 39, ll. 27-32.
[273] Kirkland, Oct. 28, p. 56, ll. 35-40; McRae, Oct. 30, p. 74, ll. 21-44; Dhillon, Nov. 16, p. 79, ll. 29-44; Katragadda, Nov. 18, p. 50, ll. 5-12; Lundie, Nov. 26, p. 56, ll. 10-47.
[274] Dhillon, Nov. 16, p. 79, ll. 29-35; Katragadda, Nov. 18, p. 49, ll. 26-47; p. 50, ll. 1-12.
[275] Dhillon, Nov. 16, p. 79, ll. 29-35.

CBSA and RCMP processes distinct from one another. BSO Katragadda explained that the importance of maintaining this separation was the basis for how the CBSA and RCMP executed their respective processes:

> It was my view that the customs and immigration processes should be kept separate from the extradition process. I did not believe that it was the CBSA's place to be involved in the extradition process that that time. I believed that keeping it separate and having CBSA do their process and then RCMP doing theirs was the most appropriate thing to do.[276]
>
> […]
>
> I didn't want there to be any confusion as to what process was being conducted with her at any given time. I wanted it to be clear that between Time A and Time B it was just customs and immigration, and then between Time B and Time C it was purely the extradition process. I wanted it to be clear for when it got to court.[277]
>
> […]
>
> I understood that – that this was a serious case. I understood the likelihood of the whole process being reviewed and I felt like we needed to take appropriate measures to ensure that the processes are separate and clear so when they are explained they can be explained clearly.[278]

162. While the CBSA permitted the RCMP to maintain visual continuity over the Applicant at the gate, they instructed the RCMP to maintain distance during the DART process.[279] Similarly, the CBSA officers only permitted the RCMP to make observations from a distance during the examination so that they could not hear the officers' interactions with the Applicant. [280] The CBSA officers deliberately chose to conduct their examination at Counter 21, which was further away from the superintendent's office where the RCMP was waiting. Officer Katragadda explained that they made this decision to ensure the RCMP would not hear their exchanges with the Applicant during the examination.[281]

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[276] Katragadda, Nov. 18, p. 50, ll. 44-47; p. 51. ll., 1-4.
[277] Katragadda, Nov. 18, p. 51, ll. 8-14.
[278] Katragadda, Nov. 18, p. 51, ll. 16-21.
[279] Kirkland, Oct. 28, p. 64, ll. 23-27.
[280] Kirkland, Oct. 28, p. 58, ll. 33-38; Katragadda, Nov. 18, p. 52, ll. 24-32.
[281] Katragadda, Nov. 18, p. 60, ll. 37-47; p. 61, ll. 1-16.

3. The CBSA Met the Applicant at the Gate for Legitimate CBSA Purposes

163. By meeting the Applicant at the gate, the CBSA was following lawful, routine practices relating to passengers who are the subject of a lookout and for whom there are serious inadmissibility concerns. The CBSA received no request from the RCMP to proceed to the gate. It was a CBSA decision.

164. The CBSA made the decision to meet the Applicant at the gate using a DART (Disembarkation and Roving Team) procedure in which they would check the passports of the passengers leaving the flight to identify the Applicant and escort her to secondary.[282] The officers testified that the CBSA routinely uses DART processes to meet travellers who are the subject of a lookout to ensure they are subjected to secondary examination.[283] This is confirmed by the CBSA operational manual which explains that DART processes should be used to respond to lookouts,[284] and identify inadmissible foreign nationals,[285] as well as those who pose a "threat to the security of Canada" including "serious criminals."[286] According to the operational manual, the objectives of DART include "assisting in the collection of evidence for immigration admissibility reports" and to "promote cooperation, coordination and the exchange of information with partner agencies."[287] Specific DART activities identified in the operational manual includes "inspection of airline passengers for possession of passports and travel documents" and "interviewing passengers at immigration secondary".

165. The DART process serves as the initiation of the examination and is part of the examination continuum. The operational manual explains:

> The purpose of screening disembarking passengers is to identify and segregate persons not in possession of passports or travel documents from the normal flow of passengers. In addition, inadmissible travellers who may pose a risk or who are otherwise inadmissible can be identified through intelligence-based indicators such as identified trends, lookouts

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[282] Kirkland, Oct. 28, p. 55, ll. 1-7; McRae, Oct. 30, p. 75, ll. 7-23; Dhillon, Nov. 16, p. 80, ll. 30-47; p. 81, ll. 1-43; Katragadda, Nov. 18, p. 50 ll. 5-35.
[283] Kirkland, Oct. 28, p. 27, ll. 42; McRae, Oct. 30, p. 39, ll. 32-44; Katragadda, Nov. 18, p. 37, ll. 1-30; Goodman, Dec. 8, p. 50, ll. 17-27.
[284] CBSA Operational Manuals, Tab 2, ENF-4, p. 105, s. 22.4.
[285] *Ibid.* at pp. 103-104, s. 22.2.
[286] *Ibid.*
[287] *Ibid.*

> and Advanced Passenger Information/Passenger Name Record (API/PNR) information received from Passenger Analysis Units (PAU).
>
> […]
>
> On-board inspections, disembarkation screening, pre-PIL roving and post-PIL activities are part of the examination continuum. At these preliminary checks, the DART officer does not do a full examination and does not make a decision to authorize or deny entry. Instead, the officer verifies that a passenger has the necessary documentation and refers undocumented and suspected inadmissible persons to Immigration Secondary for an in-depth examination. This does not usurp the authority of the PIL as DART referrals do not bypass the PIL.[288]

166. The fact that the CBSA met the Applicant at the gate, escorted her through primary inspection and referred her to secondary is not evidence of the misuse of authority. It is standard CBSA procedure where a lookout has been issued and serious inadmissibility concerns are raised.

167. The CBSA officers were concerned that the Applicant might be transiting through Canada and would not come through the regular primary inspection process.[289] They testified that they intended to examine the Applicant whether or not she was in-transit due to the existence of serious inadmissibility concerns and the lookout.[290] The officers testified that the intentions of the Applicant to enter Canada or transit through Canada were irrelevant to their interest in and authority to examine her.[291] As explained by Supt. Dhillon, "It's in the public interest for Canada to ensure that any serious criminal wouldn't be using Canada as a transit point." [292]

168. The CBSA officers correctly understood their duty and authority to examine the Applicant irrespective of whether she was in-transit. As already discussed, foreign nationals raising security related inadmissibilities are considered a top priority for the CBSA. Such passengers, especially when they are the subject of a lookout, will necessarily be subjected to an examination. Neither the jurisprudence nor the CBSA operational manuals distinguish between travellers entering Canada and those transiting through, when it comes to describing the CBSA's duty to secure the border. To ignore in-transit travellers who raise security concerns would clearly be inconsistent

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[288] *Ibid.* at p. 103, s. 22.1.
[289] Dhillon, Nov. 16, p. 80, ll. 33-47; p. 81, ll. 1-46; Katragadda, Nov. 18, p. 50, ll. 29-39.
[290] McRae, Oct. 30, p. 70, ll. 42-47; p. 71, ll. 1-15; Dhillon, Nov. 16, p. 77, ll. 32-39; Katragadda, Nov. 18, p. 58, ll. 21-29.
[291] Kirkland, Oct. 28, p. 27, ll. 1-29; McRae, Oct. 30, p. 39, ll. 33-47; p. 40, ll. 12-22; Dhillon, Nov. 16, p. 67, ll. 8-28; p. 77, ll. 32-39; Katragadda, p. 36, ll. 14-38; p. 37, ll. 24-39; Goodman, Dec. 8, p. 50, ll. 28-38.
[292] Dhillon, Nov. 18, p. 67, ll. 26-28.

one of the main objectives of *IRPA*: to promote international justice and security…by denying access to Canadian territory to persons who are criminals or security risks.[293]

169. The CBSA had the authority to conduct an examination of the Applicant, regardless of whether she was in-transit. Pursuant to section 35 of the *IRPA Regulations*, a person who is in-transit is deemed to be making an application under *IRPA* s. 15(1), which authorizes a CBSA officers to proceed with an examination. The Applicant's focus on whether an in-transit passenger leaves or remains in a sterile in-transit area[294] has no bearing on the fact that the CBSA has authority at the port of entry to examine any person who arrives on Canadian soil. In-transit passengers at Canadian ports of entry are not beyond the jurisdiction of the CBSA.

170. The Applicant was not "pulled in" to secondary for an improper purpose as alleged by the Applicant.[295] As already noted, the CBSA's intention was for the Applicant to be examined in secondary on the basis of the lookout, even before the RCMP arrived at YVR. The Applicant's assertion that the CBSA gave suggestions on how it could interdict the Applicant is entirely misleading. There is no evidence that the CBSA ever agreed to interdict the Applicant. The information the Applicant points was nothing more than general advice provided by Chief Goodman before the CBSA had any knowledge of the Applicant's identity, the nature of the foreign charges, or the specific inadmissibility concerns she raised.

4. The CBSA Had an Independent and Legitimate Interest in the Applicant's Electronic Devices

171. Securing the devices by placing them in mylar bags was a form of cooperation extended by the CBSA to the RCMP, but it also served legitimate CBSA purposes. The CBSA officers had both national security and criminal inadmissibility concerns when proceeding to the gate. They had not determined whether they would examine the Applicant's devices as a part of their examination, but they knew this was a possibility. As the RCMP had expressed a concern about the devices being remotely wiped, the CBSA agreed to secure the Applicant's devices immediately

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[293] *IRPA* s. 3(1)(i).
[294] Applicant's submissions at para. 181-184.
[295] Applicant's submissions at para. 191.

at the gate. By doing so, the CBSA was also pursuing its own interest in preserving the integrity of the data on the devices, in the event the devices became relevant to their examination.

172. The CBSA officers were advised by the RCMP at the meeting on December 1 of the concern that the devices could be remotely wiped and the request to place the devices into signal blocking bags. The officers believed the RCMP request was reasonable.[296] Supt. Dhillon testified, "it was just to ensure that the – the devices wouldn't be wiped. And at the time they weren't asking us to search them, so we weren't doing anything beyond our authorities."[297] Considering that the Applicant was the CFO of the largest telecommunications company, it would be entirely reasonable to believe that the remote wiping of her devices was within the realm of possibility. The officers recognized that the devices could become relevant to their examination into national security and criminal inadmissibility and that securing them in signal blocking bags and preserving their integrity was in the CBSA's interests.[298] The officers testified that they did not seize the Applicant's devices under *IRPA* or the *Customs Act*. Rather, they secured them for potential examination[299] and believed they were authorized to do so.[300] As explained by Supt. McRae, "A seizure is when you're taking evidence, or you're taking – there's been an undeclared item, that you're seizing that and there's a penalty to pay to get it back. This is asking for the phones so they don't get wiped as there could be information pertaining to her admissibility on there. So it – it – to me it wasn't a seizure."[301]

173. The CBSA officers had experience in examining devices as part of customs and immigration processes. They described these examinations as fairly common.[302] In December of 2018, the jurisprudence recognized the authority of CBSA officers to examine electronic devices as part of routine searches falling within the first *Simmons* category for customs purposes under s.

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[296] Kirkland, Oct. 28, pp. 57-58; McRae, Oct. 30, p. 75, ll. 34-46, Nov. 16, p. 41, ll. 7-36, p. 42, ll. 40-47; Dhillon, Nov. 16, p. 82, ll. 28-47; Katragadda, Nov. 18, p. 51, ll. 26-47, p. 52, ll. 1-21; Goodman, Dec. 8, p. 63, ll. 34-47; p. 64, ll. 1-2.
[297] Dhillon, Nov. 16, p. 82, ll. 39-41.
[298] McRae, Nov. 16, p. 41, ll. 7-36; Katragadda, Nov 18, p. 51, ll. 45-47; p. 52, ll. 1-22.
[299] Kirkland, Oct. 30, p. 7, ll. 27-34; p. 9, ll. 8-40; Katragadda, Nov. 18, p. 38, ll. 43-47; p. 39, ll. 1-16; p. 52, ll. 5-21; Nov. 19, p. 34, ll. 23-34; p. 36.
[300] Kirkland, Oct. 29, p. 46, ll. 6-19; Katragadda, Nov. 19, p. 36.
[301] McRae, Nov. 16, p. 10, ll. 28-33.
[302] Kirkland, Oct. 28, p. 41, ll. 10-17; McRae, Oct. 30, p. 56, ll. 5-7; Katragadda, Nov. 18, p. 41, ll. 28-33.

99(1)(a) of the *Customs Act*[303] and for inadmissibility examinations under s. 16(3) of the *IRPA*.[304] The relevant CBSA operational bulletin authorizes CBSA officers to conduct examinations of devices where there are a "multiplicity of indicators" that they contain, among other things, "documentary evidence pertaining to admissibility."[305] That same operational bulletin directs CBSA officers conducting device examinations to take steps to prevent remote wiping, including disabling the devices wireless and internet connectivity.[306]

174. As noted above, the interaction between the CBSA and the Applicant at the gate in the context of the DART process was part of the examination continuum. The officers were entitled to ask the Applicant questions and request her devices for the purpose of securing them, pending a potential device examination. Similarly, BSO Katragadda set aside the electronic devices he discovered in the Applicant's luggage. He recognized the possibility, in light of his inadmissibility concerns, that the CBSA would examine these devices.[307] All of these steps were routine first category *Simmons* border processes. None of these steps were improper or engaged the Applicant's *Charter* rights.

5. The CBSA Asked Questions of the Applicant to Advance Their Concerns Into National Security and Criminal Inadmissibility

175. The CBSA asked questions during the examination for their own purposes, not to assist the RCMP or a foreign criminal investigation. The fact that the questions were not extensive or deeply probing of the allegations of criminality strongly suggest that these questions were asked to form the foundation of a more extensive examination. It would be illogical for the CBSA to use their examination powers to support the RCMP or the FBI when there is no evidence that the RCMP or FBI requested the assistance of the CBSA in obtaining evidence from the Applicant.

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[303] *R. v. Bialski*, 2018 SKCA 71 at para. 111; *R v Canfield*, 2020 ABCA 383 at paras. 23, 69, 186.
[304] *R. v. Singh,* 2019 ONCJ 453 at para. 65; *R. v. Patel*, 2018 QCCQ 7262 at paras. 62-75; *R. v. Al Askari*, unreported (October 13, 2017) Lethbridge 150494938Q1 (Alta. Q.B.) at pp. 4-9. See also *R. v. L.E.*, 2019 ONCA 961 at paras. 66-72 for the proposition that CBSA officers are authorized to conduct a device examination pursuant to s. 16(3) of the *IRPA*.
[305] Exhibit 9, Defence Dhillon Binder, Tab 22, Operational Bulletin: Examination of Digital Devices and Media at the Port of Entry – Guidelines, pp. 1-2.
[306] *Ibid*. at p. 3.
[307] Katragadda, Nov. 18, p. 72, ll. 16.

176. As explained above, BSO Katragadda, as the examining officer, sought to balance the CBSA and RCMP interests in the Applicant by completing his customs examination and initiating an immigration examination which would be adjourned to a later time. The examination was only prolonged because of the delays in contacting NSU and the fact that NSU continued to suggest basic lines of questioning.[308] The decision to contact the NSU was made by the superintendents.[309] Contacting NSU, as well as CSIS,[310] for guidance is routine practice in examinations in which national security inadmissibility concerns exist.[311]

177. The CBSA officers testified that many of the questions that were posed to the Applicant were basic customs and immigration questions.[312] The questions posed by Supt. Dhillon more directly addressed his national security concerns.[313] He testified "I went to question her about admissibility…I asked questions about why her products weren't sold in the U.S. in relation to a security concern.[314]

178. There was no obligation on the officers to advise the Applicant of the outstanding U.S. charges or the existence of the warrant.[315] The fact that the questions were not extensive or deeply probing of the allegations of criminality strongly suggest that these questions were asked to form the foundation of a more extensive CBSA examination. The fact that the officers contacted the NSU and CSIS for guidance is further evidence that the questions were posed in connection with *bona fide* national security inadmissibility concerns.

179. If the CBSA officers were conducting a covert criminal investigation for the FBI as alleged by the Applicant, why would they contact NSU or CSIS? If the CBSA's intention had been to covertly obtain evidence to support the FBI investigation, why would they not ask the Applicant

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[308] McRae, Oct 30., p. 82, ll. 32-43; Dhillon, Nov. 16, p. 88, ll. 26-47; Katragadda, Nov. 18, pp. 62-63; p. 73, ll. 22-46.
[309] McRae, Oct. 30, p. 45, ll. 45-47; p. 46, ll. 1-18; p. 80-83; Nov. 16, p. 6; Exhibit 6, Email chain between Supt. McRae and Chief Goodman; Dhillon, Nov. 16, p. 88, ll. 10-25.
[310] McRae, Nov. 16, p. 8, ll. 21-47; p. 9; p. 10, ll. 1-2.
[311] Kirkland, Oct. 28, p. 35, ll. 45-47; p. 36, ll. 1-21; McRae, Oct. 30, p. 46, ll. 1-18; Nov. 16, p. 8, ll. 21-47; Dhillon, Nov. 16, p. 71; Goodman, Dec. 8, p. 71, ll. 21-37.
ll. 13-21; Katragadda, Nov. 18, p. 40, ll. 3-17; Goodman, Dec. 8, p. 71, ll. 20-36.
[312] Kirkland, Oct. 28, p. 86, ll. 46-47; p. 47, ll. 1-4; McRae, Oct. 30, p. 83, ll. 27-37; Katragadda, Nov. 18, pp. 66-72.
[313] Dhillon, Nov. 16, p. 89; 90-93.
[314] Dhillon, Nov. 18, p. 32, ll. 17, 20-23.
[315] See *Jung* (decision of Maisonville J.) at para. 68 in which the fact the CBSA did not confront Mr. Jung with the existence of outstanding criminal charges in multiple interviews did not amount to evidence of an abuse of process.

detailed questions about the criminal allegations? The evidence simply does not support the Applicant's claims of a conspiracy.

6. The CBSA Requested Passwords to the Devices in Anticipation of an Examination

180. The passwords were obtained by the CBSA exclusively for CBSA purposes. There is no evidence of a request by either the RCMP or the FBI for the passwords. Why would the CBSA go out of its way to obtain passwords for other agencies when no one asked the CBSA for the passwords? The CBSA officers had experience in conducting national security and criminality examinations and believed that the Applicant's electronic devices could hold relevant information. For the officers conducting the examination, obtaining passwords from travellers in anticipation of a device examination was a normal practice.[316] Examinations of devices are common when national security concerns are raised.[317] The officers had the authority to make a request for passcodes under both the *Customs Act* and *IRPA* as a first category *Simmons* process and did not require grounds to do so.[318]

181. The uncontradicted evidence is that BSO Katragadda, while waiting for further direction from NSU, decided it was appropriate to request the Applicant's passwords in anticipation of a potential examination of her devices.[319] He therefore directed BSO Kirkland to obtain the passwords, which he did. A few minutes later, the NSU advised the officers it had no further questions of the Applicant and BSO Katragadda returned to the examination counter to adjourn the examination.[320] The passwords were lawfully obtained for a legitimate purpose before BSO Katragadda knew whether NSU would have further guidance. The devices were seized by the RCMP subsequent to the Applicant's arrest and were never examined.

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[316] Kirkland, Oct. 28, p. 77, ll. 17-47; Katragadda, Nov. 19, p. 2, ll. 46-48; pp. 3-4.
[317] Kirkland, October 28, p. 41, ll. 34-38.
[318] *R. v. Singh,* 2019 ONCJ 453 at para. 65; *R. v. Patel*, 2018 QCCQ 7262 at paras. 62-75; *R. v. Al Askari*, unreported (October 13, 2017) Lethbridge 150494938Q1 (Alta. Q.B.) at pp. 4-9. See also McRae, Oct. 30, p. 56, ll. 14-19; Dhillon, Nov. 16, p. 73, ll. 9-18; Katragadda, Nov. 18, p. 41, ll. 34-46; Nov. 20, p. 6, ll. 46-47.
[319] Katragadda, Nov. 19, p. 2, ll. 45-47; p. 3, ll. 1-19.
[320] Katragadda, Nov 19, p. 4.

7. The Sharing of the Passcodes Was an Unintentional Error

182. The fact that the passwords were shared by BSO Kirkland with the RCMP is not evidence that the CBSA intended to support an RCMP or FBI investigation. It was a mistake, as BSO Kirkland candidly admitted. The CBSA and RCMP had made efforts to keep their processes separate from one another to prevent the RCMP from obtaining substantive information about the Applicant or her activities from the examination process. After reaching an agreement to formally separate their processes and approach the issue of information sharing through formal procedures, it is highly unlikely that BSO Kirkland would have deliberately provided the Applicant's passcodes. There is no basis for this Court to disbelieve BSO Kirkland's categorical denials that he meant to share the passwords or that he sought to support the FBI's criminal investigation. Considering the complete absence of evidence that the RCMP or the FBI had asked for the passwords, what would motivate BSO Kirkland to deliberately provide them?

183. At the time of the Applicant's examination in 2018, BSO Kirkland had 10 years of experience at the airport, most of which was devoted to conducting primary and secondary examinations of incoming travellers. BSO Kirkland understood that his role as a CBSA officer was to focus on CBSA's border security mandate, not to support criminal investigations. He testified:

> Q – As part of a secondary examination, is the BSO permitted to ask a traveller questions to support a criminal investigation or prosecution?
>
> A – To support a criminal investigation? No, we do not do criminal investigations.
>
> Q – Why not?
>
> A – Because that's not our mandate. The reason being is because we work in a port of entry, where there's a lower expectation of privacy, we don't…
>
> Q – When you say that, you mean for who?
>
> A – For the person that's entering Canada.
>
> Q – Yes. Sorry, continue, I cut you off.
>
> A - So there's great responsibility that goes with that, so you don't want that being abused right, so no we can't. We can't do that.

Q – In your experience do BSO's respect that principle?

A – Yes.

184. BSO Kirkland, and his fellow officers, also understood that there were limits on information sharing with the police and that there were formal channels through which information could be shared upon request.[321] The fact that any information sharing would take place through formal processes was discussed between the RCMP and CBSA at the meeting on December 1, to ensure the proper separation of their respective processes.[322] The explanation of Sgt. Lundie provides the context for the discussion:

> Q – Was there any discussion of sharing information between RCMP and CBSA?
>
> A – At that time I – I chimed in and I – I basically indicated at that time that, "We will not direct you at all. We are not here to intervene. We're not going to direct you at all. Do as you normally would under your legislation and your process, and then we will come in afterwards and – and conduct the arrest." And at the time same time I did also indicate that any information flow should be shared appropriately, whether that be through the 107 [*Customs Act*] or 8(2) [*Privacy Act*].[323]
>
> […]
>
> A - I – I just wanted them to know that – that, "We're not here to intervene, we're not going to collect anything from you at all. Information should be shared appropriately."[324]
>
> Q – What was the reaction when you discussed Form 107?
>
> A – They – I don't recall a response or anything that sticks out in my mind, but everyone in the room agreed to that.[325]

185. Following their discussion, the CBSA took additional steps, as already discussed, to ensure the separation of CBSA and RCMP processes. The CBSA placed restrictions on the RCMP in terms of where they could situate themselves to maintain visual continuity of the Applicant. The CBSA officers chose a counter at which to conduct the examination that would ensure the privacy

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[321] Kirkland, Oct. 28, p. 45; p. 46, ll. 1-2. McRae, Oct. 30, p. 60, ll. 33-41; Katragadda, Nov. 18, p. 42, ll. 30-47; p. 43, ll. 1-16.
[322] Kirkland, Oct. 29, p. 28, ll. 3-26; Katragadda, Nov. 18, p. 54; Lundie, Nov. 26, p. 57, ll. 37-47; p. 58, ll. 1-22.
[323] Lundie, Nov. 26, p. 57, ll. 37-47 ; p. 58, l. 1.
[324] Lundie, Nov. 26, p. 58, ll. 7-10.
[325] Lundie, Nov. 26, p. 58, ll. 20-22.

of the information provided by the Applicant. The deliberate sharing of passwords by the CBSA to the RCMP, as alleged by the Applicant, would entirely defeat the purpose of these various steps.

186. BSO Katragadda confirmed that he directed BSO Kirkland to obtain the passwords in anticipation of a potential device examination.[326] BSO Kirkland testified that he recorded the Applicant's passwords after speaking with BSO Katragadda by radio.[327] BSO Kirkland then requested the Applicant's passwords, obtained them and recorded them on a separate piece of paper and then in his notebook, in accordance with his usual practice.[328]

187. This practice, he explained, serves a number of purposes: (1) it enables him to write down the passcode quickly while it is dictated on the loose paper after which he can clearly transcribe it in his notebook; (2) by having the passcodes written in two places, multiple devices can be examined by CBSA officers simultaneously; and (3) depending on the circumstances, the loose piece of paper would be returned to the traveller, serving as a reminder to the traveller that they may wish to change their password. The Court heard evidence that other CBSA officers had a similar practice.[329] The explanation is a reasonable one.

188. Critically, at the time he recorded the password information, BSO Kirkland did not know whether the CBSA would be examining the devices or when the examination would conclude.[330] He explained the primary purpose of recording the passcodes, in these specific circumstances, in his notebook and the loose piece of paper:

> Q – What was your intention in creating that loose piece of paper?
>
> A – That piece of paper was for my usage. So I knew there was going to be a lot of devices, I knew myself and Officer Katragadda would be going through them. He would have that piece of paper to look at it, I would have my notebook, and we would be going through the devices. That was my assumption at the time.[331]

[326] Katragadda, Nov. 19, p. 2, ll. 45-47; p. 3, ll. 1-19.
[327] Kirkland, Oct. 28, p. 77, ll. 13-35.
[328] Kirkland, Oct. 28, p. 41, ll. 39-47, p. 42, ll. 1-30.
[329] Dhillon, Nov. 16, p. 73; ll. 19-34; Goodman, Dec. 8, p. 82, ll. 41-47; p. 83, ll. 1-12.
[330] Kirkland, Oct. 28, p. 80, ll. 16-20.
[331] Kirkland, Oct. 28, p. 84, ll. 21-26. See also, Oct. 30, p. 12, ll. 14-20.

189. BSO Kirkland testified that he left the piece of paper on the stack of devices that BSO Katragadda had set aside during the customs examination.[332] The piece of paper remained there until after the Applicant's arrest when Cst. Dhaliwal approached BSO Kirkland to seize the Applicant's belongings. The interaction between BSO Kirkland and Cst. Dhaliwal in transferring custody of the devices appears to have been short and informal. BSO Kirkland testified that he provided Cst. Dhaliwal with the Applicant's cell phones which had been in his cargo pant pocket and indicated the stack of electronics as also belonging to the Applicant. BSO Kirkland testified that Constable Dhaliwal took the stack of electronics, along with a loose piece of paper bearing the passcodes:

> Q – Can you tell us what happened with the anti-static bag that was in your pocket?
>
> A – I – I handed it to Officer Dhaliwal with the phones inside it.
>
> Q – Do you recall whether he asked for them?
>
> A – I can't recall if he asked for them or not. I think I just took them out of my pocket and like, "Here you go." And I think – I don't know if I set them on the counter by the rest of the stuff or just gave it to them in hand kind of thing.
>
> Q – And tell us what happened to the stack of electronics that you described that came from the luggage. And you've told us that a loose piece of paper, which you've identified in this case, was placed on top. What happened to that stack?
>
> A – They just took possession of it. I can't – I don't think I handed it off to them, I just like, "There's her stuff," and kind of walked away.[333]

190. Cst. Dhaliwal testified that he seized the Applicant's electronics from BSO Kirkland, incident to the Applicant's arrest. He explained "the devices were on the metal desk, and I took the devices and then we put them into an exhibit bag."[334] There was little discussion between the two officers. Cst. Dhaliwal further testified he "received a piece of paper with codes written on it" from BSO Kirkland and that he "handed it to me."[335]

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[332] Kirkland, Oct. 28, p. 78, ll. 38-45.
[333] Kirkland, Oct. 28, p. 83, ll. 39-47; p. 84, ll. 1-9.
[334] Dhaliwal, Nov. 23, p. 24, ll. 44-45.
[335] Dhaliwal, Nov. 23, p. 25, ll. 7-15.

191. In cross-examination, Cst. Dhaliwal confirmed that he received the devices and the piece of paper from BSO Kirkland at the same time:

> Q – All right, we don't have to get hung up on that. But what you got was what you list here, you got an iPad, you can see it here, right, a pink MacBook, two phones, and a Cruzer Glide, which is like a USB stick, right?
>
> A – That is correct, sir.
>
> Q – And you got all that from CBSA Officer Kirkland?
>
> A – That is correct.
>
> Q – And you don't have a note here with respect to the piece of paper with the passwords, but that was provided at the same time?
>
> A – That is correct, sir.
>
> Q – And you've already told us that, that he handed you that as well. So then you took all of these exhibits, the electronics and the piece of paper, and they were now in your custody and control?
>
> A – That is correct sir.[336]

192. The Court is therefore left with two versions of the events: (1) that Cst. Dhaliwal took the devices and passcodes from the counter; or (2) that BSO Kirkland provided the stack of devices and passcodes, at the same time, to Cst. Dhaliwal. Either version is consistent with BSO Kirkland's testimony that he did not intend to share the passcodes with the RCMP and that they were provided in error. The Applicant's interpretation of the evidence, that BSO Kirkland separately and deliberately provided the passcodes to the RCMP, should be rejected. It is not supported by the testimony of either BSO Kirkland or Cst. Dhaliwal and is inconsistent with all of the RCMP and CBSA's officers' evidence about their agreement to deal with information sharing issues pursuant to formal processes.

193. BSO Kirkland testified unequivocally that it was not his intention to provide the passcodes to the RCMP. He never resiled from his position. His relevant testimony includes the following:

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[336] Dhaliwal, Nov. 24, p. 32, ll. 6-22.

> Q – Officer Kirkland, was it your intention that the RCMP should have the passcodes to the devices?
>
> A – No, it was not my intention.[337]
>
> …
>
> Q – If you had realized at the time that the RCMP was walking away with the passcodes, what would you have done?
>
> A – I would have grabbed it back from them.
>
> Q – Why?
>
> A – Because they're not allowed to have it.
>
> Q – Why not?
>
> A – Because it's – well, it's a *Privacy Act* violation, basically. So that information is not allowed to be passed off to them. They – if they want information from that exam, they have to go through the proper liaison and to fill out the proper 107 paperwork and whatnot, and then CBSA will see their request and make a determination of what information can or cannot be shared with them, dependent on their request.[338]

194. BSO Kirkland realized that the passcodes had been transferred to the RCMP in a debriefing held with Chief Goodman and other officers in the days following the examination. He informed his superior of the error.[339] Chief Goodman corroborated the fact that BSO Kirkland made this disclosure during the meeting when she raised the subject of information sharing.[340] The realization that he may have erred caused BSO Kirkland significant distress. He explained "It was an embarrassing moment for me in that meeting, I, as I am right now, was embarrassed and turned red-faced. It was heart-wrenching to realize I made that mistake."[341] Chief Goodman confirmed BSO Kirkland's reaction, "we were in a boardroom table, he was directly across from me, and as I was having that discussion with the team I just saw – like he just went white and seemed distressed."[342] Chief Goodman, who had worked with BSO Kirkland for at least 10 years,

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[337] Kirkland, Oct. 28, p. 84, ll. 16-18.
[338] Kirkland, Oct. 28, p. 85, ll. 19-34.
[339] Kirkland, Oct. 30, p. 84, ll. 30-47; p. 85, ll. 1-16.
[340] Goodman, Dec. 8, pp. 80-81.
[341] Kirkland, Oct. 30, p. 17, ll. 18-22.
[342] Goodman, Dec. 8, p. 80, ll. 27-31.

unequivocally accepted BSO Kirkland's explanation that the passcodes may have been transferred to the RCMP in error.[343]

195. None of the arguments raised by the Applicant undermine the credibility of BSO Kirkland's testimony that the passcodes were shared in error, for the following reasons:

- There is no evidence that the loose piece of paper was created second as alleged by the Applicant. BSO Kirkland testified that he believed he wrote the passcodes on the loose piece of paper first, and then in his notebook.[344]
- The fact that the loose piece of paper lists the phone number of one of the devices does not transform it into "instructions for another law enforcement agency" as alleged by the Applicant.[345] BSO Kirkland testified that it was not unusual for the CBSA to record telephone numbers for a traveller's devices and that this was sometimes done if contact needed to be made with a traveller in an adjournment situation.[346] BSO Kirkland, at the time of taking the passcodes did not know how or when the examination was going to conclude, or what would happen in relation to the Applicant's extradition process. The fact that he simply followed his usual practice is not surprising. Furthermore, the Applicant's claim that the phone numbers were recorded by BSO Kirkland to support a non-CBSA investigative purpose has no evidentiary support. What would be the value of such information for a police investigation? The Applicant provides no answer.
- BSO Kirkland asked the Applicant for passcodes to her other devices, but she did not provide them. BSO Kirkland was content with receiving a single password from her, as in his view, if the examination continued, there would be other opportunities to obtain other passwords as part of the examination.[347] If the CBSA's objective was to obtain the Applicant's passwords, why would they adjourn the examination before all the passwords were obtained?

[343] Goodman, Dec. 8, p. 81, ll. 19-36.
[344] Kirkland, Oct. 28, p. 79, ll. 1-6.
[345] Applicant's submissions at para. 254.
[346] Kirkland, Oct. 28, ll. 21-32.
[347] Kirkland, Oct. 30, p. 12, ll. 38-47; p. 13, ll. 1-12.

- The fact that BSO Katragadda directed BSO Kirkland to obtain the passcodes several minutes before the examination was adjourned has been discussed in detail. BSO Katragadda was waiting for further guidance from NSU and decided to request the passcodes in the event that examination into the national security issues was to go further. NSU confirmed that it had no further questions *after* BSO Katragadda had already requested BSO Kirkland to obtain the passcodes.[348] Had NSU sought to conduct a full national security examination that day, BSO Katragadda believed the devices would have been examined.[349]
- The Applicant's suggestion that the CBSA officers had no grounds to support an examination of the devices is erroneous. BSO Katragadda testified that he did not make the decision to examine the devices and therefore did not notate grounds. However, he believed that had grounds to justify such a decision and that had the examination continued an examination of the devices could well have been conducted.[350]
- The Applicant postulates that Sgt. Lundie's evidence of overhearing a discussion between Cst. Yep or Cst. Dhaliwal and a CBSA officer about passcodes, while he was in the superintendent's office, must have been about the Applicant's electronic devices.[351] Sgt. Lundie confirmed in his testimony that he has no recollection of what the passcode discussion concerned. It is more reasonable to infer that Sgt. Lundie's memory of this discussion relates not to the Applicant's devices, but rather to the passcodes to her residence. In identifying the photos he took of the Applicant's belongings, Cst. Dhaliwal identified the keys to the Applicant's residence in addition to the security code for the residence that he obtained from Sgt. Lundie.[352] As confirmed by Sgt. Vander Graaf, who provided the house passcode to Sgt. Lundie, the key and passcode were obtained by the RCMP in order to assist the Applicant with transferring the bags to her friend and ultimately her

[348] Katragadda, Nov. 19, pp. 2-4.
[349] Katragadda, Nov. 19, p. 4, ll. 6-24.
[350] Katragadda, Nov. 19, p. 3, ll. 17-45; p. 4, ll. 1-24; Nov. 20, p. 7.
[351] Lundie, Nov. 26, p. 73.
[352] Exhibit 12, AGC Dhaliwal Binder, Tab 4, Photo 993. Dhaliwal, Nov. 23, p. 28, ll. 9-25.

home.[353] In light of the evidence, there is little question that Sgt. Lundie's memory of the passcode discussion relates to the passcode for the Applicant's residence.

- The Applicant claims that Sgt. Lundie knew that the CBSA exam was close to completion at 2:00 p.m., immediately prior to the CBSA obtaining the passcodes. While Sgt. Lundie had a six minute phone call starting at 2:00 p.m. with his supervisor at the Richmond detachment, there is no evidence that Sgt. Lundie had any information about the status of the CBSA examination at that time. A review of the relevant testimony makes this clear:

> Q – All right. And what was that call about, 2:00 p.m.?
>
> A – It would have probably been giving him an update from the day, I'm assuming.
>
> Q – You're looking at your notes, does it tell us?
>
> A – Yeah, I'm just looking at the timing of – of this, so that's at two o'clock.
>
> Q – Is there any help to be gained by looking at your notes?
>
> A – I'm just looking at the timing.
>
> Q – Yes.
>
> A – The chronological order. Because again…
>
> Q – I don't see an entry for 2:00 p.m.
>
> A – I realize that, but I'm just looking at the – at the chronological order of the day **to see if it could refresh my memory.**
>
> Q – Okay.
>
> A – So I'm assuming the call to Keith at that time, and again **I'm only assuming because I don't know**, would have been giving him an update. He is my direct line, giving him an update on that day, and what has transpired so far.
>
> Q – All right. Would you be advising him that they're close to completion of their examination? Would that make sense?
>
> A – It would have been reasonable to say that, yes.

[353] Dhaliwal, Nov. 23, p. 28, ll. 10-39; Vander Graaf, Nov. 25, p. 13, ll. 1-9, 42-47; p. 14, ll. 1-22.

In fact, the only notation in Sgt. Lundie's notes about the CBSA examination being close to concluding is a note at 12:16 indicating that the CBSA examination was "almost done."[354] This note strongly supports the testimony of BSO Katragadda, who told the Court that when he left the examination counter for the first time, close to the time of Sgt. Lundie's note, he went to the superintendent's office and reported to the superintendents that he was ready to adjourn the examination, but at that point the superintendents wanted to make contact with NSU.[355] It seems likely, based on this sequence of events, that Sgt. Lundie concluded that the examination was nearly complete. The examination, of course, did not adjourn until 14:11, nearly two hours after Sgt. Lundie made his note.

- Constable Dhaliwal listed the passcodes in his Form 5.2 along with the other seized exhibits and filed it with the Surrey Provincial Court on December 6, 2018.[356] If the CBSA and RCMP conspired to obtain the passcodes, one would expect that Cst. Dhaliwal would not have openly listed the passcodes on the Form 5.2.
- The CBSA took steps to obtain the passcodes on January 8, 2019, when Chief Goodman called Cst. Dhaliwal to inquire whether the RCMP had the passcodes and whether they could be returned.[357] If the two agencies had conspired to obtain the passcodes, it would be illogical for the CBSA to seek their return.
- The RCMP officers testified that they did not ask the CBSA for the passcodes.[358] There is no evidence that the FBI asked the CBSA for the passcodes. Even when the FBI made an MLAT request for a list of the Applicant's devices and for access to the devices themselves, they made no request for the passcodes. This strongly suggests that the FBI was not even aware of their existence. It is illogical to conclude that BSO Kirkland would take it upon himself to deliberately provide passcodes, in direct violation of CBSA operating procedures, that were never

[354] Exhibit 17, Defence Lundie Binder, Tab 3; Lundie, Nov. 26, p. 71, ll. 42-46.
[355] Katragadda, Nov. 18, p. 72, ll. 32-47; p. 73, ll. 1-15.
[356] Exhibit 12, AGC Dhaliwal Binder, Tab 8; Dhaliwal, Nov. 23, p. 41; p. 42, ll. 1-10.
[357] Dhaliwal, Nov. 23, pp. 42-43.
[358] Yep, Oct. 28, p. 10, ll. 35-42; Dhaliwal, Nov. 23, p. 15, ll. 17-20; p. 25, ll. 28-29; Vander Graaf, Nov. 25, p. 4, ll. 3-17; Lundie, Nov. 26, p. 71, ll. 4-14.

requested. The evidence strongly suggests that he did not intend for the passcodes to be transferred to the RCMP.

8. The CBSA Continued to Demonstrate Its Intention to Examine and Investigate the Applicant's Inadmissibility After the Examination

196. The execution of the Provisional Arrest Warrant did not extinguish the CBSA's interest in pursuing their inadmissibility concerns. The CBSA officers were not satisfied the Applicant had met her onus to demonstrate her admissibility to Canada and the national security and criminality concerns remained live questions in their minds. The examination was therefore adjourned for those matters to be pursued at a later date.[359] It is not uncommon for exams to be adjourned after they have commenced.[360] The fact that CBSA continued to take steps to explore their inadmissibility concerns is further evidence that their actions were motivated by their border security mandate.

197. The CBSA demonstrated its interest in continuing to explore their inadmissibility concerns from the first moments after the Applicant's arrest. BSO Katragadda, while the arrest was taking place, issued a warrant for the Applicant's arrest requiring her to be returned in custody to the CBSA for the express purpose of continuing the examination.[361] It was his good faith belief that the warrant was the appropriate means by which to ensure the continuation of the examination in the event the Applicant was released from custody in the extradition process.[362] Even if BSO Katradgadda did not have the requisite grounds to issue the warrant, this evidence is consistent with Canadian officials "acting in good faith in the legitimate, albeit vigorous, pursuit of valid Canadian immigration objectives", as described in *Bembenek*,[363] rather than evidence of a purpose contrary to *IRPA*. Further evidence of BSO Katragadda's intentions to continue the examination are found in the Order to Deliver Inmate, also issued on December 1 for the express purpose of

[359] Kirkland, Oct. 30, p. 32, ll. 36-39; Dhillon, Nov. 16, p. 94, ll. 23-35; Nov. 17, p. 8, ll. 16-36; Katragadda, Nov. 18, p. 64, ll. 27-38; p. 72, ll. 35-43; Nov. 19, p. 5, ll. 4-41; p. 6, ll. 41-47, pp. 7-11; p. 34, ll. 16-46.
[360] Kirkland, Oct. 28, p. 31, ll. 20-32; McRae, Oct. 30, p. 52, ll. 22-35; Dhillon, Nov. 16, p. 69, ll. 39-47, p. 70, ll. 1-2
[361] Exhibit 10, AGC Katragadda Binder, Tab 1, p. 1, Warrant for Arrest.
[362] Katragadda, Nov. 19, p. 7; Nov. 20, pp. 18-19.
[363] *Bembenek* at p. 54.

continuing the examination,[364] as well as BSO Katragadda's report issued on December 1 that confirms that the immigration warrant was issued "for completion of examination."[365]

198. The CBSA's interest in gathering evidence to explore the inadmissibility issues in the days following the examination provides even more support for the *bona fides* of the CBSA's interests in the Applicant:

- On December 3, 2018, Janis Lof, a manager of the National Security Unit, wrote to Tammy Sigurdson, also an NSU manager,[366] asking for an enforcement officer to be assigned to the Applicant's case. Ms. Lof expressed the view that the Applicant would come back to the CBSA and that enforcement officer should begin "liaising with the Americans for court documents."[367] The only reason for the CBSA to obtain court documents from the U.S. would be to collect further evidence of the fraud allegations in support of criminal inadmissibility concerns, as confirmed by Chief Goodman.[368] According to CBSA operational manual, evidence supporting inadmissibility under ss. 36(1)(c) and 36(2)(c) includes police reports and court records "from foreign authorities that demonstrate an offence has been committed…that charges are pending; and/or that the person has been indicted."[369] Ms. Lof further indicated the potential areas of inadmissibility to be investigated include IRPA sections "37(1)(b) for money laundering, 36(1)(c) for the fraud charges in the US and possible 34 [national security]." [370]
- On December 4, 2018, Sharon Spicer, Director of Inland Enforcement Operations, wrote to Chief Goodman and Ms. Lof to indicate that a CBSA liaison officer at the U.S. embassy "is looking into what he can get on the crim info."[371] This statement is consistent with the intention expressed by Ms. Lof that information relevant to criminal inadmissibility should be obtained from the U.S.

[364] Exhibit 10, AGC Katragadda Binder, Tab 1, p. 2, Order to Deliver Inmate.
[365] Exhibit 10, AGC Katragadda Binder, Tab 2, Immigration EOD report.
[366] Goodman, Dec. 9, p. 2, ll. 37-41.
[367] Exhibit 18, AGC Goodman Binder, Tab 15, p. 2.
[368] Goodman, Dec. 9, p. 3, ll. 28-46.
[369] ENF 1, s. 7.13 and 7.16.
[370] Exhibit 18, AGC Goodman Binder, Tab 15, p. 2.
[371] Exhibit 18, AGC Goodman Binder, Tab 10, Email from Sharon Spicer, December 4, 2018 @ 1:42 p.m.

- On December 5, 2018, Sharon Spicer wrote an email to CBSA senior management indicating that "information is still being sought to support the inadmissibility determination - Inland Enforcement Operations at NHQ is seeking information via the FBI attache at the US Embassy…" The same email also refers to considerations for next steps, including "if information is available to form reasonable and probable grounds to believe she is inadmissible, a 44 report could be written at POE. It is anticipated that any admissibility that might arise would require an admissibility hearing before the IRB."[372] Ms. Spicer's email also contemplated bail conditions for the Applicant in relation to any IRPA proceedings. Why would the CBSA discuss considerations for potential next steps which included the gathering of evidence, writing of a s. 44 inadmissibility report, a deportation hearing before the Immigration and Refugee Board and bail conditions, if the CBSA had no real interest in the Applicant's admissibility, as alleged by the Applicant? The evidence demonstrates that the CBSA was motivated to fulfill its mandate to secure the border.

- On December 5, 2018, Jo-Ann Moore, Manager of the Intelligence Support Section wrote to Ms. Spicer and others, indicating that she had spoken to Agent Sgroi of the FBI. She indicated that she advised Mr. Sgroi "that you were reaching out to him for an information request regarding the determination of admissibility…"[373] The only reason that the CBSA would express interest in obtaining information from the U.S., as discussed, would be support their investigation into the Applicant's inadmissibility on the basis of foreign criminality.

- On December 7, 2018, FBI Agent Sgroi wrote to Ms. Spicer attaching a document "you can use for your admissibility analysis."[374] The attached document was the Summary of the Facts from the Provisional Request, setting out the criminal allegations against the Applicant.[375]

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[372] Exhibit 20, AGC MacVicar Binder, Tab 3, pp. 1-2, bullets 4, 7.
[373] AGC Book of Additional Documents, Tab 4 (CAN-12).
[374] AGC Book of Additional Documents, Tab 8, p. 1 (CAN-125).
[375] AGC Book of Additional Documents, Tab 8, (CAN-126), p. 2 (Summary of Facts).

- On December 7, 2018, CBSA personnel communicated about the urgency of placing the CBSA's warrant on the Canadian Police Information Centre database (CPIC). To justify the urgency, CBSA officer explained "If no warrant is in CPIC, there is a chance the subject may be released and not returned to our custody in order for us to complete our examination." [376]

199. The continued interest of the CBSA in investigating their inadmissibility concerns, even after the examination, stands in stark contrast to *Bartoszewicz*. In that case, the court found that immigration officials had closed their file on Mr. Bartoszewicz's admissibility in Canada. They initiated deportation proceedings at the urging of Poland, which had laid criminal charges, and then withdrew the immigration proceedings on the final day of the deportation hearing, before a decision on admissibility had been rendered by the IRB. The court drew the inference that "there was no Canadian national interest in play."[377]

200. In this case, why would the CBSA issue a warrant for the return of the Applicant if they had no intention of exploring their inadmissibility concerns? Why would the CBSA take steps to obtain further information from the U.S. to investigate the Applicant's alleged criminal conduct? The evidence point to one conclusion: from the moment the CBSA learned about the Applicant and developed inadmissibility concerns, they sought to enforce their mandate.

9. <u>The CBSA's Officers Denials of Ulterior Motive Should be Believed</u>

201. The CBSA officers directly responded to the Applicant's core allegation against the CBSA: they never participated in a conspiracy with the FBI and RCMP to obtain information to support a foreign investigation. The officers unequivocally testified that their actions were motivated only by legitimate CBSA objectives.

- BSO Kirkland rejected the proposition that the CBSA and RCMP coordinated their efforts at the airport to obtain evidence for the FBI. He told the Court "I would say no to that. That doesn't make any sense. There's no gain for an officer for the CBSA to

[376] AGC Book of Additional Documents, Tab 3, p. 3.
[377] *Bartoszewicz*, at para. 33.

be doing such a thing. There's more – there's more headache than there is gain to be – to do anything like that."[378]

- Supt. McRae testified that it was national security and criminal inadmissibility concerns that caused the CBSA to examine the Applicant. He confirmed he was never asked by anyone outside the CBSA to provide information about the examination.[379]
- Supt. Dhillon rejected the suggestion that his intent on December 1, 2018 was to gather evidence for the FBI.[380] He made it clear that his questions of the Applicant related to inadmissibility concerns. In response to the suggestion that he had received instructions from the RCMP on how to carry out the examination, he stated "No. The RCMP didn't instruct me to do anything that day."[381]
- BSO Katragadda rejected the possibility that he acted to collect information for the RCMP or a non-CBSA purpose. He testified that his motivation to keep the immigration exam brief and not to directly probe the allegations of criminality was that he "didn't want it to even seem like we were working together on this because we really weren't."[382]

202. The officers provided clear, forthright and transparent explanations for their actions. They never resiled from their core testimony that neither the RCMP nor the FBI asked the CBSA to conduct an examination, ask particular questions or gather evidence. The officers only acted in furtherance of the CBSA's mandate to secure the border. This was not a case like *R. v. Rodenbush*,[383] relied upon by the Applicant, where the very customs officials who questioned the accused were preparing to arrest him. In that case, the sole purpose of the questioning was to pursue a criminal investigation. In this case, the CBSA's questioning was directed entirely at issues pertaining to admissibility.

[378] Kirkland, Oct. 30, p. 29, ll. 14-18.
[379] McRae, Nov. 16, p. 12, ll. 9-20.
[380] Dhillon, Nov. 18, p. 33, ll. 1-4.
[381] Dhillon, Nov. 18, p. 12, ll. 29-35.
[382] Katragadda, Nov. 18, pp. 63-64.
[383] [1985] B.C.J. No 3021 (C.A.)

E. Conclusion

203. The Applicant has failed to provide the "very strong evidence" contemplated by Mr. Justice Fitch in *Rogan* to show that the BSOs were not pursuing legitimate CBSA purposes on December 1, 2018. The Applicant has failed to provide evidence of agreements between the CBSA and foreign authorities to misuse CBSA powers, as established in *Tollman*. The Applicant has failed to show that the CBSA only took action at the insistence of an outside agency, as established in *Bartoszewicz*. The Applicant has not produced an evidentiary foundation capable of displacing the presumption that the CBSA officers were simply carrying out their duties.

VI. CBSA INFORMATION SHARING WAS LIMITED AND LAWFUL

A. Key Points

(i) The CBSA is authorized to share information with third parties including the RCMP, CSIS and foreign governments within certain parameters.

(ii) The CBSA shared only basic personal information about the Applicant outside the CBSA. To the extent such information was shared, it facilitated legitimate inter-agency cooperation. The sharing is not evidence of a conspiracy.

(iii) The CBSA took steps to restrict the unauthorized sharing of information they collected before, during and after the examination. The suggestion that the CBSA freely shared substantive information outside normal protocols with other agencies is not supported by the facts.

B. Overview

204. The CBSA shared only basic personal information about the Applicant outside the CBSA. To the extent such information was shared, it facilitated legitimate inter-agency cooperation. The CBSA is authorized to share information with third parties including the RCMP, CSIS and foreign governments within certain parameters.[384] The CBSA demonstrated an awareness of the constraints on information sharing and made efforts to distinguish between types of information to be shared and to control the flow of information before, during and after the examination. These efforts show an appreciation of the interests and legal authorities at play, and belie the suggestion that the CBSA shared information as part of a conspiracy to abuse its powers to support an FBI investigation.

205. Before the examination, the CBSA and RCMP agreed that any information sharing would take place formally, pursuant to the *Customs Act* and *Privacy Act*. The CBSA also insisted that the RCMP maintain distance while the CBSA interacted with the Applicant at the gate. During the examination, the CBSA required the RCMP to remain within the superintendent's office, away from the examination counter where they could see the Applicant, but could not hear the examination. Following the examination, the CBSA received requests for information from the FBI, which they assessed under the *MOU*. The CBSA determined they could lawfully share traveller records, but that the record of the examination, to which a high expectation of privacy attached, could only be shared pursuant to a mutual legal assistance request. There is no evidence that any of the information obtained by the CBSA from the Applicant during that examination, including her answers to questions such as why Huawei did not sell its products in the U.S. or whether Huawei did business in Iran, were shared outside the CBSA

206. Evidence that basic personal information about the Applicant was shared with other agencies is not evidence of the CBSA's involvement in a conspiracy to conduct a covert criminal investigation on behalf of the FBI. Rather, it is evidence of one agency assisting others to carry out their necessary work.

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[384] *Customs Act* ss. 107(4), (5), (6), (8) and (9) set out various scenarios in which customs information can be shared. The disclosure of personal information obtained by the CBSA under *IRPA* may be disclosed pursuant to s. 8(2) of the *Privacy Act*, R.S.C., 1985, c. P-21).

C. Limited Sharing with RCMP

207. As already discussed, the CBSA and RCMP formally established that their processes on December 1 would be separate and that any information sharing would take place through formal channels. The CBSA and RCMP discussed the issue of information sharing under the *Privacy Act* and *Customs Act* at the December 1 meeting to make the separation of the CBSA and RCMP processes clear, not to encourage the CBSA to gather information. Had the CBSA wanted to unlawfully share substantive information with the RCMP about the examination, there would no point in discussing formal information sharing mechanisms.

208. In addition, as discussed, the CBSA made efforts to restrict the flow of information during the examination by keeping the RCMP away from Ms. Meng at the gate and away from the examination desk until their processes were completed. Had the CBSA wanted to assist the RCMP and provide information about Ms. Meng, they would not have made efforts to limit the RCMP's proximity to any area in which they were dealing with Ms. Meng before and during the examination.

209. The efforts made by the CBSA to ensure that the RCMP did not obtain substantive information about the examination were largely successful. There is no evidence that the RCMP knew the reasons for which the CBSA examined Ms. Meng, the lines of questioning, or any of the information provided by Ms. Meng about Huawei or its business in Iran. For example, when Sgt. Lundie wrote an update email to his superiors after the Provisional Arrest Warrant was executed, he indicated that the CBSA conducted a "thorough examination" of the Applicant.[385] When asked about why he characterized the examination as "thorough" he explained that he used that word because the examination "took hours." He confirmed that he was not aware of any of the questions asked.[386] If the CBSA were using its powers to compel information from Ms. Meng to assist the FBI's investigation, it would be logical to expect that the CBSA would share information about the nature of the questions it asked Ms. Meng and her answers to matters that had some relevance to the U.S. investigation. Instead, there is no evidence to suggest that any such information was shared.

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[385] Exhibit 16, AGC Lundie Binder, Tab 17.
[386] Lundie, Nov. 26, p. 70, ll. 7-14.

210. There is no evidence that any personal information about the Applicant was in fact provided by the CBSA to the RCMP. While the RCMP officers had limited information in their notes about matters such as the Applicant having eight pieces of luggage, owning two homes in Vancouver, and details about the Applicant's travelling companion, the RCMP officers could not say conclusively that the CBSA shared this information or how the information was shared.[387] The Applicant acknowledges the information may have been overheard by the RCMP.[388] Even if the CBSA provided this basic information to the RCMP outside formal channels, it is clearly not evidence of a conspiracy to covertly support a foreign criminal investigation as alleged by the Applicant.

D. Limited Sharing With CSIS

211. The CBSA provided basic information about the Applicant to CSIS as part of their routine practices. The CSIS notes show that to the extent the CBSA provided information to CSIS about the Applicant, it was limited to matters such as her affiliation with Huawei, the existence of the provisional arrest warrant in connection with fraud charges, the fact that her electronic devices were seized by the RCMP, her passport number, a limited description of her travel itinerary.[389]

212. The fact that the CBSA provided basic information about the Applicant to CSIS is not evidence of a conspiracy to assist the FBI. The CBSA is authorized to share information with CSIS gathered under both the *Customs Act*[390] and *IRPA*[391] and does so routinely where national security inadmissibility concerns arise at the port of entry.[392] In order to obtain assistance from CSIS, the CBSA must provide some context.

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[387] Lundie, Nov. 26, p. 71, l. 15-47; p. 72, l. 1-35.
[388] Applicant's submissions at para. 306.
[389] Exhibit 19, Defence Goodman Binder, Tabs 11, 12, 13.
[390] *Customs Act*, s. 107(4) permits information to be shared when it reasonably related to national security or defence.
[391] The *Privacy Act*, s. 8(2)(a) permits personal information to be shared for a consistent use. Given the CSIS mandate under the *Canadian Security Intelligence Service Act*, R.S.C., 1985, c. C-23, ss. 14 and 15 to advise any minister of the Crown on matters relating to the security of Canada, the CBSA's limited disclosure to CSIS of the Applicant's personal information was for a use consistent with the purpose for which the information was collected. See also *IRPA*, s. 16(2.1).
[392] McRae, Nov. 16, p. 8, ll. 21-47; Goodman, Dec. 8, p. 71, ll. 21-37.

213. Rather than suggesting the existence of a conspiracy, the CBSA's contact with CSIS only provides further evidence that the CBSA had *bona fide* national security concerns in relation to the Applicant and were following routine practices applicable to national security cases.

E. Limited Sharing with the FBI

214. As already discussed, on December 4, 2018, the FBI sought records from the CBSA: travel records pertaining to the Applicant and the CBSA's examination file. Chief Goodman, the recipient of the request, asked U.S. authorities for more detail on the "specific use of the information in order for us to legally determine how we / if we can share the information."[393] After receiving additional information from U.S. authorities, Chief Goodman sought internal guidance from the CBSA as to whether the information could be shared under the *MOU*.[394] Ultimately, the CBSA determined the travel history could be provided under s. 107(8) of the *Customs Act* and the *MOU*, but declined to provide the examination report to the FBI. The CBSA instructed that the examination report could only be obtained pursuant to a mutual legal assistance request.[395]

215. The Applicant suggests that the CBSA improperly shared the travel history because an internal opinion had been expressed that the travel history could not be shared under the MOU.[396] That opinion mainly turned on an interpretation of s. 4(c) of the MOU which states:

> The Participants understand that the provision and disclosure of information under this MOU is for investigative purposes. If criminal charges are brought, and the information may give rise to a reasonable expectation of privacy considered "high" by the Participant who disclosed the information, the Participants intend to use the Mutual Legal Assistance Treaty (MLAT) process to secure the requested information.

216. The internal CBSA opinion cited by the Applicant[397] assumed that if criminal charges have been brought, the criminal investigation is over and that the request could not be for investigative purposes. This is clearly a narrow interpretation of the word "investigative" and inconsistent with

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[393] Exhibit 18, AGC Goodman Binder, Tab 8, p. 4.
[394] Goodman, Dec. 8, p. 89; Exhibit 18, AGC Goodman Binder, Tab 9, p. 4.
[395] Exhibit 19, Defence Goodman Binder, Tab 20; AGC Book of Additional Documents, Tab 1 (CAN-11).
[396] Exhibit 18, AGC Goodman Binder, Tab 8, pp. 2-3.
[397] Applicant's submissions at para. 312.

the broad interpretation recognized by the jurisprudence.[398] Furthermore, it is difficult to see how the privacy interest in the CBSA's travel history for the Applicant (as opposed to the examination record) could be considered "high".

217. In any event, the fact that there was an internal CBSA opinion against the sharing of the travel history under the *MOU* is not evidence that it was the only opinion or that the CBSA officials who shared the information concurred with that opinion. Indeed, emails exchanged between CBSA officials suggest that they believed the sharing was authorized as long as the information was used for "investigative purposes" and conveyed that information to the U.S.[399] The U.S. confirmed its understanding that the information shared under the *MOU* by the CBSA was for investigative purposes and that information to be used in court would be obtained pursuant to an MLAT request.[400]

218. There is no evidence to suggest the improper sharing of information between the CBSA and FBI. The CBSA made efforts to distinguish between the types of information sought, and to determine the lawful avenues by which such information could be shared. This demonstrates a conscious effort on the part of the CBSA to act within its legal authorities. Had the CBSA been part of a conspiracy to further the FBI's investigation, it would have sought their guidance for questioning the Applicant, shared all its information with them immediately, without any analysis or consideration of whether lawful sharing mechanisms were available.

F. Limited Sharing with Canadian DOJ

219. The CBSA provided nothing more than basic personal information about the Applicant to the Canadian DOJ as it prepared for the Applicant's extradition bail hearing. This disclosure was authorized under the *Privacy Act*.[401]

220. This information provided was limited to the following: (1) the Applicant was arrested by the RCMP for fraud over $5000; (2) the Applicant is a high-ranking executive with an international company; (3) the Applicant is a frequent traveller; and (4) the Applicant owns property in different

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[398] *Canada (Minister of Public Safety and Emergency Preparedness) v. Maydak*, 2005 FCA 186 at paras. 11, 16-17.
[399] AGC Book of Additional Documents, Tab 2 (CAN-31); Tab 5 (CAN-84); Tab 6 (CAN-88), p. 1.
[400] AGC Book of Additional Documents, Tab 12 (RESP-131_2), p. 1.
[401] *Privacy Act* s. 8(2)(d) permits the disclosure of personal information to the Attorney General of Canada for use in legal proceedings involving the Crown in right of Canada or the Government of Canada.

parts of the world.[402] None of the information shared from the examination directly related to the inadmissibility concerns, including the Applicant's responses to questions relevant to the foreign charges. The Applicant grossly overstates the nature of the information provided.

G. Conclusion

221. The information shared by the CBSA to other agencies was authorized by law. The fact that the sharing was so limited in its scope, particularly in relation to the RCMP and FBI, is only further evidence that the CBSA was pursuing its border security mandate and not participating in a conspiracy to assist a foreign investigation.

[402] Defence Book of Additional Documents, Tab 9 (CAN-207).

VII. THE APPLICANT'S SECTION 8 RIGHTS WERE NOT BREACHED

A. Key Points

(i) The RCMP's actions were authorized by the common law power to search incident to arrest.

(ii) The justification for the common law power of a search incident to arrest arises from the need for law enforcement authorities to gain control of things or information, which outweighs an individual's interest in privacy. The authority to search incident to arrest exists because of the need to arm the police with adequate and reasonable powers for the investigation of crime.

(iii) The RCMP conducted the seizure of the Applicant's electronic devices reasonably and for valid objectives incidental to the reason the Applicant was arrested, namely to preserve and collect evidence as requested by the Requesting State.

(iv) Both the request by the Requesting State for the seizure of the electronic devices and RCMP's resulting seizure of those devices is contemplated by Article 15 of the *Treaty* and s. 39 of the *Extradition Act*.

(v) There was no RCMP investigation of the Applicant and so the RCMP were necessarily informed by U.S. law enforcement as to what evidence might be relevant to an American criminal investigation and what information might be needed to make a request for that evidence through the MLAT process.

(vi) The RCMP's collection of the make, model and ESN information from the devices was a continuation of the seizure of the devices at YVR and was necessary to properly maintain, preserve and account for the evidence. The RCMP obtained the make, model and electronic serial number (ESN) information for two related purposes: (1) for RCMP evidence continuity management (to enter seized evidence on the RCMP "Property Tracker" database and the 5.2 Form); and, (2) to facilitate an expected MLAT request from the Requesting State for the electronic devices by properly identifying and preserving the continuity of the seized evidence.

(vii) The RCMP did not conduct a "search" of the electronic devices within the meaning of section 8 of the *Charter* when they physically examined and collected the ESN information as no *informational* content of the devices was searched.

(viii) A section 8 *Charter* analysis is contextual and informed by the totality of the circumstances. In the context of this case, the collection of the ESN information did not engage the Applicant's *Charter* rights.

(ix) The actions of the RCMP in respect of the seizure of the electronic devices and subsequent actions related to the preservation and protection of continuity of that evidence is reasonable and did not breach the Applicant's section 8 *Charter* rights.

(x) The Applicant's argument regarding the potential use of ESN Information is entirely speculative.

B. Overview

222. The Applicant's argument that the RCMP's actions in respect of her electronic devices was a breach of her s. 8 *Charter* rights is not supported by facts or law. At the request of the Requesting State, the RCMP seized the electronic devices in the possession of the Applicant at the time of her arrest. The collection of the ESN information was part of the process of the seizure of the Applicant's electronic devices to properly preserve and manage the evidence. The RCMP's actions were authorized by the common law power to search incident to arrest. The RCMP conducted the seizure reasonably and for valid objectives incidental to the reason the Applicant was arrested.

223. The RCMP's collection of the ESN information was a continuation of the search incident to arrest. The RCMP sought to obtain information from the items to properly identify them for RCMP's own evidence management purposes and to particularize them so that the FBI could make an MLAT request. The RCMP's physical examination of the devices and collection of the ESN information was a continuation of the seizure of the Applicant's electronic devices and was authorized by the common law power to search incident to arrest. The RCMP were not required to seek judicial authorization to physically examine the devices to collect the ESN information. There was no s. 8 breach. The Applicant's assertions to the contrary are based on speculation not facts.

C. Key Facts

224. The PA Request included a request that the RCMP protect any electronic devices in the Applicant's possession in Faraday bags to prevent remote wiping.[403]

225. On December 1, 2018, at YVR, after the Applicant's arrest, Cst. Dhaliwal took possession of the following electronic devices:

(i) Apple MacBook Air Laptop;
(ii) Apple iPad Pro tablet;
(iii)iPhone 7 Plus smartphone;

[403] Exhibit 1, AGC Yep Binder, Tab 2, p. 1.

(iv) Huawei Mate 20 RS smartphone; and
(v) Slider Cruz – USB Drive
(the "Electronic Devices").

226. The Electronic Devices were sealed in evidence bags and transported to RCMP E-Division (E-Div) Headquarters in Surrey, British Columbia by Cst. Dhaliwal.

227. On December 4, 2018, in an initial telephone discussion with S/Sgt. Lea, FBI Agent John Sgroi requested the "make, model and serial numbers of the electronic devices".[404] In a call later that day to S/Sgt. Ben Chang, Agent Sgroi requested the "descriptions and lists of the devices (with ESN#, make model) of the electronic devices seized from the Applicant.[405] The discussions referenced that the purpose of obtaining the information was to make an MLAT request for any electronic devices seized from the Applicant during her arrest.[406]

228. On December 4, 2018, the Applicant's file was transferred internally within RCMP E-Div from the Federal Domestic Liaison Unit ("FDLU") to Federal Serious Organized Crime ("FSOC"). This meant direction of the file was transferred from S/Sgt. Lea to S/Sgt. Chang. The RCMP personnel involved in the file also changed from FDLU to FSOC, with the exception of Cst. Dhaliwal who remained the exhibits officer assigned to the file.

229. On December 4, 2018, Cst. Dhaliwal requested the assistance of Cpl. Paul Wrigglesworth (RCMP Tech. Crimes) to obtain the make, model and ESN information of the Electronic Devices. Cst. Dhaliwal and Cpl. Wrigglesworth conducted a physical inspection of the Electronic Devices and obtained the following information:

(i) Apple MacBook Air Laptop – FCC ID, IC, S/N;
(ii) Apple iPad Pro tablet – S/N;
(iii) iPhone 7 Plus smartphone – FCC ID#, SIM Card #; IMEI; and
(iv) Huawei Mate 20 RS smartphone – SIM Card #.[407]

(the "ESN Information").

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[404] Defence Book of Additional Documents, Tab 22**,** Affidavit of S/Sgt. Peter Lea, at Exhibit A.
[405] Exhibit 12, AGC Dhaliwal Binder, Tab 6.
[406] Exhibit 12, AGC Dhaliwal Binder, Tab 6, p. 37; Defence Book of Additional Documents, Tab 22.
[407] Exhibit 12, AGC Dhaliwal Binder, Tab 8, p. 1 (Form 5.2).

230. On December 4, 2018, Cst. Dhaliwal entered a description of the Electronic Devices, including the ESN Information, on the RCMP Evidence Management database, "Property Tracker", which is also referred to as the "Prime exhibit tracker".[408]

231. On December 6, 2018, Cst. Dhaliwal included a description of the Electronic Devices, including the ESN Information, on a Form 5.2 and filed it with the Surrey Registry of the B.C. Provincial Court pursuant to s. 489.1(1)(b) of the *Criminal Code*. The Form 5.2 also listed and described, in detail, all other items seized from the Applicant at YVR on December 1, 2018.

D. Warrantless Searches and Section 8 of the *Charter*

232. Section 8 of the *Charter* protects individuals from unreasonable search or seizure. A search or seizure will be reasonable where it is (1) authorized by law; (2) the law itself is reasonable; and (3) the manner in which the search is carried out is reasonable.[409]

233. A warrantless search is *prima facie* unreasonable and the burden is on the Crown to demonstrate that the search was reasonable. There was no warrant obtained by the RCMP to seize the Electronic Devices and collect the ESN Information. As a warrantless search, the onus rests with the Crown to demonstrate, on a balance of probabilities, that the RCMP's seizure of the Applicant's Electronic Devices, including the collection of the ESN Information, was authorized by law and was conducted reasonably.

234. In this case, the RCMP's seizure of the Electronic Devices (including obtaining the ESN Information) was authorized by the common law doctrine of search incident to arrest. While guidance from the Supreme Court regarding search and seizure incident to arrest in the context of Canadian police investigations is of assistance, it is important to recognize the obvious - this case deals with an extradition arrest. There is no Canadian police investigation of the Applicant. In carrying out their duties under the *Extradition Act*, the RCMP are assisting a treaty partner in relation to a foreign investigation. Accordingly, the framework established by the Court for assessing the reasonableness of a search incident to arrest in a domestic investigation requires modification to be sensibly applied to the extradition context.

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[408] Exhibit 12, AGC Dhaliwal Binder, Tab 6, p. 44.
[409] *R. v. Caslake*, [1998] 1 SCR 51 at para. 10; and *R. v. Fearon*, 2014 SCC 77 at para. 12.

235. For a search incident to arrest to be justified, the police must be pursuing a lawful purpose connected to the arrest. The three requirements are that (1) the arrest must be lawful; (2) the search is truly incidental to the arrest in that it has a valid purpose connected to the arrest; and, (3) the police must conduct the search reasonably.[410] Put in simple terms, the court asks, "what were they looking for and why."[411] For a search to be truly incident to arrest, law enforcement must have a subjective belief that the search is for a legitimate purpose related to the arrest. Further, that subjective belief must be objectively reasonable.[412]

236. The common law power to search incident to arrest is deeply rooted in Canadian law and exists because of the need to arm the police with adequate and reasonable powers for the investigation of crime.[413] Whether a search incident to arrest is reasonable depends on the context of the search. A search incident to arrest can be for the purpose of "preserving evidence that may be lost or destroyed, or merely gathering evidence" [414] and the police must be able to explain that the search was related to one or more of the objectives of protecting the police, protecting or preserving the evidence, or discovering evidence.[415]

237. The power of police to search incident to arrest not only permits searches without a warrant, but does so in circumstances in which the grounds to obtain a warrant do not exist.[416] The Supreme Court is clear that in respect of search incident to arrest, "this is not a standard of reasonable and probable grounds, but simply a requirement that there be some reasonable basis for doing what the police did."[417] However, the power must be exercised in the pursuit of a valid purpose related to the proper administration of justice.[418] Finally, the search must meet the procedural and substantive requirements of the law and must not exceed any subject-matter or location limits imposed by the law.[419] In this case, the request from the Requesting State provides the reasonable basis and the valid purpose for the RCMP's actions.

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[410] *Fearon* at para 27.
[411] *Fearon* at para. 21 and *Caslake* at para. 17.
[412] *Caslake* at para. 19.
[413] *Fearon* at paras. 16, 17 and 22.
[414] *Caslake* at paras. 19-24.
[415] *Caslake* at para. 5.
[416] *Fearon* at para. 16.
[417] *Fearon* at para. 22.
[418] *Fearon* at para. 16.
[419] *Caslake* at para 12.

238. The authority for a search incident to arrest arises out of the need for law enforcement authorities to gain control of things or information, which outweighs the individual's interest in privacy.[420] In other words, the search must be truly incidental to the arrest. In considering if the search is incidental to the arrest, the Court must consider the police motives and determine that the police are "attempting to achieve some valid purpose connected to the arrest. Whether such an objective exists will depend on what the police were looking for and why."[421]

239. The Supreme Court has recognized that due to the unique privacy interest in the *informational contents* of electronic devices, police may only search the contents of such devices incident to arrest in limited circumstances. The search of the informational content of electronic devices is distinguished from a physical examination of the physical properties of the devices, such as occurred in this case.[422]

240. In this case, the RCMP seized the Electronic Devices because the Requesting State had requested that Canadian law enforcement seize any electronic devices that were in the possession of the Applicant at the time of her arrest.[423] As expressed in the PA Request, the Requesting State was concerned about collecting and preserving evidence, especially to ensure that the electronic devices were protected in Faraday bags to protect them from being remotely wiped. It is clear from the PA Request that the evidence was being sought in connection with an investigation in the Requesting State. The RCMP members accepted this request as reasonable and understood that any electronic devices they seized were to be placed in Faraday bags to preserve evidence for the investigation.[424] The RCMP subjectively believed that they were seizing the Electronic Devices incident to arrest.[425] Further, the RCMP did not consider the collection and recording of the make, model and ESN Information to be a search.[426]

241. The U.S. request for the Electronic Devices provides important context for considering the reasonableness of the RCMP's conduct. First, the RCMP had to attempt to protect and preserve the data on the electronic devices by having the electronic devices placed in Faraday bags as soon

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[420] *Caslake* at para. 17.
[421] *Caslake* at para. 19.
[422] See *R. v. Fearon* at para. 155 (dissenting reasons).
[423] Exhibit 1, AGC Yep Binder, Tab 2, p. 1.
[424] Yep, Oct 26, p. 21, ll. 12-42.
[425] Dhaliwal, Nov 23, p. 24, ll. 40-42.
[426] Dhaliwal, Nov 24, p. 43.

as possible to reduce the risk that the devices would be remotely wiped. Second, the RCMP had to seize the electronic devices themselves to preserve the evidence. Third, the RCMP had to properly manage the Electronic Devices which necessarily included identifying what was seized (by their identifying numbers) both for RCMP's requirements to validly account for what they had seized for their own purposes and pursuant to their duties under s. 489.1(1)(b) of the *Criminal Code* to record seized evidence. Fourth, the RCMP needed to particularize what evidence was seized so that the Requesting State had an opportunity to obtain the seized items through the MLAT process. That the Requesting State made the request for the RCMP to seize the Electronic Devices in support of the American investigation was proper and supported by treaty and law.

242. As already noted, the *Treaty* recognizes that the United States may request of Canada to seize items in the possession of a person sought for extradition. Article 15 of the *Treaty*, produced above, is provided here again for convenience*:*

> 1) The extent permitted under the law of the requested State and subject to rights of third parties, which shall be duly respected, all articles acquired as a result of the offense or which may be required as evidence shall, if found, be surrendered to the requesting State if extradition is granted.
>
> 2) Subject to the qualifications of paragraph (1) of this Article, the above-mentioned articles shall be returned to the requesting State even if the extradition, having been agreed to, cannot be carried out owing to the death or escape of the person sought.

243. Section 39 of the *Extradition Act*, also produced above, contemplates seizing and sending items seized from a person sought to the country requesting that person's extradition through a judicially authorized process. Section 39 provides:

> 39(1) Subject to a relevant extradition agreement, a judge who makes an order of committal may order that <u>any thing that was seized when the person was arrested and that may be used in the prosecution of the person for the offence for which the extradition was requested be transferred to the extradition partner at the time the person is surrendered</u>. [emphasis added]
>
> (2) The judge may include in the order any conditions that the judge considers desirable, including conditions
>
> (a) respecting the preservation and return to Canada of a thing; and
>
> (b) respecting the protection of the interests of third parties.

244. In *Berke*, Ehrcke J. observed that the purpose of s. 39 of the *Extradition Act* is analogous to a "sending order" under s. 20 of the *Mutual Legal Assistance in Criminal Matters Act*.[427] Justice Ehrcke held that it is not a condition precedent of ordering the sending of goods seized upon the arrest of a person under an extradition arrest that those items *will* be admitted at the trial in the requesting state.[428] The existence of s. 39 of the *Extradition Act* provides important context to the doctrinal principles of search incident to arrest because it recognizes that, in extradition, the arrest is not related to a Canadian investigation. Canadian law enforcement is collecting and preserving potential evidence for a foreign investigation. Accordingly, the steps taken by Canadian police, must be viewed within this context and include the steps they take to make the evidence potentially available to a requesting state. In this case, one of the valid objectives of collecting the ESN Information was to preserve evidence in order to enable U.S. law enforcement to have an opportunity to make a request for what was seized.

E. The RCMP's Collection of the Make, Model and ESN Information Was Part of the Search Incident to Arrest and Did Not Require Judicial Authorization

245. The Applicant argues that the RCMP required judicial authorization to obtain and record the ESN Information from the Electronic Devices. The Court should reject this assertion on the basis that the purpose of the collection of the ESN Information was a connected and necessary step incident to the Applicant's arrest, and in pursuit of a lawful purpose. A purposive analysis of the evidence of why the RCMP collected the ESN Information demonstrates it was collected as a necessary part of the management of the seized Electronic Devices, which includes assisting the FBI in potentially making an MLAT request to obtain those devices. The RCMP were not required to seek judicial authorization to physically examine the Electronic Devices to collect the ESN Information. There was no s. 8 *Charter* breach.

246. The RCMP needed to collect the ESN Information to accurately record and identify the things seized for two reasons. First, the RCMP needed to record the ESN information to ensure that the RCMP had an accurate description of the items seized from the Applicant to log into the RCMP exhibit database "Property Tracker".[429] Second, the information was recorded so that the Requesting State could particularize an MLAT request for the Electronic Devices so as to know

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[427] *Berke* at para. 11.
[428] *Berke* at para. 12.
[429] Dhaliwal, Nov. 23, p. 40, ll. 10-25; Exhibit 12, AGC Dhaliwal Binder, Tab 6, p. 44.

what items to request. In the words of Cst. Dhaliwal, "it appeared that there was some sort of request coming in eventually for this information."[430] The request to which Cst. Dhaliwal is referencing is presumably an MLAT request from the Requesting State.[431]

247. The requirement that the police have a subjective belief that the search is for a legitimate purpose related to the arrest and that belief is objectively reasonable is satisfied in this case.[432] The RCMP's subjective belief of why they obtained the ESN Information was for legitimate purposes related to the Applicant's arrest: (1) to properly preserve evidence and assist law enforcement in making an MLAT request, and 2) record the details of the items the RCMP seized from the Applicant.

248. The RCMP's belief in the purpose of recording the ESN Information is also objectively reasonable. The Requesting State initially requested that the Electronic Devices be protected and seized, presumably for its investigation. As a necessary subsequent step, the Requesting State indicated on December 4, 2018, that in furtherance of the initial request for the seizure of the electronic devices, it required specific information including the make, model and ESN to make an MLAT request for those items. The requests guiding the RCMP's actions to collect the information is objectively reasonable as, without the step of collecting the ESN Information, the very purpose of the seizure of the electronic devices would be frustrated. In other words, if the U.S. did not know what the RCMP seized, how could they make a particularized request sufficient to satisfy the requirements for an MLAT or an order under s. 39 of the *Extradition Act* to obtain any seized items?

249. It is also sensible, from an evidence continuity perspective, that police record identifying numbers printed on seized objects, including the IMEI of a seized phone, to accurately identify those items. If an item has a serial number physically imprinted on it, as is the situation in this case, it is logical to record that information when identifying the object.[433] Some guidance regarding whether it is lawful to record an IMEI's in advance of obtaining judicial authorization

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[430] Dhaliwal, Nov. 23, p. 34, ll. 42-46.
[431] Dhaliwal, Nov. 23, p. 33, ll. 2-45; p. 39, ll. 4-39.
[432] *Caslake* at para. 19.
[433] Exhibit 12, AGC Dhaliwal Binder, Tab 5, pp. 1005, 1007, 1017, 1018, 1019, 1020 (photos of the ESNs of the Electronic Devices).

for further forensic testing of a phone is found, by inference, in *R. v. Zere*.[434] In *Zere*, the police recorded the IMEI of a seized phone in advance of seeking judicial authorization to allow the Digital Mobile Field Triage ("DMFT") unit of the RCMP to conduct a forensic electronic extraction of data from the phone. The process is described by the Court as:

> On November 7, 2016, pursuant to a judicial authorization, Constable Vieira provided a Digital Mobile Field Triage (DMFT) request form (Exhibit 18) to Constable Panzer, an RCMP DMFT technician, requesting that Constable Panzer download the information contained on the phone using the standard software, hardware, and policies and procedures followed by the RCMP for doing such downloads. The unique device identification number (the IMEI number) identified by Constable Vieira in his request to Constable Panzer matched the IMEI number of the cell phone on which Constable Panzer performed the download. Constable Panzer put the downloaded information into an Excel spreadsheet which he forwarded to Constable Vieira. Constable Vieira reviewed the information and on October 4, 2017 created a PDF of that spreadsheet for the purposes of disclosure, which Mr. Zere's counsel concedes he received.[435] [emphasis added]

The inference from these facts, given that the IMEI was included in the judicially authorized request for forensic analysis of the phone provided to the DFTM, is that Cst. Vieira did not obtain judicial authorization to physically obtain the IMEI of the seized phone. This is identical to the case at bar, in which Cst. Dhaliwal and Cpl. Wrigglesworth recorded the details of the Electronic Devices which included numbers that were physically printed on those objects for the same purpose as Cst. Vieira, namely, to correctly identify the seized phone to ensure proper continuity of evidence.

F. The RCMP Conducted the Search Incident to Arrest Reasonably

250. If satisfied that the collection of the ESN information was authorized by the common law authority of search incident to arrest, the Court must then determine whether the RCMP conducted the search reasonably. Factors that may impact the reasonableness of the search include (1) the nature of the ESN Information including the Applicant's privacy interest in that information; and, (2) the evidence of good faith conduct and transparency of the RCMP in obtaining and recording the ESN Information.

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[434] *R. v. Zere*, 2018 ONSC 5035.
[435] *Zere* at para. 30.

251. The nature of the ESN Information in the context of this case did not require separate judicial authorization. The fundamental question to be asked in respect of the collection of the ESN Information is "what are the police really after?"[436] The RCMP collected the ESN Information in order to properly identify the things seized. The ESN Information are numbers assigned by the hardware manufacturers and assigned to the devices. The ESN Information, on its own, does not reveal any personal or biographical core information about the Applicant. At most, it is information that, in combination with other information, may be used to satisfy a judge to issue a warrant to obtain private information from the devices.[437]

252. The RCMP conducted the collection of the ESN Information in a tailored manner. The RCMP did not search the contents of the Electronic Devices. No informational content or personal information was the subject matter of the search. The ESN Information does not provide insight into the Applicant's private life and it could not, in and of itself, affect the Applicant's dignity, integrity and autonomy.[438] The RCMP conducted a physical inspection of the seized electronic devices to properly manage those devices and assist the Requesting State to make an MLAT request. The ESN Information, in and of itself reveals, no personal information about the Applicant.[439]

253. In other contexts, where police have used surreptitious electronic techniques to extract IMEI and IMSI information from phones, Courts have found that there can be a minimal intrusion on a person's privacy interest.[440] However, the circumstances of those cases are very different from the case at bar based on the method through which the IMEI was obtained and purpose for which the RCMP were collecting the IMEI. In *R. v. Jennings*[441] and *X(Re)*,[442] the issue was whether the police needed judicial authorization to use Mobile Device Identifies ("MDI") technology, colloquially known as Stingrays, to surreptitiously capture IMEI and IMSI information emitted from cell phones. In those cases, the Courts held that what triggered a privacy interest in the subject matter of the search was that, by the "repeated deployment of MDI" the

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[436] *R. v. Byokets*, 2020 ABQB 70 at para. 62; *R. v. Marakah*, 2017 SCC 59 at para. 15.
[437] AGC Book of Additional Documents, Tab 24 (Agreed Statement of Facts Re: ESN Information).
[438] *R v. Tessling*, 2004 SCC 67; cited in *R. v Jennings*, 2018 ABQC 296 at para. 13.
[439] AGC Book of Additional Documents, Tab 24 (Agreed Statement of Facts Re: ESN Information).
[440] *Jennings* at paras. 51, 52; *X(Re)*, 2017 FC 1047 at paras. 7-9.
[441] *R v. Jennings*, 2018 ABQB 296.
[442] *X(Re)*, 2017 FC 1047.

police begin to develop a pattern of behaviour of the owner of the cell phone that reveals personal information. In that context, the purpose to collect the IMSI/IMEI information, through electronic means, was to identify individuals and patterns of behaviour, i.e, a much more intrusive purpose than in this case. The Court in *R. v. Byokets*, a case which considers whether an individual had a reasonable expectation of privacy in IP addresses, provides a helpful description of how IMEI/IMSI information was obtained, the purposes for which it was obtained, and why it engaged a privacy interest in *Jennings* and *X(Re)*:

> The MDI and CSS technology described in the *Jennings* and *X (Re)* decisions leads me to conclude that those cases are distinguishable from the case at bar because the subject or identity of the target is often already known when the MDI or CSS technology is used, and more importantly, because of the nature of the information that may be obtained or inferred by the authorities. In *X (Re)*, the Court described that the technology is used for two purposes, being (i) to attribute a cellular device to a known subject of investigation and, (ii) once attributed, to geo-locate a subject of investigation's cellular device at some later date, when the subject's precise whereabouts are no longer known: at para 54. The Court considered that over time, the IMSI and IMEI numbers of a specific subject of investigation may allow the authorities to determine contacts and communication patterns, and could be used identify digital activities such as web browsing: at paras 149 & 162. This was echoed in *Jennings* where Shelley J stated, "[t]he evidence established that, over time, the police can draw inferences about a target's cell phone usage from this information, and can use IMEI and IMSI to ascertain a target's phone number": at para 39. Thus, significant personal information could be gleaned about a particular individual from the IMSI and IMEI numbers.[443] [emphasis added]

254. The Applicant concedes that the ESN Information could only provide private information about her if U.S. law enforcement, had it obtained the information, took a subsequent step of obtaining judicial authorization to seek information from third party record holders.[444] That law enforcement could potentially use the ESN Information to, at a later time, apply for judicial authorization to obtain information about the Applicant, ignores the actual purpose for which the RCMP collected the ESN Information in this case. The information was not collected in a manner or for a purpose similar to that in *Jennings* or *X(Re)*: by technological means to establish patterns of behaviour or geo-locate the Applicant. Indeed, the Applicant's reliance on *Jennings* and *X(Re)* ignores the obvious distinction that the ESN Information could not be used (in combination with

[443] *Bykovets* at para. 40.
[444] AGC Book of Additional Documents, Tab 24 (Agreed Statement of Facts Re: ESN Information).

other information) to surreptitiously and actively monitor her activities, because the Electronic Devices were in the custody of the RCMP, not the Applicant.

255. Courts are to adopt a purposive and contextual approach to determining the reasonableness of a search. That context demands a recognition that the evidence supports a finding that the RCMP obtained the ESN information to, on the one hand, record on the "Property Tracker" the details of the items the RCMP seized from the Applicant for domestic accounting purposes and, on the other hand, to properly preserve and identify that evidence in the event the U.S. made an MLAT request for the Electronic Devices.

256. The Applicant asks this Court to accept a hypothetical and speculative alternative purpose for RCMP collection of the ESN Information based on what might potentially be done with the information at a later stage – if future judicial authorization is granted. In so doing, the Applicant attempts to re-characterize the purpose for which the RCMP collected the ESN Information and the nature of that information from information used to accurately identify seized items to a "gateway" to the Applicant's private information. There is no evidence to support this assertion. Any section 8 analysis in this case must be focused on what actually occurred and not engage in speculation and unreasonable hypotheticals. A "search" under section 8 only occurs where the totality of the circumstances test leads to the conclusion that a reasonable expectation of privacy exists.[445] In the totality of circumstances, the Applicant had no ongoing expectation of privacy in the ESN Information on the seized devices that required separate judicial authorization to collect it.

257. In *R v. Spencer*, the Supreme Court held that whether an individual had a reasonable expectation of privacy should be assessed by using a purposive approach considering the totality of circumstances.[446] The Supreme Court grouped the relevant considerations under four headings: (a) subject matter of the alleged search; (2) the claimant's interest in the subject matter; (3) the claimant's subjective expectation of privacy in the subject matter; and, (4) whether this subjective expectation of privacy was objectively reasonable.[447] Application of these factors to the collection

[445] *R. v. Edwards,* [1996] 1 SCR 128 at para. 45.
[446] *R. v. Spencer*, 2014 SCC 43 at para. 17.
[447] *Spencer* at para. 18.

of the ESN Information does not support a finding that the Applicant had an ongoing reasonable expectation of privacy in the ESN Information, such that a warrant was required.

258. The Applicant's subjective expectation of privacy in the ESN Information is not objectively reasonable. As described above, the ESN Information, in itself, reveals only the type of device, the country in which the phone is manufactured and the name of the service provider. No core biographical information is contained in this information. The Applicant's argument that the ESN information can be used as a "key" to unlock other personal information does not establish an expectation of privacy. Any information that can be used in combination with other information to obtain a warrant could be described as a "key"; that does not mean that a reasonable expectation of privacy attaches to the information. What the RCMP collected was bare identification information from the phone in order to properly manage the seized evidence for their own internal purpose and for the purpose of allowing the United States to particularize its request for the seized devices in an MLAT.

259. The manner in which the RCMP conducted the search was reasonable, the Applicant makes no assertion to the contrary. The reasonableness of the manner of a search is informed by the lack of privacy interest the Applicant had in the ESN in these circumstances. As set out above, the ESN Information was gathered to properly record and identify the items seized and was done in a transparent manner, including filing on a Form 5.2 filed with the Provincial Court.[448] Neither the CBSA nor the RCMP searched the contents of the Electronic Devices. There was no technologically invasive process used by the RCMP to obtain the ESN Information. The police physically inspected the phone to obtain the ESN Information.

260. As established by the Supreme Court in *R v. Vu*, the police require judicial authorization to search for the *contents* of electronic devices. In *Vu*, the police obtained a warrant to search the accused's residence. In the course of their search the police discovered two computers and a cellphone, all of which they searched. The warrant did not specify the search was to include the computers in the home as the traditional legal framework for a search warrant of a place had permitted the search of traditional receptacles, such as a cupboard or a cabinet, without having to specify them in the warrant. The Court in *Vu* held that the warrantless search of the accused's

[448] Exhibit 12, AGC Dhaliwal Binder, Tab 8, Form 5.2; Dhaliwal, Nov. 23, pp. 41, ll. 10-29.

personal computers violated his s. 8 *Charter* right, explaining that the traditional legal framework was no longer appropriate for computers as they differed from traditional "receptacles" in the following ways: (i) the amount of personal information stored in them touches on a user's biographical core and the intimate details and personal choices of his or her lifestyle; (ii) the information they automatically generate is unbeknownst to the user; (iii) the information is retained in them even after a user believes it has been destroyed; and (iv) the information accessed through a computer is connected to a network through the Internet and therefore is not contained in the same way as a conventional receptacle.[449]

261. However, it is also well-established that police do not need a separate or specific judicial authorization to forensically test a non-electronic item that has been lawfully seized.[450] The reason for the different expectations in privacy between physical and electronic items occurs when police wish to examine an electronic device because it is the *informational contents* of the computer (or smartphone) that are the target of the search.[451] The individual's expectation of privacy over the informational contents of electronic devices is what engages s. 8 of the *Charter*. The RCMP were not obtaining the informational contents of the Electronic Devices on December 4, 2018. Cst. Dhaliwal and Cpl. Wrigglesworth inspected the electronic devices to record numbers physically printed on the seized devices.

262. The Court of Appeal in *Fedan*, addressed the issue of whether an individual retains an expectation of privacy in the data contained on a Sensing and Diagnostic Module ("SDM") that recorded the last moments of a fatal car crash. SDMs are a type of "black box" installed by the manufacturers in automobiles to record basic data about the vehicle's speed and braking activities. The Court held that once the police had lawfully seized the vehicle driven by Mr. Fedan, he no longer had any lawful right to possess, access, use or dispose of his vehicle.[452] Further, the data contained on the SDM provided no personal information about Mr. Fedan. As held by Madam Justice Smith:

> [The SDM information] did not capture any information that revealed intimate details of Mr. Fedan's biographical core, and in particular about who was driving

[449] *R v. Fedan*, 2016 BCCA 26 at para. 56.
[450] *R. v. Strong*, 2020 ONSC 7528 at para. 91(b) and (c).
[451] *Strong* at paras. 91(d) and 9(e).
[452] *Fedan* at para. 79.

> the car. Further evidence had to be obtained to connect the driving of his vehicle to Mr. Fedan himself.[453]

263. Like in the case at bar, the Applicant concedes that further evidence from third party record holders, such as telecommunication service providers – that requires judicial authorization before being obtained – is needed to obtain any personal or intimate details about the Applicant using the ESN Information.[454] Accordingly, in the context of this case, the police did not need to obtain judicial authorization to collect the ESN Information.

264. There is no impact on the lawfulness of the search incident to arrest resulting from the passage of time between the Applicant's arrest at YVR on December 1, 2018, and the date that the ESN Information was recorded on December 4, 2018. The time between an arrest and a search is not a determinative factor as to whether a search is incident to arrest. Even a substantial delay between the arrest and the search should not lead the court to draw an inference that the arrest and search are not sufficiently connected if there is a reasonable explanation.[455] The collection of the ESN Information was part of the search incident to arrest that commenced at YVR on December 1, 2018, and was continued on December 4, 2018 at RCMP's E-Div Headquarters in Surrey, British Columbia. To provide accurate context to the passage of time between the arrest and the collection of the ESN Information is the fact that the file was transferred between RCMP departments on December 4, 2018.

265. On December 4, 2018, the RCMP Meng file was transferred from RCMP Intake FDLU to RCMP FSOC. The file was transferred because it became apparent that the file required too many resources for the FDLU.[456] The impact of transferring coordination of this file was that S/Sgt. Ben Chang became the officer in charge and Cpl. Jennifer Hunter became the File Coordinator. December 4, 2018, was the first day of the file in FSOC. The RCMP determined that Cst. Dhaliwal, despite being in FDLU, would remain the Exhibits Officer. As the Exhibits Officer, he was tasked with recording the details of the items seized from the Applicant and recording them

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[453] *Fedan* at para. 81.
[454] AGC Book of Additional Documents, Tab 24 (Agreed Statement of Facts Re: ESN Information).
[455] *Caslake* at para. 24.
[456] Vander Graaf, Nov. 25, p. 16, ll. 7-18; Exhibit 12, AGC Dhaliwal Binder, Tab 6, p. 37.

on Property Tracker and on a Form 5.2.[457] He did so with the guidance of Cpl. Hunter, as he did not have previous experience with managing electronic exhibits.

266. Cst. Dhaliwal also did not have experience with recording information regarding seized electronic devices and so requested the assistance of Cpl. Paul Wrigglesworth, formally in an RCMP Form 4074.[458] Cst. Dhaliwal and Cpl. Wrigglesworth obtained the ESN information from the electronic devices. It is also significant that Cst. Dhaliwal recorded the physical details of all of the items seized from the Applicant, including her Passports, not just the ESN Information indicating that on December 4, 2018, the proper identification of the devices was undertaken which was a necessary part of the search incident to arrest at the Airport on December 1, 2018.

267. The RCMP members acted in good faith in collecting the ESN information. No case law suggested that the RCMP members needed to seek judicial authorization to obtain the make, model and ESN Information from the Electronic Devices to properly identify the those devices for their own purposes and for the purpose of a potential MLAT request from a requesting state in an extradition matter.

268. The RCMP acted in a transparent and professional manner. The process of obtaining and recording the ESN Information was described in various RCMP documents including Cst. Dhaliwal notes,[459] emails and the Form 4074 – Assistance Request – Technological Crime, which set out in detail the request for obtaining the ESN information.[460] The RCMP also recorded photographs of the results of the search and recorded the results on a Form 5.2 that was filed with the Surrey Registry of the British Columbia Provincial Court on December 6, 2018.[461]

269. The RCMP acted under the common law power to search incident to arrest. The seizure of the Electronic Devices at YVR was conducted reasonably as was the continuation of that process by properly recording the details of what was seized. The AGC has satisfied its burden that, on balance, the RCMP did not breach the Applicant's s. 8 *Charter* rights.

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[457] Exhibit 12, AGC Dhaliwal Binder, Tab 8 (Form 5.2); Exhibit 12, AGC Dhaliwal Binder, Tab 6, pp. 35-44.
[458] Exhibit 12, AGC Dhaliwal Binder, Tab 7.
[459] Exhibit 13, Defence Dhaliwal Binder, Tab 1, Dec. 4, 2018 Notes of Cst. Dhaliwal at pp. CAN-1-000222_0010 to CAN-1-000222_0015.
[460] Exhibit 12, AGC Dhaliwal Binder, Tab 7, RCMP Form 4074 – Assistance Request, Technological Crime; Dhaliwal, Nov. 23, pp. 34-35.
[461] Exhibit 12, AGC Dhaliwal Binder, Tab 8, Form 5.2; Dhaliwal, Nov. 23, pp. 41, ll. 10-29.

G. Judicial Authorization to Collect the ESN Information Was Not Available to the RCMP

270. The unique context of this situation is illuminated by the fact that, as there was no Canadian investigation regarding the Applicant and no indictable offence in Canada, the RCMP would be unable to seek a *Criminal Code* warrant to obtain the ESN Information. The *Criminal Code* provides that a search warrant can be obtained if there is an indictable offence in Canada.[462]

H. Conclusion

271. The purpose of the collection of the ESN Information was inextricably connected to the Applicant's arrest and the seizure of the electronic devices. The RCMP collected the ESN Information for a valid law enforcement objective. The RCMP conducted the search and seizure in relation to the Electronic Devices reasonably. The Applicant's s. 8 *Charter* rights were not breached and the RCMP's conduct concerning the Electronic Devices was not abusive.

[462] Section 487.1 *Criminal Code*.

VIII. S/SGT. CHANG DID NOT SHARE THE ESN INFORMATION WITH THE FBI

A. Key Points

(i) There is no evidence that S/Sgt. Chang shared any information with the FBI.

(ii) The evidence supports a strong inference that S/Sgt. Chang did not share any information with the FBI. That evidence includes:

- No emails were sent from S/Sgt. Chang's RCMP email to an FBI email account after the ESN Information was collected. However, the ESN Information was provided to S/Sgt. Chang by Cst. Dhaliwal via RCMP email accounts.

- FBI Agent John Sgroi, the same individual who requested the information from S/Sgt. Chang on December 4, 2018, made the same request on to another RCMP member on December 20, 2018.

- On December 27, 2018, 23 days after the Applicant says S/Sgt. Chang shared information about the Electronic Devices with the FBI, the Requesting State made an MLAT request (listing FBI Agent Onks as the contact) for the Electronic Devices that included a request for a list of what devices were seized including their make, model and serial numbers.

- All RCMP members who testified denied sharing the ESN Information with the FBI.

(iii) There is no evidence that the RCMP's document preservation policies are inadequate or create systemic problems that offend the administration of justice. Regular procedures were followed following S/Sgt. Chang's retirement to deactivate his accounts and transfer, store, or dispose of the devices as necessary. There is no evidence that either S/Sgt. Chang or the RCMP did not properly preserve any materials.

(iv) Whether all of S/Sgt. Chang's emails and texts were retained is irrelevant there is an irresistible inference based on the evidence that he did not share the ESN Information with the FBI.

(v) The Applicant's assertion that the FBI wanted the ESN Information for a purpose other than to make an MLAT request calls into question the character of Canada's treaty partner. Courts are clear that without evidence, such allegations should be given no credence.

B. Overview

272. A central allegation of abuse raised by the Applicant is that the ESN Information was shared by S/Sgt. Chang with the FBI after December 4, 2018, when he was contacted by FBI Legal Attache, John Sgroi. However, that assertion is inconsistent with the evidence. As will be described below: (1) S/Sgt. Chang sent no emails from his RCMP account to anyone at the FBI after December 2, 2018; (2) John Sgroi made a follow up requested for the descriptions of the seized electronic devices on December 20, 2018; and, (3) on December 27, 2018, the Requesting State made an MLAT Request for the seized electronic devices – that included requesting a list of any and all electronic devices seized at the time of the Applicant's arrest, including a description of the item, make and model of the device, and any visible serial numbers.[463] There is simply no credible support for the Applicant's allegations that the ESN Information was shared with the FBI.

C. No Emails Were Sent From S/Sgt. Chang's RCMP Email Account to the FBI

273. Cst. Dhaliwal collected the ESN Information on December 4, 2018, and emailed it to Cpl. Hunter and S/Sgt. Chang using their RCMP email accounts.[464] Cst. Dhaliwal testified he did not share any information with the FBI.[465]

274. Jayson Allen, a Network Security Analyst employed by Shared Services Canada (SSC), testified that the only email sent from S/Sgt. Ben Chang's RCMP email account to an FBI email account was on December 2, 2018, which predates the RCMP's collection of the ESN Information by two days.[466] Mr. Allen's search captured RCMP emails sent from S/Sgt. Chang's computer and smart phone.[467] As S/Sgt. Chang did not send any emails using his RCMP email account to any FBI email accounts after December 2, 2018, the only reasonable conclusion is that he did not send the ESN Information to the FBI using his RCMP email account. The Applicant's assertion that S/Sgt. Chang could have covertly sent an email to the FBI sharing the ESN Information using a blind copy addressee or with his personal email account or by text message strains credulity, given that all actions taken in respect of the ESN Information were transparently recorded by the

[463] AGC Book of Additional Documents, Tab 20, p. 5.
[464] Exhibit 12, AGC Dhaliwal Binder, Tab 6, p. 44.
[465] Dhaliwal, Nov. 23, p. 40, ll. 26 – 40; p. 43, ll, 16-30.
[466] Allen, Dec. 14, at p. 16, ll, 27-47 and p. 17, ll. 1-7; Exhibit 21, AGC Allen Binder, Tab 1, at Ex. A pp. 3-4; Tab 2.
[467] Allen, Dec. 14, at p. 14, ll, 1-11.

RCMP including the filing of the Form 5.2 with the Surrey Provincial Court. No evidence supports the Applicant's speculative assertion that S/Sgt. Chang emailed the ESN Information to the FBI.

D. S/Sgt. Chang's Emails and Text Messages Were Deleted in the Normal Course After His Retirement from the RCMP

275. No abuse of process can be attributed to the deletion of S/Sgt. Chang's texts and emails. The RCMP's policies around preservation and management of materials do not offend either the perceived or actual administration of justice. Unlike domestic investigations, where *Stinchcombe* considerations apply to police-generated documents, the emails and text messages presumably created by S/Sgt. Chang here related to a foreign investigation and if existent, were administrative in nature and substance. S/Sgt. Chang had no obligation to take extra steps to store information, other than the steps he took upon his retirement in accordance with RCMP policies (ie. uploading relevant documents to PRIME and/or related RCMP databases if applicable.)

276. Upon S/Sgt. Chang's retirement from the RCMP on June 13, 2019, all of his RCMP accounts and services, including email and phone, underwent the RCMP's normal procedures for a departing member. This included the following steps:

- S/Sgt. Chang uploaded emails related to this matter to the PRIME file.[468]
- On July 5, 2019, the "E" Division FSOC section completed its departure process, which included making a request for S/Sgt. Chang's email to be deleted.[469]
- Also on July 5, 2019 S/Sgt. Chang's phone was transferred to another member. The device was wiped and reconfigured when it was activated by the new user.[470] Prior to this, the phone had been in storage (presumably between S/Sgt. Chang's retirement and transfer) and the new user was provided the phone because their existing phone had battery issues. Upon the new user inserting a new SIM card, the phone would complete a memory wipe and reboot, as per the Samsung Android activation process.[471]
- On July 10, 2019, S/Sgt. Chang's ROSS and H Drive were deleted.[472]

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[468] AGC Book of Additional Documents, Tab 22, Letter to defence from DOJ, dated January 21, 2021.
[469] Affidavit of Ma, October 9, 2019, at para. 10.
[470] Defence Book of Additional Documents, Tab 27; Letter to defence from DOJ, dated November 11, 2020; AGC Book of Additional Documents, Tab 22, Letter to defence from DOJ, dated January 21, 2021.
[471] AGC Book of Additional Documents, at Tab 22, Letter to defence from DOJ, dated January 21, 2021.
[472] *Ibid.*

277. There is no evidence that S/Sgt. Chang did not properly upload, archive, or save what he believed to be relevant file materials to PRIME or a related RCMP database, as required. It is the RCMP "E" Division's standard practice to override data after 90 days, after which the overridden data is not retrievable.[473] There is also no reason to believe that S/Sgt. Chang did not upload all relevant file information (if any) from his phone to PRIME before he retired and the phone was transferred to a new user.

278. A further search for S/Sgt. Chang's computer was undertaken in November 2020, in response to the Applicant's inquiries by a series of letters, beginning on September 23, 2020. That search resulted in the information reproduced at paragraph 411 of the Applicant's submissions, namely that a hard drive believed to be from S/Sgt. Chang's computer was located along with other hard drives in storage, and attempts to read/access the hard drive failed because the drive was broken.[474] The hard drive and the drives found near it were all placed in quarantine for the possibility of further analysis.[475]

279. The *Leung* decision referenced by the Applicant concerns disclosure of a cellblock videotape of the accused in an impaired driving proceeding. The specific videotape was requested by defence and the Crown failed to notify the police of the request for 24 days, at which point the video had been taped-over.[476] It cannot be said that the Applicant's correspondence to the AGC on January 2, 2019, regarding alleged state misconduct as part of the extradition proceedings, was a particularized request which was ignored by the AGC in the same manner as in *Leung*.

280. In *Nowack*, the court considered the deletion of police emails through an automated archive system, where emails going back beyond a certain date, were deleted and could not be recovered.[477] The accused argued "that the police knew or should have known that the failure to preserve emails was a violation of *Stinchcombe*" and "were either guilty of gross negligence or a conspiracy to harm Mr. Nowack's constitutional rights."[478]

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[473] *Ibid.*
[474] Defence Book of Additional Documents, Tab 28, Letter from AGC to defence, dated November 30, 2020.
[475] *Ibid*.
[476] *R. v. Leung*, 2008 ONCJ 110 at para. 17.
[477] *R. v. Nowack*, 2019 ONSC 5345 at para. 87.
[478] *Ibid*. at para. 88.

281. While the Court acknowledged that the Crown has a duty to preserve materials that are subject to *Stinchcombe* obligations, it held that even in the domestic context:

> [91] Police emails, however, are not *Stinchcombe* disclosure. The police and the Crown are two different entities. The police are required to supply the fruits of the investigation to the Crown. The fruits of the investigation include material gathered during the investigation. The police are a third party for other purposes: *Jackson* at paras. 79-82. Of course, the police were required to preserve emails that reflected on the credibility of the complainants. There were some, and the Crown disclosed them. The fact that the police disclosed emails relating to the credibility of some Crown witnesses shows that they were aware of their duty.
>
> [92] The defence was required to show a reasonable possibility that the deleted emails were relevant: *McQuaid* at paras. 32-34. The defence was unable to do so. There is no suggestion that the officers failed to keep proper notes. There was nothing in the notes of the officers that would suggest the existence of relevant emails. There is no evidence that the emails contained anything like therapeutic counselling records (*R. v. Carosella*, 1997 CanLII 402 (SCC), [1997] 1 S.C.R. 80); or a 12-year old witness statement that had been destroyed when the police did not lay charges (*B.(F.C.)*; or a car that had not been forensically examined (*Bero)*.[479]

282. Further, on the issue of disclosure, the court in *Nowack* held that in order to obtain a remedy, the accused must show actual prejudice.[480] Due diligence in requesting disclosure is also a factor, as "[t]he police can hardly be faulted for routinely deleting emails."[481] Failure in making a timely request may be considered by the court in determining if there has been prejudice to the accused's right to a fair trial:

> If defence counsel knew or ought to have known on the basis of other disclosures that the Crown through inadvertence had failed to disclose information yet remained passive as a result of a tactical decision or lack of due diligence it would be difficult to accept a submission that the failure to disclose affected the fairness of the trial…[482]

283. The Crown has an obligation to disclose all relevant and non-privileged evidence and exercise good faith in determining which information must be disclosed and in providing ongoing disclosure.[483] Where the existence of material is disputed, the Crown cannot be required to justify the non-disclosure of material the existence of which it is unaware or denies, once it alleges that it has

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[479] *Ibid*. at paras. 91-92.
[480] *Ibid.* at para. 50.
[481] *Ibid.* at para. 93.
[482] *Ibid*. at para. 51, citing *R. v. McQuaid*, 1998 CanLII 805 (SCC), [1998] 1 S.C.R. 244 at para. 38.
[483] *R. v. Chaplin*, 1995 CanLII 126 (SCC), [1995] 1 SCR 727 at para. 21.

fulfilled its obligation to produce all relevant materials.[484] In such a case, the defence must establish that there is in existence further material which is potentially relevant. [485] The Court in *Chaplin* held that:

> Apart from its practical necessity in advancing the debate to which I refer above, the requirement that the defence provide a basis for its demand for further production serves to preclude speculative, fanciful, disruptive, unmeritorious, obstructive and time-consuming disclosure requests.[486]

284. It is only once the defence establishes a basis as outlined above, that the Crown must justify a continuing refusal to disclose material that exists.[487] As there is no credible basis for the assertion that the ESN Information was shared or sent by S/Sgt. Chang, the RCMP's preservation policies is irrelevant.

E. Additional Requests from the United States For the ESN Information Post-Date December 4, 2018

285. Additional evidence that belies the Applicant's assertion that S/Sgt. Chang shared the ESN Information with the FBI is that John Sgroi, the same individual who made the December 4, 2018, request for descriptions of the seized electronic devices, made a request for the same information on December 20, 2018, to Supt. Flynn of the RCMP National HQ. In his email to Supt. Flynn, Agent Sgroi writes:

> I received a query from my HQ regarding the devices, media and any other electronics seized from Meng. Would it be possible to get a list of that which was seized? Could you also advise who has possession of these items? The purpose is to assist in properly drafting an MLAT request.[488]

The only reasonable inference flowing from Agent Sgroi's request to Supt. Flynn on December 20, 2018, is that Agent Sgroi never received any information from S/Sgt. Chang regarding the seized electronic devices as alleged by the Applicant.

286. Yet another piece of evidence that demonstrates the frailty of the Applicant's allegations of S/Sgt. Chang's sharing of the ESN Information is that on December 27, 2018, (23 days after the

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[484] *Ibid.* at para. 30.
[485] *Ibid.*
[486] *Ibid*. at para. 32.
[487] *Ibid.* at para. 33.
[488] AGC Book of Additional Documents, Tab 15.

Applicant says that S/Sgt. Chang shared the ESN information with the FBI) the Requesting State submitted a Supplemental MLAT to Canadian DOJ, requesting:

> A list of any and all electronic devices seized by Canadian authorities at the time of MENG's arrest, including, but not limited to, a description of the item, make and model of the device, and any visible serial numbers.[489]

287. The irresistible conclusion from the U.S. asking for this information at the end of December 2018, is that the Requesting State had not received any information about the Electronic Devices from S/Sgt. Chang. It is simply not plausible to believe that U.S. law enforcement would request information that they had already received. The Applicant's allegations that the ESN Information was shared are incompatible with any reasonable understanding of the evidence.

F. Unsupported Allegations that the Requesting State Sought the ESN Information for an Improper Purpose

288. Underlying the Applicant's allegations of abuse regarding the ESN Information is a speculative allegation that the FBI requested this information to use it to obtain personal information about the Applicant from other sources – contrary to the purpose for which John Sgroi had stated he wanted the information. There is no evidence to support the Applicant's allegations and they are refuted by the evidence regarding the purpose for which the ESN Information was collected. The Applicant's narrative that the ESN Information was requested to be used as a "gateway" to unlock other personal information of the Applicant is complete speculation and asks the Court to ignore the presumption of good faith applied to Canada's treaty partners in extradition matters.[490]

289. The evidence is that in his call with RCMP, Agent Sgroi requested the make, model and ESN information for the purpose of making an MLAT request. This is supported by the notes of S/Sgt. Peter Lea as well as in subsequent emails from S/Sgt. Chang to Cpl. Hunter and Cst. Dhaliwal. That the ESN Information was requested for the purpose of making an MLAT request is also supported by Agent Sgroi's email to Sgt. Flynn of the RCMP on December 20, 2018.

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[489] AGC Book of Additional Documents, Tabs 19 and 20.
[490] See *Freimuth* and discussions in section II. C. of these submissions.

290. Finally, the Applicant's allegations that the FBI sought the ESN Information to unlock the Applicant's personal information from her "cloud accounts" fails the test of common sense. First, information is only stored to the cloud if a user configure the device to store information in that manner. Second, the user also has the opportunity to delete information from cloud storage.[491] Practically, there would be no motive for U.S. law enforcement to seek information from the Electronic Devices stored on the "cloud" on December 4, 2018, days after the phones were seized when Agent Sgroi asked S/Sgt. Lea and S/Sgt. Chang for identifying information from the electronic devices, or 20 days later when Agent Sgroi requested the same identifying information from Supt. Mark Flynn. That the FBI requested the information for improper reasons is simply not a credible or reasonable inference to draw from the evidence in this case. This Court should reject the Applicant's narrative that the ESN Information was sought for any reason other than to properly identify the seized Electronic Devices for domestic evidence accounting purposes and to properly preserve evidence in the event that U.S. law enforcement made an MLAT request.

G. Conclusion

291. The evidence does not support the Applicant's speculative allegations that the RCMP shared any information in respect of the seized Electronic Devices with the Requesting State. Further, the Applicant's assertion that the deletion of S/Sgt. Chang's emails and texts amounts to an abuse is without merit. S/Sgt. Chang's emails would not have contained information regarding sharing of ESN Information, because it did not happen. His emails and texts processed reasonably and in accordance with a sensible and reasonable RCMP policy of data retention for retired members. There is no merit to the Applicant's allegations that the RCMP shared the ESN Information with the FBI, and thus, no abuse of process.

[491] AGC Book of Additional Documents, TAB 24 (Agreed Statement of Facts RE: ESN Information).

IX. NO ADVERSE INFERENCE IS AVAILABLE TO THE APPLICANT IN RESPECT OF S/SGT. CHANG'S REFUSAL TO VOLUNTARILY TESTIFY

A. Key Points

(i) No adverse inference is available to the Applicant as a result of S/Sgt. Chang's refusal to testify at the voir dire.

(ii) S/Sgt. Chang was the Applicant's witness because they requested that he testify at the *voir dire*.

(iii) When informed that S/Sgt. Chang would not voluntarily testify, the Applicant did not take any steps to take measure to attempt to compel S/Sgt. Chang to testify. The Applicant did not even raise the issue of the possibility of compulsion with the AGC or the Court – instead content to do nothing and seek an adverse inference.

(iv) In these proceedings, the Applicant has demonstrated a willingness to litigate in attempts to obtain evidence from other jurisdictions, including the United Kingdom and Hong Kong. However, in respect of this one crucial piece of evidence, the Applicant did not take any steps to attempt to compel S/Sgt. Chang to testify.

(v) Litigants who need evidence from witnesses abroad can request assistance from a foreign judicial system to compel witnesses to testify. A witness located in a foreign jurisdiction can only be legally compelled by, or through cooperation with, the legal authorities of that jurisdiction.

(vi) The Applicant was aware that S/Sgt. Chang's evidence would likely be damaging to her case based on an affidavit he previously swore in these proceedings that he did no share any information with the FBI.

(vii) The only reasonable inference to be drawn from the Applicant's failure to make any efforts to have S/Sgt. Chang testify is that his evidence would be detrimental to the Applicant's case.

(viii) The AGC respectfully requests this Court to find that the available inference from the Applicant's failure to pursue S/Sgt. Chang as a witness is that S/Sgt. Chang did not share the ESN Information with the FBI. That inference is consistent both with S/Sgt. Chang's previous affidavit evidence as well as the other evidence in this case.

B. Overview

292. The Applicant did not pursue S/Sgt. Chang as a witness at the *voir dire* when she realized he was unwilling to voluntarily testify. The reasonable explanation for the inaction is that it was a strategic choice: she knew that S/Sgt. Chang's evidence would be damaging to her case. The Applicant's request that the Court draw an adverse inference from S/Sgt. Chang's refusal to voluntarily participate in the *voir dire* is not warranted. The only evidence that exists is that S/Sgt. Chang did not share the ESN Information with the FBI. The Applicant's failure to take any steps to compel S/Sgt. Chang's attendance does not allow her to fill an evidentiary gap through a speculative inference that is inconsistent with the Applicant's knowledge of his likely evidence.

293. From his affidavit previously filed in the *Larosa* application, the Applicant knew that S/Sgt. Chang's evidence was that he did not share any information with the FBI.[492] However, once advised that S/Sgt. Chang refused to voluntarily testify at the *voir dire*, the Applicant took no steps to attempt to compel him to testify. It appears now that she was content to wait and request the Court to draw an adverse inference from his absence. The Applicant's attempt to ascribe an improper motive to S/Sgt. Chang's refusal to participate is speculative, and an unreasonable inference in light of all the available evidence.

C. Key Facts

294. There is no doubt that S/Sgt. Chang was the Applicant's witness in the *voir dire* on the "second branch" abuse of process application. The issue of witnesses was agreed to between the parties and was made clear by counsel for the AGC and counsel for the Applicant at the commencement of the *voir dire* in the following exchange:

> MR. GIBB-CARSLEY: And, My Lady, for the record, before we call Constable Yep, I would like to make it clear that in this matter, while I said that the Attorney General is presenting witnesses, these of course are witnesses that were requested by Ms. Meng, so given that we are in an abuse of process application, these are in fact the witnesses wanted by Ms. Meng and Ms. Meng's counsel, and the Attorney General has produced them. I say that only because I wouldn't want there to be the apprehension that these are witnesses called by the Crown, produced by the Crown to make our case, this is the abuse of process application. We have agreed to a process where Crown will do examination in chief, followed by cross, but I simply

[492] Defence Book of Additional Documents, Tab 21 Affidavit of S/Sgt. Ben Chang.

> wanted the record to reflect the nature of these witnesses. My Lady, the Attorney General of Canada is -- my friend Mr. Peck has a comment.
>
> MR. PECK: There's one matter I would ask a direction that you give, My Lady, that is an order excluding witness, and there is a secondary matter, and that is that at least one of the witnesses being proffered is actually my learned friend – my learned friend's decision. Thank you.[493]

295. The "one witness" to which the Applicant's counsel was referring was Supt. Bryce McRae, who was not on the list of witnesses the Applicant's counsel provided as the witnesses they wished to examine at the *voir dire*. Further, contrary to what is set out in the Applicant's submissions, the purpose for which the Applicant requested S/Sgt. Chang testify was not "so that he could be cross-examined on his affidavit."[494] The Applicant and Respondent had agreed to a list of witnesses that the Applicant wished to call in support of her "second branch" application. As a procedural matter, the parties agreed that counsel for the AGC would make efforts to arrange for the participation of the witnesses and that the examinations of the witnesses would proceed with the AGC conducting an examination-in-chief followed by the Applicant conducting cross-examination. The Applicant is attempting to recast the circumstances in order to overcome her failure to take any steps to compel S/Sgt. Chang to testify upon learning that he would not voluntarily participate.

296. S/Sgt. Chang, who retired from the RCMP in June 2019, resides in Macau, China. Once the Applicant had finalized her list of witnesses on September 14, 2020,[495] counsel for the AGC contacted S/Sgt. Chang to advise that his participation as a witness was requested by the Applicant. S/Sgt. Chang retained legal counsel. On or about October 24, 2020, S/Sgt. Chang's legal counsel advised the Applicant that S/Sgt. Chang had not made a final decision, but expected he would not participate at the *voir dire*. On November 5, 2020, counsel for S/Sgt. Chang confirmed with the Applicant that S/Sgt. Chang would not participate in the proceedings.

297. The Applicant made no effort to compel S/Sgt. Chang to testify once learning that he would not participate. The Applicant never raised the issue of compelling S/Sgt. Chang's attendance with counsel for the AGC, S/Sgt. Chang's lawyer or the Court. The Applicant's conduct suggests that she was content to not take any steps to compel (or even try to compel) S/Sgt. Chang to testify

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[493] Transcript of proceedings, October 26, 2020, at p. 5 ll. 2 – 27.
[494] Applicant's submissions at para. 377.
[495] AGC Book of Additional Documents, Tab 23 – Letter to from defence to DOJ dated September 14, 2020.

so that she could instead seek an adverse inference. As such, the Applicant must accept the following consequences of making her choice to take no action: (1) no adverse inference is available to her; and (2) the Applicant's refusal to attempt to compel S/Sgt. Chang to testify suggests that she did not truly want his evidence before the Court, thus supporting the inference that S/Sgt. Chang's testimony would not be helpful to her because he did not share the ESN Information. The latter inference is consistent with S/Sgt. Chang's October 2019 affidavit and the body of evidence before the Court supporting the conclusion that he did not share the ESN Information with the FBI.

D. The Doctrine of Adverse Inference

298. The doctrine of adverse inference is a common law principle derived from "ordinary logic and experience."[496] It flows from the conclusion that the weight given to evidence is informed, in part, by the ability that either party had to provide proof for their case.[497] The logic of an adverse inference is that if a party, without explanation, avoids calling a witness who has knowledge of the facts in dispute and who was expected to help that party's case, then it might be open to the court to infer that the witness's evidence is, in fact, unsupportive of that case, or even contrary to it.[498]

299. An adverse inference can arise in either civil or criminal contexts, but the logic must be adapted in light of the rights and obligations of the parties. For example, this principle cannot be overstated to effectively place an onus on the accused to testify.[499] Similarly, an adverse inference sought against the Crown should not improperly broaden the Crown's disclosure obligations, nor fetter the independence of the prosecution to choose how to bring its case.[500] Conversely, the formal or practical obligations of either party might ground an adverse inference if a court concludes that the party failed to meet those obligations by not calling the witness. For example, there may be a stronger basis for an adverse inference where a party has indicated the importance of a witness to the jury, and then declined to call that witness without explanation.[501]

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[496] *R. v. Jolivet*, 2000 SCC 29 at para. 26; see also *R. v. Rooke* (1988), 40 CCC (3d) 484 (BCCA) at paras. 77-81.
[497] *R v. Rooke* at para. 73.
[498] *Jolivet* at para. 28.
[499] *Ibid.* at para. 3.
[500] *Ibid*. at para. 16.
[501] *Ibid.* at para. 29.

300. In a departure from historical precedent, courts now hold that drawing an adverse inference is a matter of discretion. In other words, there is no such thing as a "mandatory adverse inference."[502] The discretion is engaged only when appropriate, and it only extends to certain inferences. For example, while it may be possible to infer from a witness's absence that they would have been unhelpful or even contradictory for the party that ought to have called them, it is not open to a criminal court to use an adverse inference to determine the fact of guilt.[503] In this sense, the principle is meant to be a logical extension, not an alteration, of the established evidentiary burdens on which a case must be decided.

301. Application of the adverse inference doctrine therefore depends on the legal context of the decision, and strength of the inference being sought. It also depends on access to the absent evidence. The courts will generally decline to draw an inference where the parties have equal access to the absent witness; there is no reason to infer that one party prevented the witness from testifying if either party could have called that witness.[504]

302. In either the civil or criminal context, a court should only rely upon an adverse inference if the court has dealt with other explanations for the witness's absence.[505] This guards against the possibility that a court might draw an adverse inference from the absence of evidence when there are other possible explanations for the absence that are non-adverse. In *Jolivet* the Court quoted a definition of this rule, previously quoted by the BC Court of Appeal in *Rooke*, which describes it as the "right to explain" the witness's absence.[506] Generally speaking, the rule tends to be stated in stronger terms for criminal matters: "An adverse inference may only be drawn where there is no plausible reason for not calling the witness."[507] A sufficient explanation does not need to be extraordinary. As affirmed by the BC Court of Appeal, it may be that the decision to decline calling a witness was tactical, or that there was a good faith belief in the unreliability of the

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[502] *Ibid.* at para 4; see also *Weeks v. Baloniak*, 2005 BCCA 193 at para. 12.
[503] *R. v. Rohl*, 2018 BCCA 316 at para. 1.
[504] *Lambert v. Quinn,* (1994), 110 DLR (4th) 284 (Ont CA) at 287; for a recent summary of BC precedent on this point, see *Purewal v. Uriarte*, 2020 BCSC 1798 at paras. 61-62.
[505] See *Buksh v. Miles,* 2008 BCCA 318 paras. 30-35; see also *R. v. Degraw,* 2018 ONCA 51 generally, and at para. 36.
[506] *Jolivet* at para. 26; *Rooke* at para. 87.
[507] *Degraw* at para. 30; *R. v. Lapensee*, 2009 ONCA 646 at para. 42.

witness.[508] Parties generally have discretion over the tactics of their case, so an appropriate explanation may be that the party was operating within that discretion.

303. The Applicant has failed to provide any justification for making no attempt to compel S/Sgt. Chang to testify. The Applicant was aware that S/Sgt. Chang was unlikely to testify as early as October 24, 2020, and definitively on November 5, 2020, but took no steps to compel him – or even raise the issue of compellability – with the AGC, S/Sgt. Chang's lawyer or the Court. The reasonable conclusion from the Applicant's inaction is that she was content for S/Sgt. Chang not to testify and seek an adverse inference.

E. Available Options to Compel Witnesses Living Abroad

304. Litigants who need evidence from witnesses abroad can request assistance from a foreign judicial system to compel witnesses to testify. A witness located in a foreign jurisdiction can only be legally compelled by, or through cooperation with, the legal authorities of that jurisdiction.[509] It is possible for Canadian courts to seek the cooperation of foreign courts in compelling a witness. In *Moore v. Bertuzzi,* the Ontario Superior Court issued a letter of request to compel a witness in the United States to attend trial via videoconference.[510]

305. Whether the available procedures to compel S/Sgt. Chang would ultimately have been successful is beside the point. It is the Applicant's inaction that disentitles her to an adverse inference and supports an inference that S/Sgt. Chang's evidence would be unhelpful to her. While S/Sgt. Chang's location in Macau may have presented logistical and jurisdictional hurdles to compelling his attendance, the fact is, the Applicant has demonstrated a keen interest in obtaining evidence from outside Canada and litigating these extradition proceedings in foreign courts. The Applicant has filed with this Court numerous affidavits from individuals residing outside of Canada and recently brought applications for disclosure against HSBC in the United Kingdom and Hong Kong.[511] The Applicant's extra-jurisdictional efforts in this case are relevant only to the extent that the Applicant has made every effort to obtain evidence from foreign jurisdictions to

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[508] *Rohl* at para. 2.
[509] *R. v. Zingre*, [1981] S.C.J. No. 89, [1981] 2 SCR 392.
[510] *Moore v. Bertuzzi,* 2014 ONSC 1318 at paras 62 and 68-92: see also, *Haaretz.com v Goldhar*, 2018 SCC 28 at paras 59-64.
[511] *Meng v. HSBC*, [2021] EWHC 342 (QB).

fully litigate her case, and yet, on a crucial piece of evidence involving S/Sgt. Chang, she took no steps.

F. Conclusion

306. The Applicant's gives no reason why she failed to take any action to attempt to compel S/Sgt. Chang to testify. It is possible it was an oversight, however, a more plausible explanation is that she made a strategic choice knowing that S/Sgt. Chang's evidence would be detrimental to her case if he actually testified. Whether deliberate or in error, the consequence is that no adverse inference in favour of the Applicant is available and the reasonable inference is that the Applicant did not want S/Sgt. Chang. As such, the reasonable inference, as supported by a body of evidence in this case, is that S/Sgt. Chang did not share the ESN Information with the FBI.

X. THERE WERE NO EFFORTS BY RCMP OR CBSA TO CONCEAL OR RECAST EVENTS

A. Key Points

(i) The notes of both RCMP members and CBSA officers must be evaluated in a context-specific, common sense manner. There are no exhaustive criteria to consider when assessing either.

(ii) In this case, the RCMP members and CBSA officers took notes of what was significant to their respective obligations at the time. CBSA BSOs recorded information that was relevant to their role of administration and enforcement of the *IRPA* and the *Customs Act*. RCMP officers were concerned about the arrest, and their notes focus on points related to this. Neither the RCMP nor the CBSA can be faulted for taking notes relevant to their roles at the time, rather than what is now significant to the Applicant's abuse of process allegation.

(iii) *Charter* obligations do not exist in a vacuum and the fluid context in which notes are made plays a role in how they should be assessed.

(iv) The fact that a police officer does not have something in their notes, in itself, does not result in a breach of *Charter* rights pursuant to section 7, and correspondingly, there is no *Charter* right to be investigated by an officer with a perfect memory.

(v) The note taking obligations of CBSA officers must be considered in the context of an administrative scheme for assessing admissibility to Canada.

(vi) The Applicant's customs and immigration examination proceeded in a routine manner. There is no evidence of improper communications or actions within or between any of the agencies involved.

(vii) This is not a situation analogous to that in *Carosella* or contemplated in *La*, where materials were destroyed either purposely or inadvertently, demonstrating systemic destruction of evidence, resulting in prejudice to the Applicant, and undermining the administration of justice. Further, there is no obligation to disclose what does not exist.

B. Overview

307. The Applicant's arrival at YVR, her customs and immigration processing, and the execution of the Provisional Arrest Warrant were a normal occurrence, throughout which both CBSA and RCMP were fulfilling their responsibilities as they would in any other case. Neither the RCMP nor the CBSA deliberately or negligently omitted or recast their interactions with the Applicant and each other, or their respective procedures. Notes taken contemporaneously with the events reflect the dynamic environment in which they were made. Further, it is reasonable that both RCMP members and CBSA officers who dealt with the Applicant at YVR have independent memory of certain details, either prompted by their notes or significant enough to them to remain in their memory. There was no effort by RCMP or CBSA, either separately or collectively, to hide or reframe what happened at YVR before, during, or after the Applicant's arrival at YVR on December 1, 2018.

C. The Duty to Take Notes Must Be Considered in a Practical, Context-Based Manner

308. The duty of police officers to make accurate notes is an uncontroversial proposition of law. Generally, the duty to make notes is an extension of the role of police in conducting an investigation and where applicable, in the laying of charges and involvement in prosecutions. Police notes are an important record of police actions, as well as immediate and accurate evidence.

309. The Applicant relies on various propositions in *Wood v. Schaeffer*,[512] where the concern was the application of specific Ontario regulations, which expressly imposed specific obligations on Ontario police officers to make notes in particular circumstances. There is no similar statutory or regulatory framework in British Columbia. It is important to note that courts have previously commented on the limited application of that case to determinations of reliability and credibility of police in the context of note-taking. For example, in *Lotfy*, Mr. Justice Frankel held:

> While I accept police officers have an obligation to make notes, given that *Wood v. Schaeffer* deals with a statutory and regulatory framework specific to Ontario, I am not in a position to determine whether the positive legal duty to make notes that exists in Ontario exists in British Columbia. This is because this point was not fully

[512] *Wood v. Schaeffer,* 2013 SCC 71.

> argued. In particular, we were not referred to any statute or regulation applicable to police note-taking in British Columbia.[513]

310. Neither the *Criminal Code*, nor the jurisprudence provide an exhaustive list of requirements or criteria governing police officers' duty to take notes. Notwithstanding guidelines specific to individual law enforcement agencies, notes that are comprehensive, concise, and as near in time to the event as practicable are generally regarded as best practice. Courts have consistently held that creation of contemporaneous notes is to be undertaken in a common sense, context-specific manner, considering the role of the officer at the given time, and the practicability and reasonableness of stepping out of dynamic, fluid circumstances to reflect and record notes.[514]

311. While inaccuracy and incompleteness are not to be strived for or accepted, "the usual discrepancies which creep into officers' notebooks" are not *prima facie* reason to question the integrity of an officer or the reliability and integrity of the evidence.[515]

312. Since officer notes fill the dual role of an investigative tool and an evidentiary document, police must be cognizant of the fact that *Charter* obligations require them to make notes that may play a significant role in assisting the court in assessing evidence.[516] However, *Charter* rights do not exist in a vacuum. Police interactions take place in a variety of fluid and demanding settings. As stated by Fairburn J. in *Moulton* in the context of alleged *Charter* breaches resulting from a pat-down search:

> I would be remiss not to acknowledge the inherently difficult job that the police have. They work in oftentimes demanding, fluid and challenging circumstances. They have to make difficult calls on the spot and apply a sometimes complex web of legal concepts to their interactions with individuals. For this reason, it is important that they be provided with significant latitude in the execution of their duties so that they can, as noted in *Mann* at para 16*,* respond "quickly, effectively, and flexibly to the diversity of encounters experienced daily on the front lines of policing." See also: *R v White,* 2007 ONCA 318 at para 54.
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> It is critical that the law evolve in a way that is respectful of officer and public safety and that it carefully accommodates dynamic, real-time situations that only police officers, on

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[513] *R. v. Lotfy*, 2017 BCCA 418 at para. 48.
[514] *R. v. Odgers*, 2009 ONCJ 287 at paras. 16-18; see also *R. v. Dhillon*, 2015 ONSC 5400 at para. 39.
[515] *Odgers*, at paras. 16-18.
[516] *Odgers*, at para. 16; see also *Truong*, 2011 BCSC 1483 at para. 20 citing *R. v. Truong*, 2010 BCSC 1956 at para. 5(v).

> the street, can really attest to. As Doherty JA noted in *R v Golub,* 1997 CanLII 6316 (ON CA), [1997] 102 OAC 176 at para 18, "[j]udicial reflection is not a luxury the officer can afford." We must remain deeply aware of and respectful toward officer and public safety, including the need to provide officers with the tools necessary so that they can do their jobs, while keeping themselves safe [Emphasis added]. [517]

D. There Was No Deliberate Decision by RCMP or CBSA Not to Take Notes

313. The Applicant's assertion that the RCMP and CBSA deliberately decided not to take notes in order to conceal events or to shield themselves from scrutiny is not supported by evidence, nor can it be inferred from the totality of the circumstances. In fact, notes of the RCMP members and CBSA officers involved are accurate, and though imperfect, are reflective of the context and environment in which they were made.

1. RCMP Notes

314. On November 30, 2018, partly as a result of the division of tasks on a previous matter they were working on, it was decided between Csts. Yep and Dhaliwal that Cst. Yep would take the lead on execution of the Provisional Arrest Warrant, namely swearing the affidavit and conducting the arrest.[518] Over the course of his career, Cst. Yep had executed multiple arrest warrants, and testified that safety concerns were a factor that was always considered in conducting arrests.[519]

315. The testimony of all frontline RCMP members in this case, taken collectively, illustrates that safety is a normal and expected factor in the planning of arrests. This can be said to be even more prominent in a dynamic environment such as an airport terminal. Whether or not the Applicant herself posed an immediate safety risk to officers is not the only material safety consideration that RCMP members had in mind. Unlike a search, where vague or peripheral concerns of safety have been held to be inadequate grounds, it is not unreasonable to conclude, based on the evidence and circumstances, that officer safety, public safety, and the Applicant's safety were considered as part of a broader context for arrest of the Applicant at an airport terminal, where hundreds of travellers were present. Further, it was unknown who was accompanying the Applicant and the RCMP were in an environment that is not a usual setting for arrests.

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[517] *R. v. Moulton*, 2015 ONSC 1047 at paras. 102-103.
[518] Yep, Oct. 26, p. 20, ll. 12-25.
[519] Yep, Oct. 26, p. 7, ll. 27-39.

316. Further, safety was not a substantive ground for the Applicant's arrest. The Provisional Arrest Warrant was. As such, it is not unreasonable that the safety concern was not explicitly recorded in Cst. Yep's notes, since it was in no way linked to the substantive reasons for the Applicant's arrest.

317. The lack of explicit notes regarding safety concerns is not an unreasonable omission, and certainly not a fatal one in the notes of RCMP members. Similarly, the lack of explicit mention of CBSA jurisdiction at the airport in the notes stems from this being a regular part of RCMP training and past experience.[520]

318. Further, there is no evidence that RCMP members deliberately omitted information in their notes or suppressed, falsified, or manipulated information after the fact. For example, Cst. Yep's notes contain notations at regular intervals on November 30, 2018, and December 1, 2018.[521] Though not extensive, these notes address the fact that various interactions happened, contain brief notations of names, contacts, and events.

319. Similarly, Cst. Dhaliwal's notes of the 9:30 a.m. meeting on December 1, 2018, do not contain a transcript of the half-hour meeting, or a detailed synopsis of all considerations. However, they do contain notations at regular intervals, identifying the participants and purpose of the meeting, and what was discussed in general terms.[522] Though limited, the nature of the notes is not evasive, and does not suggest deliberate or negligent omission of information, of the type contemplated in the jurisprudence. Rather, Cst. Dhaliwal's notes are reflective of the fluid circumstances of attending an informal meeting with CBSA, where various parties were working to address anticipated and hypothetical concerns in a time-pressured environment, as contemplated in *Moulton*.

320. Cst. Dhaliwal confirmed that he did his best to make sure his notes were accurate regarding what he observed and heard.[523] Further, Cst. Dhaliwal testified that his notes aided in refreshing

[520] Yep, Oct. 26, p. 16, ll. 6-24; p. 73, ll. 31-47; p. 74, ll. 1-23; Dhaliwal, Nov. 20, p. 22, ll. 7-30.
[521] Yep, Oct. 26, p. 63, ll. 28- 46; p. 69, ll. 3-23.
[522] Dhaliwal, Nov. 23, p. 87, ll. 18-45.
[523] Dhaliwal, Nov. 20, p. 29, ll. 7-25; Dhaliwal, Nov. 23, p. 47, ll. 7-13 and 31-41.

or jogging his memory about the events and he referred to his notes on multiple occasions in cross-examination.

321. Both Csts. Yep and Dhaliwal were extensively cross-examined on their recollections and their note-taking practices, and both confirmed their notes were made contemporaneously or near the time of the events, thus providing further reasoning for their brevity in the circumstances.[524] During their testimony, all officers confirmed having an independent recollection of the events recorded in their notes.

322. In *Chapman*, a police officer's testimony was challenged because relevant evidence was provided for the first time at trial, rather than in preceding notes, reports, or at the preliminary inquiry.[525] Despite there being no statutory obligation or duty of the officer to keep notes or a record, the court held that the officer's credibility and reliability were relevant in the circumstances.[526] In conducting a credibility analysis, the Court adopted the following passage from *R. v. Dhillon*[527] as instructive on the issue of how such analyses should be regarded:

> While the importance of notes has been repeatedly affirmed, including in *Wood v. Schaeffer* … it must be remembered that at least one of the primary purposes for notes is to assist with refreshing memory. While good note taking can and often does reflect good police work, the fact that an officer does not have something in his or her notes does not mean that it did not occur. When assessing the credibility and the reliability of an officer's evidence, it is open to a trial judge to place as much weight on the absence of notes as deemed appropriate in all of the circumstances. The trial judge here decided that the absence of detailed notes was irrelevant to his considerations. This is neither a surprising, nor prohibited conclusion.[528]

323. At its core, the nature of Sgt. Lundie's involvement was as a liaison/contact at the airport. Sgt. Lundie's notes are reflective of the fact that the RCMP was not conducting a domestic criminal investigation and that he was not acting as team lead for the RCMP. He was present to execute an *Extradition Act* warrant.[529] This context must be considered when assessing the value and

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[524] Yep, Oct. 26, p. 18, ll. 11-16.
[525] *R. v. Chapman*, 2019 BCSC 2330 at para. 24.
[526] *Ibid.* at para. 23.
[527] *R. v. Dhillon*, 2015 ONSC 5400.
[528] *Chapman* at para. 28, citing *Dhillon* at para. 39.
[529] Lundie, Dec. 7, p. 30, ll. 15-24; p. 37, ll. 2-30; p. 47, ll. 27-32; Dec. 8, p. 32, ll. 22-25.

appropriateness of his notes. The Appellant's evaluation of Sgt. Lundie's testimony focuses on select assertions and responses on cross-examination, without the overarching context of how Sgt. Lundie viewed his involvement, and how that involvement unfolded in the circumstances. The evidence overlooked by the Applicant includes:

- Though not routine, he did not regard the initial call on November 30, 2018, from Ken Kopp as uncommon.[530]
- His motivation to attend and assist on December 1, 2018, was to introduce Csts. Yep and Dhaliwal to CBSA and ensure everything went smoothly within the airport boundaries. This was repeatedly stated in his testimony.[531]
- Sgt. Lundie acknowledged that Csts. Yep and Dhaliwal were looking to him for guidance, but did not accept that his role in relation to them or to Sgt. Vander Graaf was as team lead or 'in charge'.[532]
- Sgt. Lundie was not conducting or present at the examination of the Applicant.
- Despite interactions with Agent Onks, Sgt. Lundie repeatedly testified regarding his understanding that "at the end of the day" he was not assisting the FBI, in the manner that FDLU would be.[533]

324. Even in a domestic case there is no *Charter* right to be investigated by an officer with an eidetic memory.[534] Further, there is no rule of law that says a police officer's testimony, unsupported by notes, is inadmissible or deemed to be incredible or untrustworthy. Notes, the absence of notes and the quality of notes, are only factors in assessing credibility.[535]

325. Finally, Sgt. Vander Graaf's notes and their level of detail are not a benchmark against which to evaluate other officers' notes. They reflect information Sgt. Vander Graaf recorded to help refresh *her* memory.[536] As re-iterated repeatedly in the jurisprudence above, detailed notetaking is a prudent practice, but the adequacy of notes is a context-specific analysis and there is no single standard to be attained.[537]

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[530] Lundie, Nov. 27, p. 14, ll. 38-40; Dec. 7, p. 11, ll. 2-10.
[531] Lundie, Nov. 27, p. 20, ll. 23-32; p. 22, ll. 16-20; p.21, ll. 18-26; Dec. 7, p. 47, ll. 27-32 and ll. 40-47; p. 48, ll. 1-13.
[532] Lundie, Dec. 7, p. 66, ll. 46-47; p. 67, ll. 1-47 and p. 69, ll. 1-9.
[533] Lundie, Dec. 7, p. 29, ll. 18-34; p. 30, ll. 16-24.
[534] *R. v. Tjernstrom*, 2017 BCSC 285 at para. 34.
[535] *R. v. Davidoff*, 2013 ABQB 244 at para. 27.
[536] Vander Graaf, Nov. 25, p. 22, ll. 18-22.
[537] *R. v. Dhillon*, 2015 ONSC 5400; see also *R. v. Davidoff*, 2013 ABQB 244; *Odgers*, at paras. 16-18.

2. CBSA Notes

326. As already discussed, the CBSA is charged with the administration and enforcement of the *IRPA* and the *Customs Act*. It ensures that access to Canada is permitted only to individuals and goods that are admissible to this country.

327. While the notes prepared by CBSA officers are expected to be accurate, the courts have specifically noted that regulatory duties performed by CBSA officers do not engage the same standards of note taking that regularly apply to police duties. In *Patel*, Marchi J.C.Q. explained that the unique role played by CBSA officers at the border is the key to understanding the difference in note-taking standards:

> The context also provides an answer to the argument of the Accused regarding the fact that Officer Warren did not take "detailed notes of what has been searched and why". It would be unreasonable to equate the obligations of officers working in the customs and immigration context with those of peace officers involved in a criminal investigation. The balance between the demands of effective law enforcement and everyone's right to be free of unreasonable searches and seizures cannot be the same as in "normal" circumstances.
>
> In *Dehghani*, Justice Iacobucci made that distinction when he wrote:
>
> > […] at a border the state has an interest in controlling entry into the country. Individuals expect to undergo questioning with respect to their entry into Canada whether that be in the immigration or customs context. These interests and expectations dictate that examination of a person for purposes of entry must be analyzed differently from the questioning of a person within Canada.
>
> In the opinion of the Court, given the context, it would be unreasonable to impose the same obligation upon an immigration officer like Officer Warren, who is involved in an administrative scheme, as those of police officers investigating a criminal offence.[538]

328. All CBSA officers expressed their understanding that they were expected to record noteworthy interactions with travellers,[539] and did in fact record transactions of note with the

[538] *Patel* at paras. 72-74.

[539] Kirkland, Oct. 28, p. 46, ll. 3-42; Oct. 30, p. 21, ll. 1-28; McRae, Oct. 30, p. 60, ll. 42-47; p. 61, ll. 1-41; Katragadda, Nov. 18, p. 43, ll. 21-47 and p. 44, ll.1-29; Dhillon, Nov. 16, p. 74, ll. 21-43; Goodman, Dec. 8, p. 45, ll. 11-47; p. 46; p. 47, ll. 1-4.

Applicant. Minor discrepancies in notetaking practices between BSOs do not amount to an abuse of process. The BSOs' testimony regarding notetaking practices during meetings with members of the CBSA and other agencies are not contradictory in any material way. The variations in the understanding of notetaking practices between Kirkland, Katragadda and Dhillon are reasonable.[540] The variations complained of by the Applicant are not unexpected, contradictory or evidence of an abuse of process.

329. The BSOs all had a consistent practical understanding that given the dynamic and frequent interactions with other BSOs and superintendents, they would not likely take notes of such meetings. Indeed, there is nothing in the operational manuals indicating that they were required to. The same is true for the BSOs rationales for not taking notes of meetings with other agencies.

330. In the context of the Applicant's customs and immigration examination, BSO Katragadda and Kirkland's notes reflect their respective roles and their understanding of their general notetaking obligations. BSO Katragadda was conducting the secondary examination and testified to making notes of substantial happenings in his day, including the examination of the Applicant.[541] BSO Kirkland was tasked with taking contemporaneous notes and assisting with the examination as required.[542] Their notes reflect information that was considered relevant to their duties at the time and in the context of their roles.[543] Further, these roles were not rigid and, as reflected in the evidence, there is overlap in some tasks performed by each officer.

331. The BSOs' explanations for the recording of passcodes is also generally consistent. Both BSO Kirkland and Supt. Dhillon stated that they would often record passcodes on a piece of paper, then transfer them to their notebooks. Supt. Dhillon specified that he would transcribe passcodes into his notebook if he had additional concerns or found something related to "a *Customs Act* concern or an *IRPA*-related concern."[544] BSO Kirkland testified that he would usually write the

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[540] Kirkland, Oct. 28, p. 46, ll. 3-42; Kirkland, Oct. 30, p. 21, ll. 1-28; Katragadda, Nov. 18, p. 43, ll. 21-47; p. 44, ll. 1-29; Dhillon, Nov. 16, p. 74, ll. 21-43.
[541] Katragadda, Nov. 18, p. 43, ll. 21-47; p. 44, ll. 1-29; p. 52, ll. 33-39; p. 74, ll. 14-24; p. 75, ll. 14-34; Nov. 19, p. 30, ll. 32-47; p. 31, ll. 1-11; p. 41. ll. 7-17; p. 45, ll. 34-47; p. 47, ll. 8-33; p. 48, ll. 1-38; p. 49, ll. 18-36.
[542] Katragadda, Nov. 18, p. 66, ll. 34-35; Nov. 19, p. 43, ll. 3-4; p. 4, ll. 5-14; p. 46, ll. 28-38; p. 66, l. 47- pp. 67, ll. 1-2; p. 69, ll. 3-17; Kirkland, Oct. 28, p. 31, ll. 2-11.
[543] Katragadda, Nov. 19, p. 2, ll. 18-36; p. 3, ll. 20-25; p. 4, ll. 1-4; p. 54, ll. 1-5; p. 62, ll. 4-16; Nov. 20, p. 19, ll. 9-17; Kirkland, Oct. 30, p. 21, ll.1-28; p. 28, ll. 33-40.
[544] Dhillon, Nov. 17, p. 23, ll. 29-33; see also, Goodman, Dec. 8, p. 82, ll. 41-47; p. 83, ll 1-12.

passcode down on a piece of paper first, then transcribe it into his notebook *during* the course of the examination more neatly.[545]

332. The evidence supports the view that at all times, the CBSA officers conducted themselves in good faith, had a *bona fide* interest in the Applicant's admissibility to Canada, and were motivated by legitimate immigration and customs objectives, such as determining the admissibility of a foreign national into Canada. The notes indicate that the CBSA officers did their jobs.

E. There Was No Direction to Conceal

333. There is no evidence that the CBSA, at any level, sought to recast the evidence relating to the Applicant's examination or conceal facts. Director General MacVicar testified that her comments on the issue of recordkeeping were focused on communicating the importance of "having a full record of what had occurred."[546] Her concern was that CBSA records directly reflect "the CBSA process and what had happened," and matters within CBSA knowledge when discussing the events at YVR involving the Applicant.[547] Director General MacVicar categorically denied making a direction to her staff not to create records for fear of them being disclosable.[548] Based on her testimony, there can be no suggestion of a CBSA effort to conceal or recast the evidence.

334. Director General MacVicar's testimony is consistent with Director Linde's belief that the comments were not made with the intention to suppress, conceal, recast or withhold information about the matter.[549] The intention and effect of Director General MacVicar's comments is further substantiated by the fact that Director Linde did not provide any subsequent direction to his staff not to keep records or make notes of the matter.[550]

335. The comments also align with the evidence of Chief Goodman, that while she decided not to create a timeline of events, Director General MacVicar's comments did not "change or

[545] Kirkland, Oct. 28, p. 41, l. 43-p. 42, ll. 1-8.
[546] MacVicar, Dec. 11, p. 47, ll. 1-3.
[547] MacVicar, Dec. 11, p. 47, ll. 15-19 and 43-47; p. 79, l. 45-p. 80, l. 16.
[548] MacVicar, Dec. 11, p. 79, ll. 28-43.
[549] Exhibit 22, Agreed Statement of Facts dated December 14, 2020.
[550] *Ibid.*

encumber" her recordkeeping or communication otherwise.[551] This is further supported by the fact that Chief Goodman did not hesitate to write and respond to emails regarding the passcodes after the meeting with Director General MacVicar.[552]

336. Chief Goodman testified that she had no concerns about the conduct of the BSOs either before or after the meeting with Director Linde and Regional Director General MacVicar.[553] There was nothing to conceal. Further, there is no evidence that the frontline BSOs contacted or communicated with each other or higher ups in the organization in an effort to recast events during or after the fact.[554] CBSA personnel provided briefings and held meetings as they would in any other high-profile case. It was standard practice to do so.[555]

337. There is no evidence that the CBSA recast the events or concealed information. The notes of Robin Quinn suggest the opposite. Her notes of a CBSA Executive meeting in January 2019 record the comment, "Be as truthful and responsive as possible."[556]

F. The Circumstances of this Case Do Not Amount to Lost Evidence

338. Lost evidence may amount to an abuse of process if it can be established that evidence was either deliberately destroyed, or in the rare case where despite no improper motive, negligence resulting in lost evidence "is so prejudicial to the accused's right to make full answer and defence that it impairs the right to a fair trial."[557]

339. The Applicant's assertion that the notes of the RCMP members and CBSA officers amount to a loss of evidence cannot be taken seriously. Further, the Applicant's Appendix "A" reproduces portions of testimony strategically and without surrounding context. Taken individually, the excerpts illustrate certain witnesses' inability to remember events that occurred two years prior, or

[551] Goodman, Dec. 10, p. 43, ll. 32-33.
[552] Goodman, Dec. 9, p. 18, ll. 3-47; p. 19, ll. 1-15; Exhibit 18, AGC Goodman Binder, Tab 1.
[553] Goodman, Dec. 9, p. 18, ll. 17-30.
[554] Kirkland, Oct. 30, p. 17, ll. 2-10; p. 20, ll. 19-26; p. 23, ll. 8-19; Katragadda, Nov. 19, p. 28, ll. 5-12; p. 54, ll. 41-46; p. 58, ll. 39-47; p. 59, ll. 1-7; p. 60, ll. 15-18; Dhillon, Nov. 17, p. 13, ll. 32-30; p. 14, ll. 17-44.
[555] Goodman, Dec. 8, p. 79, ll. 39-46.
[556] Exhibit 4, Defence Kirkland Binder, Tab 11, p. 8.
[557] *R. v. Neidig*, 2015 BCCA 489 at para. 34.

inability to comment on matters outside of their knowledge. A witness's inability to recall a specific event or comment on an issue outside of their experience is not the type of conduct contemplated in the jurisprudence when considering a stay of proceedings. Taken collectively, and at its highest, the Applicant's Appendix "A" is a puzzle with many missing pieces that is of no assistance to the Court.

340. The Applicant invokes *Carosella* and in *La* as bases for a stay of proceedings in this case. In *Carosella*, a *voir dire* established that notes of an interview with a complainant were destroyed before being disclosed to the accused. The social worker who had conducted the interview and later shredded the notes, had no recollection of their contents.[558] The social worker further testified that the materials were destroyed to prevent anything from being produced in court.[559] In the circumstances, the court granted a stay of proceedings on the grounds that the crisis centre's policy allowing for active and systematic destruction of evidence required in court proceedings undermined the administration of justice and function of the courts.[560]

341. In *La*, the court found that failure to disclose a taped interview with a minor complainant due to police inadvertence did not seriously impair the accused's right to make full answer and defence for a number of reasons, including: the recorded conversation was not a "detailed conversation" and involved issues peripheral to the proceedings; the complainant provided other statements to police and testified at the preliminary inquiry; and, an alternative source of the information was available via the officer's testimony that the complainant had lied, thus providing defence an avenue in attacking her credibility.[561]

342. Unlike what was contemplated in *Carosella* and *La*, there is no evidence here of the systemic destruction of evidence "designed to defeat the processes of the court."[562] Furthermore, the *Stinchcombe* disclosure principles have no application to the extradition context. Moreover, the Crown and by extension, RCMP and CBSA, are not obliged to disclose what does not exist.[563] Contrary to the Applicant's claim, there is no indication that the events alleged by her transpired.

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[558] *R. v. Carosella*, [1997] 1 S.C.R. 80 at para. 12.
[559] *Ibid.* at para. 12.
[560] *Ibid.* at para. 56.
[561] *R. v. La*, 1997 CanLII 309 (SCC), [1997] 2 SCR 680 at paras. 31-34.
[562] *Carosella* at para 56.
[563] *Ampadu* at para. 39.

G. Conclusion

343. There is no evidence the RCMP or CBSA officers failed to take relevant notes. There is also no evidence that the RCMP or CBSA concealed or recast the events related to the Applicant's immigration examination and extradition arrest. Finally, there is no evidence that the RCMP or CBSA engaged in the systemic destruction of evidence.

XI. THE APPLICANT DOES NOT MEET THE TEST FOR A STAY OF PROCEEDINGS

A. Overview

344. A stay of proceedings is the most drastic remedy a court can order and should only be granted in "exceptional", "rare" and the "clearest of cases". The Applicant has failed to demonstrate any abusive conduct on the part of Canadian or American authorities in respect of the events surrounding the Applicant's arrest by the RCMP, and immigration examination by the CBSA. The Applicant's allegations of a conspiracy orchestrated by the United States to deny the Applicant her *Charter* rights is unsupported by the evidence. Likewise, the Applicant's allegations against the RCMP and CBSA are unfounded. The RCMP and CBSA lawfully fulfilled their mandates and conducted their duties in good faith. Their conduct cannot be considered improper, much less so egregious that it could warrant a stay of the Applicant's extradition proceedings.

345. The Applicant's argument fails on the first stage of the *Babos* test for a stay of proceedings because the conduct of the RCMP and CBSA, taken either individually or collectively, cannot possibly warrant a stay of proceedings because it could not amount to conduct that would offend society's sense of fair play and decency. The Application for a stay of proceedings should be dismissed.

B. Stay of Proceedings: The Three Stage *Babos* Test

346. In *R. v. Babos*, the Supreme Court clarified the test for a stay of proceedings, reiterating that it "is the most drastic remedy a criminal court can order" and only justified on rare occasions.[564] There are two categories of abuse identified by the Court. The main category arises when there is serious state misconduct or circumstances that compromise the fairness of the hearing. In the extradition context, the hearing refers to the committal hearing not the trial in the requesting state as trial fairness in a foreign state is not an issue within the jurisdiction of an

[564] *R v. Babos*, 2014 SCC 16 at para. 30-31, 39. See also (N.B. not in AGC's Book of Authorities): *R v. Regan*, [2002] 1 SCR 297 at para. 55, *R v. Carosella*, [1997] 1 SCR 80 at para. 52; *R v. O'Connor*, [1995] 4 S.C.R. 411, at paras. 68-69, 77, 81-82. In its earlier jurisprudence, the Supreme Court had already established that a stay of proceedings is the "most drastic remedy a criminal court can order" (para. 30) and that while there are rare occasions when a stay of proceedings is warranted, this result should only occur in the "clearest of cases" (para. 31) (see also *R. v. Regan,* 2002 SCC 12 at para. 53 and *R. v. O'Connor,* [1995] 4 S.C.R. 411, at para. 68). In *R. v. Bacon*, 2020 BCCA 140, the unanimous Court followed *Babos* and reiterated the three part test for the residual category at para. 27.

extradition judge. The residual category is engaged where there is no risk to trial fairness, but continuing the proceeding risks undermining the integrity of the judicial process.[565]

347. The following three-stage test set out in *Babos* for determining whether a stay is warranted applies equally to the main and residual categories:

> 1) There must be prejudice to the accused's right to a fair trial (or, in this case, fair extradition hearing) or the integrity of the justice system that "will be manifested, perpetuated or aggravated through the conduct of the trial, or by its outcome";
>
> 2) There must be no alternative remedy capable of redressing the prejudice; and
>
> 3) Where there is still uncertainty over whether a stay is warranted after steps (1) and (2), the court is required to balance the interests in favour of granting a stay, such as denouncing misconduct and preserving the integrity of the justice system, against "the interest that society has in having a final decision on the merits".[566]

348. The Supreme Court has repeatedly emphasized the prospective impact of the conduct in question, calling the first criterion of the test "critically important".[567] Courts must consider the ongoing impact of any abuse that is found under either category. It is only in "exceptional" and "relatively very rare" cases that past misconduct will be "so egregious that the mere fact of going forward in the light of it will be offensive".[568]

349. In *Babos*, Moldaver J. held that a there are limits on the type of conduct society will tolerate in the prosecution of offences. At times, state conduct will be so troublesome that having a trial - even a fair one - will leave the impression that the justice system condones conduct that offends society's sense of fair play and decency. In writing for the majority, Moldaver J. described the first stage of the test in respect of the residual category as follows:

> [35]...when the residual category is invoked, the question is whether the state has engaged in conduct that is offensive to societal notions of fair play and decency and whether proceeding with a trial in the face of that conduct would be harmful to the integrity of the justice system. To put it in simpler

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[565] *Babos* at para. 31.
[566] *Ibid.* at para. 32.
[567] *Ibid.* at paras. 34, 38-39.
[568] *Ibid.* at paras. 36 and 38.

> terms, there are limits on the type of conduct society will tolerate in the prosecution of offences. At times, state conduct will be so troublesome that having a trial - even a fair one - will leave the impression that the justice system condones conduct that offends society's sense of fair play and decency. This harms the integrity of the justice system. In these kinds of cases, the first stage of the test is met.

350. At the second stage, the question becomes whether there is any other remedy to redress the prejudice short of a stay of proceedings. As Moldaver J. described it:

> [39] At the second stage of the test, the question is whether any other remedy short of a stay is capable of redressing the prejudice. Different remedies may apply depending on whether the prejudice relates to the accused's right to a fair trial (the main category) or whether it relates to the integrity of the justice system (the residual category). Where the concern is trial fairness, the focus is on restoring an accused's right to a fair trial. Here, procedural remedies, such as ordering a new trial, are more likely to address the prejudice of ongoing unfairness. Where the residual category is invoked, however, and the prejudice complained of is prejudice to the integrity of the justice system, remedies must be directed towards that harm. It must be remembered that for those cases which fall solely within the residual category, the goal is not to provide redress to an accused for a wrong that has been done to him or her in the past. Instead, the focus is on whether an alternate remedy short of a stay of proceedings will adequately dissociate the justice system from the impugned state conduct going forward.

351. The Court also affirmed in *Babos* that in residual category cases, balancing must always occur, since courts must consider which of two options better protects the integrity of the justice system: staying the proceedings or proceeding despite the impugned conduct. Relevant factors include:

(i) the nature and seriousness of the impugned conduct;

(ii) whether the conduct is isolated or reflects a systemic and ongoing problem;

(iii) the circumstances of the accused;

(iv) the charges he or she faces; and

(v) the interests of society in having the charges disposed of on the merits.[569]

352. Moldaver J. observed in *Babos* that the burden to justify a stay in the residual category is onerous and such cases will be "exceptional" and "very rare".[570] Further, although the doctrine of abuse of process has been largely subsumed under s. 7 of the *Charter*, the Supreme Court confirmed in *O'Connor* that the "clearest of cases" standard continues to apply when considering whether a stay would be "appropriate and just" under s. 24(1) of the *Charter*.[571]

1. Stay of Proceedings in the Extradition Context

353. The *Babos* test applies to extradition proceedings, although the balancing test has been further refined in the extradition context to take into account factors of particular importance to extradition.[572] The test has been described as whether the impugned conduct amounting to an abuse is "disproportionate to the societal interest in the effective discharge of our international obligations to those accused of serious crimes in the jurisdiction of our extradition partner."[573] A stay of extradition proceedings is no small matter: imposing one would deny a requesting state the ability to have the truth of the allegations determined, a result that is no less drastic than staying a prosecution.[574] In determining whether such a remedy is appropriate in the extradition context, an extradition judge must also have regard for Canada's international obligations. A stay of proceedings necessarily results in Canada being unable to fulfill its obligations to a treaty partner.

354. The Applicant has been unable to establish any abuse on the part of the Requesting State. This case bears no similarity to cases where stays were ordered in the extradition context such as *Licht*,[575] *Cobb*,[576] and *Tollman*,[577] where the courts found that the foreign state had, by its abusive conduct, disentitled itself from having the person sought extradited. Put simply, the alleged RCMP and CBSA conduct that the Applicant says is abusive, is not comparable to the conduct in cases

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[569] *Babos*, at para. 41.
[570] *Babos* at para. 44.
[571] *O'Connor* at para. 68, 70.
[572] *India v. Badesha* 2018 BCCA 470 at para. 95 and 99.
[573] See *United States v. Cavan*, 2015 ONCA 664 at para. 67; see also *United States of America v. Wilson*, 2016 BCCA 326 at para. 81.
[574] *Badesha* at paras. 62, 95 and 99.
[575] *United States of America v. Licht* (2002), 163 C.C.C. (3d) 372 (B.C.S.C.)
[576] *United States of America v. Cobb*, 2001 SCC 19.
[577] *United States of America v. Tollman* (2006), 212 C.C.C. (3d) 511 (Ont. S.C.)

where stays have been granted which include – (1) illegal U.S. law enforcement activities in Canada (*Licht*); and, threats of sexual violence against a person sought for extradition by a U.S. judge if the individual resisted extradition (*Cobb*).

C. The Applicant Has Not Met the *Babos* Test for a Stay of Proceedings

355. The Applicant has failed to demonstrate conduct by the Requesting State that could possibly prejudice the integrity of the justice system. The Applicant must show that the conduct results in prejudice to the integrity of the justice system that will be perpetuated or manifested through the conduct or outcome of the trial. Granting a stay permanently halts the prosecution of the accused, frustrates the truth seeking function of the trial, and deprives the public of the opportunity to see justice done on the merits and cannot be justified in the absence of ongoing prejudice.[578]

356. The evidence before the Court on the Applicant's Second Branch Abuse does not support the Applicant's claim that the RCMP or CBSA acted abusively or abused their powers. The evidence is that the RCMP and CBSA performed their functions according to law under their respective mandates. The CBSA are mandated to protect Canada's borders and determine admissibility of people and goods seeking entry to Canada. The RCMP, in this case, were mandated to effect the Provisional Arrest Warrant and seize evidence so that it could be available should the Requesting State wish to make an MLAT request for the evidence. The RCMP and CBSA cooperated appropriately as required to complete their respective functions.

357. The Applicant's allegation that the extradition arrest should have preceded the immigration examination cannot amount to circumstances that are so egregious that a stay is warranted. There is no law that indicates the definitive order of immigration and arrest procedures at a port of entry. The CBSA and RCMP were confronted on the morning of December 1, 2018, with an entirely unique set of circumstances. The evidence shows they sought a reasonable solution to carry out their respective mandates. Any allegation that they acted in bad faith is not credible.

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[578] *Babos*, at para. 30.

358. As the Applicant has not satisfied the first stage of the *Babos* test, the consideration of whether alternate remedies to a stay of proceedings are available is not required. Further it is understood that submissions regarding remedy and the second stage of the *Babos* analysis, if necessary, will be addressed a future hearing once the Court has heard all four branches of the Applicant's abuse.

359. In respect of the third stage of *Babos*, concerning balancing, again, the AGC's position is that the conduct alleged by the Applicant cannot satisfy the first stage of the *Babos* analysis. As such, the Court need not engage in a balancing exercise between whether the proceedings should continue or be stayed. However, for completeness, a brief consideration of key factors relevant to the third stage balancing exercise of *Babos* is set out below.

360. When the residual category of abuse is engaged, the third stage of the *Babos* test must always be considered. Under the third stage of the *Babos* test, the Applicant must satisfy the Court that the interests served by a stay, such as denouncing misconduct and preserving the integrity of the justice system, outweigh the interest that society has in having a final decision on the merits. In determining whether to stay the proceedings or continue to a hearing in the face of impugned conduct, courts may consider factors such as: as the nature and seriousness of the impugned conduct, whether the conduct is isolated or reflects a systemic and ongoing problem, the circumstances of the accused, the charges he or she faces, and the interests of society in having the charges disposed of on the merits.[579]

361. The evidence adduced by the Applicant does not establish misconduct, much less conduct that is sufficiently egregious to tip the balancing of the relevant interests towards a stay. As stated by Moldaver J. in *Babos*, "Undoubtedly, the balancing of societal interests that must take place and the "clearest of cases" threshold presents an accused who seeks a stay under the residual category with an onerous burden."[580]

362. Considered in light of this high standard, any prejudice arising in these circumstances cannot outweigh the interests in proceeding with the Applicant's extradition hearing. Society has a significant interest in ensuring that an individual sought for extradition is surrendered when

[579] *Babos*, at para. 41.
[580] *Babos*, at para. 44.

statutory requirements have been met so as not to allow international borders to frustrate the prosecution of criminal activity.

363. The nature of the charges the Applicant faces in the Requesting State is an important factor to consider in the balancing process as outlined by the Supreme Court in *Babos*. The allegations against the Applicant are serious and her alleged fraudulent conduct put HSBC at risk of substantial economic loss. Society has an interest in the prosecution of the Applicant's alleged offences. As described by Moldaver J., ultimately the question for this Court will be whether it can be said that in these circumstances the "affront to fair play and decency is disproportionate to the societal interest in the effective prosecution of criminal cases that a stay of proceedings will be warranted." Only allegations of abusive conduct of the most egregious nature are sufficient to justify the drastic remedy of a stay of proceedings and deny Canada's treaty partner the opportunity to bring to justice those accused of serious crimes.

D. Conclusion

364. The Applicant has not demonstrated that foreign authorities engaged in improper conduct. The circumstances of this case do not warrant the remarkable and rare step of staying the proceedings.

XII. ORDER SOUGHT

365. The Application for a stay of proceedings be dismissed.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

Dated at the City of Vancouver, Province of British Columbia, this 3rd day of March 2021.

[redacted] [redacted] [redacted]

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