Federal Court Cour fédérale

Date: 20211229

Docket: T-1170-19

Citation: 2021 FC 1479

Ottawa, Ontario, December 29, 2021

PRESENT: The Honourable Mr. Justice Pamel

BETWEEN:

SHIN IMAI

Applicant

and

HER MAJESTY THE QUEEN IN THE RIGHT OF CANADA as represented by the MINISTER OF FOREIGN AFFAIRS

Respondent

PUBLIC JUDGMENT AND REASONS

(Confidential Judgment and Reasons issued December 29, 2021)

I. Overview

[1] The Marlin Mine, a gold mine in Guatemala owned at the time by a subsidiary of the Canadian mining company Goldcorp Inc. [Goldcorp], ceased operating in May 2017, but not before attracting international condemnation for purported environmental and humanitarian failures. In fact, in May 2010, seven years prior to the mine's closure, the Inter-American

Commission on Human Rights [Commission], an institution of the Organization of American States [OAS], of which Canada is a member, issued a precautionary measures decision against the Government of Guatemala following the filing of a human rights petition in 2007 from the Communities of the Sipakepense and Mam Mayan People of the Municipalities of Sipacapa and San Miguel Ixtahuacán, an organization supported by the Indigenous communities in the vicinity of the mine; the precautionary measures decision included a request that the Government of Guatemala suspend operations at the Marlin Mine pending a full investigation into the purported environmental and human rights abuses and the mine's impact on the Indigenous Mayan communities living nearby.

[2] The Government of Guatemala issued its official response to the Commission's precautionary measures decision, stating that the claims of environmental contamination were unsubstantiated but that it would initiate its own investigation into the allegations. Canada did not take part in the Commission's decision and was not a party to the proceedings before the Commission; the matter involved the Commission and the Government of Guatemala, and neither Canada nor Goldcorp had any standing before the Commission in this matter. However, throughout June 2010, and following Goldcorp's request for support, the Canadian government and embassy staff in Guatemala engaged with the Guatemalan government, the Commission and Goldcorp in relation to the Marlin Mine situation. The Applicant, Professor Shin Imai, argued before me that what we then saw was not the Department of Foreign Affairs, Trade and Development, today Global Affairs Canada [Global Affairs] acting in accordance with its stated policy when advised of a Canadian company possibly committing human and environmental abuses abroad, i.e., to investigate the situation and use its offices abroad so as to open a dialogue

amongst the interested parties with a view to seeking a constructive, results-oriented remedy in the event that the concerns of abuses are validated, but rather Global Affairs coming to Goldcorp's aid through its intervention with the Commission and the Government of Guatemala in a strategic effort to promote Goldcorp's position.

[3] In the end, mining operations were not suspended, and on December 7, 2011, the Commission modified its decision by lifting the request for the Government of Guatemala to suspend operations at the Marlin Mine but continued to request that the Government of Guatemala ensure that the 18 Mayan communities affected by the mine have access to potable drinking water as well as water for irrigation purposes.

[4] Since the mine's closure in May 2017, Goldcorp, and later Newmont Mining Corporation [Newmont Corporation], which purchased the mine in April 2019, have been undertaking reclamation activities at the mine.

[5] In November 2014, Professor Imai sought disclosure of records from Global Affairs by way of a request [ATIA request] pursuant to the *Access to Information Act*, RSC 1985, c A-1 [Act], relating to the Canadian government's response to the Commission's 2010 precautionary measures decision and its role in the Commission's reversal of that decision, in particular seeking communications between Global Affairs, Goldcorp, the OAS, the Commission, and the Guatemalan government.

[6] In response to the ATIA request, Global Affairs disclosed several hundred pages of documents to Professor Imai, eventually prompting a narrower request dealing specifically with communications between Global Affairs, Goldcorp and the Commission from the date that the Commission requested Guatemala to suspend operations at the Marlin Mine to the date that the Commission reversed its decision.

[7] Over time, Global Affairs disclosed additional documents in answer to the ATIA request, culminating on February 28, 2018, when Global Affairs provided Professor Imai with its fifth and final release disclosure package [February 2018 Disclosure] containing 36 pages of documents of which 20 pages included redactions in reliance upon subsections 15(1) and 19(1) as well as paragraphs 13(1)(a), 13(1)(b), 20(1)(b), 20(1)(c), 20(1)(d), 21(1)(a) and 21(1)(b) of the Act. Additional information was released to Professor Imai by Global Affairs on November 26, 2020, and reliance upon paragraph 20(1)(d) no longer became relevant, however, the present application is limited to the redactions on the 20 pages contained in the February 2018 Disclosure.

[8] In its final report of findings dated June 5, 2019, pursuant to subsection 37(2) of the Act [OIC report], the Office of the Information Commissioner [OIC] concluded that Global Affairs had applied the exemptions pursuant to subsections 15(1) and 19(1) as well as paragraphs 20(1)(b), 20(1)(c), 21(1)(a) and 21(1)(b) of the Act in accordance with the Act and that where such application was discretionary, Global Affairs had reasonably exercised its discretion. In addition, as concurrent exemptions were applied pursuant to paragraphs 13(1)(a), 13(1)(b) and 20(1)(d) of the Act to some of the same information, the OIC did not find it

necessary to consider whether the refusal to disclose the same information could also be justified pursuant to these additional paragraphs of the Act.

[9] On July 18, 2019, Professor Imai commenced the present application against Her Majesty the Queen, represented here by the Minister of Foreign Affairs [Minister] pursuant to section 41 of the Act, seeking judicial review of the February 2018 Disclosure and challenging the availability and, where applicable, the reasonability of the exercise of Global Affairs' discretion as regards its refusal to disclose information within the February 2018 Disclosure; in particular, Professor Imai claims that Global Affairs has not met its burden of proof and, to the extent that the subsection 15(1) and paragraphs 21(1)(a) and 21(1)(b) exemptions apply, that Global Affairs failed to exercise its discretion to disclose the records in a reasonable fashion. Professor Imai also submits that Global Affairs' handling of his request was fraught with errors, unexplained actions, and inconsistencies. Ultimately, Professor Imai is seeking disclosure of an unredacted copy of the records pursuant to sections 49 and 50 of the Act.

[10] On June 30, 2020, this Court issued a confidentiality order granting Global Affairs' request to file a confidential version of its supporting affidavit. The Court also ordered Global Affairs to provide Professor Imai with a revised annotated release package to particularize the exemptions relied upon in the February 2018 Disclosure so as to clarify the exemptions Global Affairs had applied to the redacted information, in particular where concurrent exemptions were applied to the same information, and to correct errors in one of the exhibits.

[11] In short, I am satisfied that Global Affairs properly relied upon the particular exemptions of the Act and reasonably exercised its discretion where required in the application of such exemptions. Accordingly, and for the reasons that follow, I am dismissing the present application for judicial review.

II. Issues

[12] According to Professor Imai, disclosure would not only provide public accountability regarding Global Affairs' actions with respect to the Commission's decision—which is in the public interest—but would also advance the public debate on how Canada ensures that Canadian companies comply with human rights laws and environmental standards when operating abroad. In addition, Professor Imai argues that underlying the more narrow issues of this case, there is a compelling Indigenous rights component, a case study of how the Canadian government balances Indigenous rights as against corporate interests; in December 2020, the federal government tabled legislation to implement the United Nations Declaration on the Rights of Indigenous Peoples [UNDRIP] so as to make all its legislation consistent with that policy, and Professor Imai argues that it would be very difficult to make meaningful changes to policy if individuals cannot get access to information on how Canada proceeds to respect the rights of Indigenous peoples abroad. In this case, disclosure of information, he says, will contribute to a more meaningful debate on what changes Canada must bring to its legislation in light of the UNDRIP, and in particular as regards the Act, and what changes Canada must bring in terms of foreign diplomatic policy or legislative controls when considering public policy factors militating in favour of disclosure of information under the Act.

[13] The 20 relevant pages of the February 2018 Disclosure, which include two briefing notes and a series of internal emails, are summarized in the table below, along with the relevant disclosure page numbers and the exemptions of the Act claimed by Global Affairs. The Minister asks the Court to keep in mind that these documents represent what remains contested from a series of multiple disclosures involving a substantial amount of information and are but a snapshot in time in the context of some of the broader public policy issues that have been raised by Professor Imai.

Doc	From/To	Date in 2010	Page	Exemption applied	Text redacted (from/to)
1	Briefing note	June	29	15(1)/20(1)(c)	Mine/ Background
2a	Briefing note	June	26	19	IACHR/ Naturally
2b			26	19	with/However
2c			26	13(1)(a) and (b)/15(1)	Commission/ who
2d			26	13(1)(a) and (b)/15(1)	Information/Our
2e			26	15(1)	Guatemala/The
2f			26	15(1)/20(1)(c)	itself/the end
3a	Marder/ Patterson	June 14 – 4:45 pm	27/331	15(1)/20(1)(c)	Canada/High
3b			27/331	15(1)/20(1)(c)	MINT/Anything
3c			27/331	15(1)/21(1)(a)	Tuesday/*the end*
4a	Patterson/ Marder	June 14 – 6:12 pm	330	15(1)/20(1)(c)	Canada/Jeff
4b			330	13(1)(b)/19	with/of

4c			330	13(1)(a) and (b)/15(1)/20 (1)(c)	information/sect *sect 19*
4d			330	19	*sect 19*/ indicated
4e			330	13(1)(a) and (b)/15(1)	case/Given
4f			330	15(1)	IACHR/Please
5a	Marder/ Patterson	June 14 – 8:12 pm	330	15(1)/20(1)(c)	Canada/Thanks
5b			330	15(1)	helpful/At
5c			330	15(1)	IACHR/Mil
6a	Moffett/ Culham	Oct 13 – 10:19 am	1/5/10	13(1)(a) and (b)/15(1)	Guatemala/à
6b			2/5/10/ 11	20(1)(c)/21(1)(b)	effet (et)/Votre
7a	Culham/ Moffett	Oct 13 – 3:13 pm	4/9	15(1)/21(1)(b)	Corp./*over 2 lines*
7b			4/9/10	15(1)/21(1)(a)	*over 3 lines*
7c			4/10	15(1)	*Over 3 lines*/That
7d			4/10	15(1)	party/to
8a	Moffett/ Culham	Oct 13 – 6:02 pm	3/8	15(1)/20(1)(c)	yesterday/*over 3 lines*
8b			3/8/9	15(1)/21(1)(b)	*over 7 lines*
8c			3/9	15(1)/20(1)(c)	*over 3 lines*/I
9a	Labrom/ Janoff	Oct 13 – 7:26 pm	7/8	15(1)/21(1)(a)	application/*over 7 lines*
9b			7/8	15(1)	*over 3 lines/*Regards

10	Labrom/ Janoff	Oct 14 – 6:53 am	7	15(1)/20(1)(b)	oversight/*the end*
11a	Moffett/ Labrom	Oct 14 – 7:46 am	6	15(1)/21(1)(b)	cas/Cependant
11b			6	15(1)/21(1)(b)	l'IACHR/Leur
11c			7	15(1)	soulevés/*over 10 lines*
11d			7	15(1)/20(1)(c)	*over 3 lines*
11e			7	15(1)	*over 7 lines*/to end
12a	Moffett/ Janoff	Oct 26 – 9:49 am	22	15(1)/20(1)(c)/21(1)(b)	(official)/Two
12b			22	19	*N\A – already released*
12c			22/23	15(1)/20(1)(c)	non-official/Next
13a	Janoff/ Culham	Nov 15 – 12:53 pm	24	15(1)/20(1)(c)	Oct 25/6 Amb.
13b			25	15(1)/20(1)(c)	challenge/For
13c			25	15(1)/20(1)(c)	systems;/he
13d			25	15(1)/20(1)(c)	Representative/ *the end*

[14] The table has been prepared using the colour-coded revised annotated release package provided by the Minister. Within the 20 pages, there are 13 individual documents, some of which are found in duplicate within the 20 pages and some of which cross over into multiple pages; as mentioned earlier, many of the 13 documents contain concurrent exemptions of the Act applied to the same redactions. Consequently, I have included in the table the words that appear immediately before and after each redacted section so that they can easily be identified.

[15] I should also mention that the issues regarding the application of subsection 19(1) of the Act have been resolved between the parties. In any event, a simple review of the information identified in documents 2(a) and (b), 4(b) and (d) shows that it consists of personal information falling under that subsection. As for document 12(b), the redaction was in error, and the two words initially redacted were disclosed to Professor Imai. Although the table was prepared on the basis of the revised annotated release package, I have taken note of the clerical errors listed in the affidavit of Ms. Lafave filed in support of the Minister's position.

[16] The issues before me in this application are as follows:

(a) What is the standard of review for each of the exemptions relied upon by the Minister?

(b) Did the Minister properly apply the exemptions to the February 2018 Disclosure in accordance with the Act and where discretionary, did the Minister reasonably exercise such discretion?

III. The legislative framework and overarching principles

[17] I have set out the relevant legislative provisions in the annex to my decision. I should also mention that Bill C-58, *An Act to amend the Access to Information Act and the Privacy Act and to make consequential amendments to other Acts*, received royal assent and came into force on June 21, 2019, approximately four weeks prior to the filing of the present application on July 18, 2019. No issue was raised by the parties as to the effect of any of the amendments to the Act, and I am to review the matter in light of the most recent provisions of the Act as at the time of the filing of the present application.

[18] Our courts have recognized that the Act enshrines “an essential component of democracy: the public’s right to government information”. The public’s right to information is essential for public scrutiny of government activities as well as full and meaningful participation in public debate (*Bronskill v Canada (Canadian Heritage)*, 2011 FC 983, [2013] 2 FCR 563 at para 4 [*Bronskill*]). For these reasons, the Supreme Court has recognized the Act’s quasi-constitutional status (*Canada (Information Commissioner) v Canada (Minister of National Defence)*, 2011 SCC 25 [*Commissioner v Defence*]).

[19] The Act provides the public with a right of access to information contained in records under the control of a government institution (subsection 4(1) of the Act). Even though government institutions have the ability to refuse to disclose information subject to the limited and specific exemptions set out in sections 13 to 26 of the Act, the Act’s public importance means that those exemptions must be construed “narrowly” (*Do-Ky v Canada (Foreign Affairs and International Trade)*, [1997] 2 FC 907 at page 909, 1997 CanLII 16205 [*Do-Ky FC*]; *Canada (Information Commissioner) v Canada (Prime Minister)*, 2019 FCA 95 at para 37 [*OIC v PM*]; *Lavigne v Canada (Office of the Commissioner of Official Languages)*, 2002 SCC 53 at paras 30 and 55).

[20] Where multiple interpretations are possible, the Court must “choose the one that infringes on the public’s right to access the least” (*Rubin v Canada (Minister of Transport)*, [1998] 2 FC 430 (CA) at para 23). The right to government information is mandatory for both public scrutiny of government activities as well as the full and meaningful participation in public debate and discussion (*Bronskill* at para 4).

[21] When an applicant seeks judicial review of a refusal to disclose information, the Court has the benefit of the OIC's report of findings (sections 36(1) and 37 of the Act). The OIC's opinion "carries much weight in light of the expertise possessed by the Commissioner", but it is not binding upon the Court (*Blank v Canada (Minister of Justice)*, 2009 FC 1221 at para 41).

[22] As this is an application under subsection 41(1) of the Act, the government institution generally bears the burden of establishing that the information was properly exempted from disclosure (subsection 48(1) of the Act; *OIC v PM* at para 37). If the Court determines that the exercise of discretion is at issue, the determination of which party bears the onus of establishing that the discretion was exercised reasonably depends on the circumstances (*Attaran v Canada (Minister of Foreign Affairs)*, 2011 FCA 182 at para 20 [*Attaran*]), however when dealing with a confidential record upon which an applicant does not have access, the burden is on the government institution to establish that the discretion was exercised in a reasonable manner (*Attaran* at para 27; *Bronskill* at para 124).

IV. Assertions of overarching errors in Global Affairs' disclosure

[23] As a preliminary matter, Professor Imai submits that Global Affairs' handling of his request has been fraught with serious record-keeping deficiencies that would undermine Global Affairs' ability to justify its refusal to disclose information and erode the basis for the exemptions it claims. As an example, Professor Imai argues that those deficiencies prevented Global Affairs from detecting that some of the information redacted in the February 2018 Disclosure had in fact already been disclosed to Professor Imai in previous disclosure packages.

[24] The fact that record-keeping was less than optimal was all but admitted by Global Affairs. In her affidavit, Ms. Lafave, Team Leader of the Access to Information and Privacy Protection Division of Global Affairs [ATIP Division], advised that around the time of receipt of Professor Imai's ATIA request, changes were made to ATIP Division's information management practices and, "[a]s a result, and due to the passage of time, document retention issues, and the fact that some ATIP Analysts who had worked on this file are no longer with [Global Affairs], some information is unavailable with respect to this file and other related files". In her cross-examination, Ms. Lafave confirmed that information is not only "unavailable" but in reality lost because of internal record-keeping:

> In putting together my affidavit, I found that some documents had not been correctly saved in the system. So information that had been worked on by previous analysts had not been correctly saved in our system. Nor had previous release packages that were provided to Mr. Imai over the course of the investigation.

[25] In the circumstances of this case, I understand that much of the evidence otherwise necessary for the record has been lost, including missing exemption analysis worksheets, as they were not properly saved, and that many of the original ATIP analysts are no longer with Global Affairs so there is no access to much of the reasoning process as it related to the exercise of discretion with respect to the application of the exemptions to disclosure under the Act. Professor Imai does not suggest that the overarching deficiency issue is enough in itself to overturn Global Affairs' refusal to disclose the redacted information that is the subject of the present application, but only that it casts doubt on the supposed evidence that Global Affairs exercised discretion when required under the Act.

[26] For my part, other than adding colour to the debate, the fact that there existed deficiencies in record-keeping at Global Affairs may be less relevant to the issues before me. Either Global Affairs' decision to redact information was justified or it was not. It is not for the Court to make recommendations on how to improve record-keeping by government agencies. The burden is on Global Affairs to justify its disclosure decisions, and if there are deficiencies in record management systems which, in the end, impede an agency's ability to justify its disclosure decisions, it will pay the price in possibly having its decisions to exempt information from disclosure set aside.

V. Analysis

[27] I should begin by saying that although I certainly appreciate Professor Imai's perspective of the varying nuances of policy implications underlying the present application, at its core, this application is about whether the ATIP Division properly applied the exemptions under the Act in responding to Professor Imai's narrowly worded and quite specific ATIA request. Also, I need not deal with the information identified in the table as documents 2(a) and (b), 4(b) and (d) and 12(b) because, as mentioned earlier, they relate to the exemption under subsection 19(1), which has already been resolved.

[28] Consequently, I will begin my review with Global Affairs' reliance on subsection 15(1) of the Act; this exemption has been applied to nearly all of the redacted information with the exception of the information identified in the table above as documents 2(a) and (b), 4(b) and (d), 6(b) and 12(b).

A. *Subsection 15(1): Information injurious to the conduct of international affairs*

[29] In addition to submissions made by the Minister in open court, there being no objection on the part of Professor Imai, I also heard submissions from the Minister *in camera* in respect of her *ex parte* representations relating to Global Affairs' refusal to disclose the redacted information by reason of subsections 13(1) and 15(1) of the Act (paragraph 52(2)(a) of the Act; *Kitson v Canada (Minister of National Defence)*, 2009 FC 1000, [2010] 3 FCR 440; *Attaran* at paras 47 to 49).

[30] Subsection 15(1) provides as follows:

International affairs and defence	**Affaires internationales et défense**
15(1) The head of a government institution may refuse to disclose any record requested under this Part that contains information the disclosure of which could reasonably be expected to be injurious to the conduct of international affairs, the defence of Canada or any state allied or associated with Canada or the detection, prevention or suppression of subversive or hostile activities, including, without restricting the generality of the foregoing, any such information	15(1) Le responsable d'une institution fédérale peut refuser la communication de documents contenant des renseignements dont la divulgation risquerait vraisemblablement de porter préjudice à la conduite des affaires internationales, à la défense du Canada ou d'États alliés ou associés avec le Canada ou à la détection, à la prévention ou à la répression d'activités hostiles ou subversives, notamment :
. . .	[…]
(e) obtained or prepared for the purpose of intelligence respecting foreign states,	e) des éléments d'information recueillis ou préparés aux fins du renseignement relatif aux

international organizations of states or citizens of foreign states used by the Government of Canada in the process of deliberation and consultation or in the conduct of international affairs;	États étrangers, aux organisations internationales d'États ou aux citoyens étrangers et utilisés par le gouvernement du Canada dans le cadre de délibérations ou consultations ou dans la conduite des affaires internationales;
. . .	[…]
(h) that constitutes diplomatic correspondence exchanged with foreign states or international organizations of states or official correspondence exchanged with Canadian diplomatic missions or consular posts abroad;	h) des renseignements contenus dans la correspondance diplomatique échangée avec des États étrangers ou des organisations internationales d'États, ou dans la correspondance officielle échangée avec des missions diplomatiques ou des postes consulaires canadiens;
. . .	[…]
[Emphasis added.]	[Je souligne.]

[31] Subsection 15(1) of the Act is a discretionary, injury-based exemption, and it involves a two-step process, with the standard of review regarding both steps being one of reasonableness (*3430901 Canada Inc. v Canada (Minister of Industry)*, 2001 FCA 254 at para 45 [*Telezone*]; *Bronskill* at paras 63, 69 and 76; *Attaran* at paras 17 and 18). As stated by Madam Justice Dawson at paragraph 14 of the Federal Court of Appeal decision in *Attaran*:

> . . . The subsection provides that the head of a government institution "may refuse" to disclose any record. This requires a two-step exercise. The first step the head must take is to determine whether disclosure could reasonably be expected to be injurious to the conduct of international affairs. If the determination is that it may, the second step is to decide whether having regard to the

> significance of the risk and other relevant factors, disclosure should be made or refused. . . .

[32] Subsection 15(1) is subject to the remedy under section 50 of the Act, which provides:

Order of Court where reasonable grounds of injury not found	**Ordonnance de la Cour dans les cas où le préjudice n'est pas démontré**
50 Where the head of a government institution refuses to disclose a record requested under this Part or a part thereof on the basis of section 14 or 15 or paragraph 16(1)(c) or (d) or 18(d), the Court shall, if it determines that the head of the institution did not have reasonable grounds on which to refuse to disclose the record or part thereof, order the head of the institution to disclose the record or part thereof, subject to such conditions as the Court deems appropriate, to the person who requested access to the record, or shall make such other order as the Court deems appropriate.	50 Dans les cas où le refus de communication totale ou partielle du document s'appuyait sur les articles 14 ou 15 ou sur les alinéas 16(1)c) ou d) ou 18d), la Cour, si elle conclut que le refus n'était pas fondé sur des motifs raisonnables, ordonne, aux conditions qu'elle juge indiquées, au responsable de l'institution fédérale dont relève le document en litige d'en donner communication totale ou partielle à la personne qui avait fait la demande; la Cour rend une autre ordonnance si elle l'estime indiqué.
[Emphasis added.]	[Je souligne.]

[33] Under section 50 of the Act, the reviewing Court must determine whether the government institution had "reasonable grounds on which to refuse" disclosure of the information. This review is decided on a *de novo* basis; as an integral part of the *de novo* process, the Court can consider evidence that was not before Global Affairs when it issued the February 2018 Disclosure.

[34] As part of the first step inherent in subsection 15(1) of the Act, the Minister must show that there is a reasonable expectation of probable harm to Canada's international affairs if the information is disclosed (*Merck Frosst Canada Ltd v Canada (Health)*, 2012 SCC 3, [2012] 1 SCR 23 at paras 192 to 196 [*Merck Frosst*]; *Bronskill* at paras 70), with the burden resting with the Minister to so establish with evidence of a "clear and direct connection between the disclosure of specific information and the injury that is alleged"; the injury cannot be speculative (*Merck Frosst* at paras 197; *Bronskill* at para 126; *Do-Ky FC* at p 923).

[35] As regards the standard of proof, Professor Imai suggest that there is a "heavy onus" upon the Minister to establish a reasonable expectation of probable harm (*Bronskill* at para 125; *Criminal Trial Lawyers' Association v Canada (Justice)*, 2020 FC 1146 at para 47). I do not agree that the notions of a heavy burden or heavy onus often addressed in the case law relate to the evidentiary standard that must be met by the party seeking to establish a reasonable expectation of probable harm. The Supreme Court in *Merck Frosst* addressed the history of the notion of "heavy burden" in relation to the exemption to disclosure under subsection 20(1) of the Act (*Merck Frosst* at paras 93 and 94), but made clear that when addressing the notion of a reasonable expectation of probable harm, a party seeking to invoke the exemption need only show that the risk of harm is considerably above a mere possibility, and need not establish on the balance of probabilities that the harm will in fact occur (*Merck Frosst* at paras 196 and 199). In addition, in *Canada (Information Commissioner) v Canada (Prime Minister)*, [1993] 1 FC 427, 1992 CanLII 2414, it is clear that when referring to the "heavy onus", the Court is not addressing the standard of proof but rather the fact that where, as is here, the process of disclosure relies on evidence, the notion of a "heavy onus" relates to the fact that the party seeking to maintain

confidentiality must do so in a formal manner through clear and direct evidence (p 429). Consequently, the standard of proof for the establishment of reasonable expectation of probable harm remains, as set out in *Merck Frosst*, above a mere possibility but less than on a balance of probabilities, that is, whether a reasonable person would expect harm to occur as a result of disclosure.

[36] If I am to find that there is a reasonable expectation of probable harm to Canada's conduct of international affairs in the event of disclosure, the second step is to decide whether having regard to the significance of the risk and other relevant factors, disclosure should nonetheless be made or refused—whether the public interest in disclosure outweighs the harm (*Attaran* at para 14). In assessing the exercise of discretion conferred in subsection 15(1) in respect of this second step, the Court must first examine the totality of the evidence to determine whether, on a balance of probabilities, the government institution understood that there existed a discretion to disclose or to refuse to disclose, evidence of which may be express or inferred (*Attaran* at paras 30 to 36).

[37] If the Court is satisfied that the government institution turned its mind to the exercise of discretion, the Court must then determine whether the government institution exercised its discretion reasonably by balancing all the relevant public and private interests in disclosure against the public interest in non-disclosure (*Attaran* at para 18; *Bronskill* at paras 194 and 216). In *Ontario (Public Safety and Security) v Criminal Lawyers' Association*, 2010 SCC 23, [2010] 1 SCR 815 [*Criminal Lawyers' Assn.*], the Supreme Court framed this stage of the analysis as a

weighing of the competing interests at stake to determine what is in the public interest. The Supreme Court stated at paragraph 48:

> . . . the second step is to decide whether, having regard to the significance of that risk and other relevant interests, disclosure should be made or refused. These determinations necessarily involve consideration of the public interest in open government, public debate and the proper functioning of government institutions . . . the head must weigh the public and private interests in disclosure and non-disclosure, and exercise his or her discretion accordingly.

[38] In refusing disclosure, it is not sufficient for government institutions to recite boilerplate declarations that discretion was exercised and that all relevant factors were considered, but it is also not necessary for a government institution to provide a detailed analysis of each and every factor that has an impact on the decision or how they were weighed against each other (*OIC v PM* at paras 82–90).

[39] In addition, as regards discretionary decisions, the Court is to apply deference; the Court "will not lightly interfere with discretionary decisions such as the ones at issue herein" (*OIC v PM* at para 82). However, as stated in *Bronskill* at paragraph 82, "some deference has to be given, but not to the point of neutralizing the role of the judiciary as provided for by the legislation."

(1) There exists a reasonable expectation of probable harm to Canada's international relations if the redacted information is released

[40] As stated, Global Affairs applied the exemption under subsection 15(1) of the Act to all of the redacted information except what has been identified in the table as documents 2(a) and (b), 4(b) and (d), 6(b) and 12(b).

[41] As a preliminary matter, Professor Imai points to a paragraph on one of the pages of the February 2018 Disclosure that had, until a week before the hearing, been exempted from disclosure under subsection 15(1) of the Act, and only just recently released to him as part of the revised annotated release package. This, says Professor Imai, puts into serious doubt the reliability of the decision making process regarding the remaining subsection 15(1) exemptions. For my part, and although I am invited by Professor Imai to maintain a healthy dose of skepticism with regard to the disclosure decisions of Global Affairs, as I indicated to his counsel, the Court's role is to assess what has been redacted, and not what has not been.

[42] There is no checklist of items that go into the determination of whether Global Affairs could reasonably expect that harm would result with the disclosure of the information being sought by Professor Imai. At the trial level in *Do-Ky FC*, in reference to the refusal to disclose diplomatic notes pursuant to section 15 of the Act, Mr. Justice Nadon, prior to his appointment to the Federal Court of Appeal, summarized the perspective that the Court would be considering at pages 923–924:

> While no general rules as to the sufficiency of evidence in a section 14 [*sic*] case can be laid down, what the Court is looking for is support for the honestly held but perhaps subjective opinions of the Government witnesses based on general references to the record. Descriptions of possible harm, even in substantial detail, are insufficient in themselves. At the least, there must be a clear and direct linkage between the disclosure of specific information and the harm alleged. The Court must be given an explanation of

> how or why the harm alleged would result from disclosure of specific information. If it is self-evident as to how and why harm would result from disclosure, little explanation need be given. Where inferences must be drawn, or it is not clear, more explanation would be required. The more specific and substantiated the evidence, the stronger the case for confidentiality. The more general the evidence, the more difficult it would be for a court to be satisfied as to the linkage between disclosure of particular documents and the harm alleged.

[43] Professor Imai submits that what Global Affairs appears to be doing, at least from the public record, is using subsection 15(1) to shield Canada from embarrassment and that the only conceivable harm disclosing the records could cause is harm to Canada's international reputation if the records show that it behaved contrary to its policies and public statements; subsection 15(1) cannot be used, argues Professor Imai, as a tool to hide misconduct or embarrassing government behaviour and to do so is a reviewable error (*Bronskill* at para 131; *Canada (Attorney General) v Commission of Inquiry into the Actions of Canadian Officials in relation to Maher Arar*, 2007 FC 766 at para 58). The Minister submits that Professor Imai's assertion that Global Affairs' use of subsection 15(1) is simply an attempt to shield the government from embarrassment is but a bald allegation with no evidence to this effect.

[44] The Minister submits that the evidence clearly demonstrates a reasonable expectation that the disclosure of the information would result in probable harm to Canada's credibility with the Government of Guatemala and other foreign nations, to the integrity and credibility of the Commission, and to Canada's relations with other international organizations. Global Affairs argues that any reasonable person would expect this harm to result from the release of the redacted information (*Do-Ky FC* at p 923). In addition, the Minister argues that, contrary to Professor Imai's assertions, there exists evidence, albeit confidential, of a "clear and direct

connection" and adds that evidence of harm is self-evident from the rationale Global Affairs considered and the redacted information itself, which are unavailable to Professor Imai because they are confidential. In any event, Global Affairs submits that Goldcorp's evolving corporate status is irrelevant to the issue of whether the information is protected by subsection 15(1) of the Act.

[45] I appreciate that it is often difficult to assess the linkage between the evidence and the purported harm from public versions of affidavits. Here, the public version of Ms. Lafave's affidavit sets out the process followed by Global Affairs to determine the application of subsection 15(1) of the Act, the determinations made with respect to the reasonable expectation of probable harm, and the considerations and determinations made in its exercise of discretion to apply subsection 15(1) in order to exempt the information. Admittedly, the assertions are broad and set out in general terms, but as stated by Ms. Lafave during her cross-examination, the direct links may be found in the confidential portions of her information.

[46] Professor Imai argues that it is not enough to say that the information constitutes "diplomatic correspondence" for the exemption under subsection 15(1) to apply as there is no class exemption for diplomatic correspondence or notes and "no presumption that such notes contain information the disclosure of which could reasonably be expected to be injurious to the conduct of international relations" (*Do-Ky v Canada (Minister of Foreign Affairs and International Trade)*, 1999 CanLII 8083, 241 NR 308 (FCA) at para 8 [*Do-Ky FCA*]).

[47] I agree, however, the Minister is not proposing that the exempted information constitutes diplomatic correspondence. Clearly it does not as the exempted information is contained only in briefing notes and internal emails. I accept that in support of her position, the Minister cited in her written materials a passage from the trial division decision in *Do-Ky FC*, a case which involved the issue of whether the disclosure of a diplomatic note could be exempted under subsection 15(1) of the Act, however, the Minister's position is that Global Affairs applied the subsection 15(1) exemption to protect information, the disclosure of which would compromise Canada's diplomatic relationship with the Government of Guatemala and therefore be harmful to international affairs, and not that the exempted information constituted diplomatic correspondence. Rather, I do take the Federal Court of Appeal decision in *Do-Ky FCA* to stand for the proposition that harm from disclosure may be self-evident from the nature of the information itself but that in the end, it comes down to the evidence.

[48] As regards any claim that the redacted information may contain frank or critical opinion or statements the disclosure of which may reasonably jeopardize Canada's relationship with the Government of Guatemala, the OIC or the Commission, Professor Imai argues that the Minister is trying to draw an analogy with the situation described in the Federal Court decision in *Attaran v Canada (Foreign Affairs)*, 2009 FC 339 [*Attaran FC*], where the Court stated at paragraph 48:

> [48] The Court cannot ignore, discount or substitute the Court's opinion for the clear evidence and opinion of a commander in the Canadian forces and a senior official at the Department of Foreign Affairs and International Trade that public disclosure of the redactions in these documents can reasonably be expected to be injurious to the conduct of Canada's international affairs with Afghanistan. The fact that other countries and the Afghanistan Independent Human Rights Commission have repeatedly reported on torture in Afghanistan, that does not diminish the likelihood of serious negative criticism of Afghanistan by Canada in an official

> report could reasonably be expected to be injurious to Canada's relationship with Afghan officials, and that these relationships are necessary for Canada to conduct its affairs in Afghanistan.
>
> [Emphasis added.]

[49] Professor Imai focuses on the last sentence of the citation and argues that as the situation in Afghanistan at the time was an active military operation, it would reasonably be expected that any criticism of that country under the circumstances would be injurious to Canada's relationship and its ability to conduct its affairs with Afghanistan. Professor Imai adds that the statement by the Court is not to be taken as support for the proposition that any frank opinion of a country or international organization that Canada has relations with automatically creates a reasonable expectation of probable harm to Canada's international relations if details of such frank or critical opinions are made public.

[50] I agree, but that is not what the Minister is arguing; the Minister does not argue that the statement in *Attaran FC* stands for such a principle, for to do so would run afoul of the proposition set out in *Bronskill* that the Act's exemptions are not to be used to prevent embarrassment or to hide illegal acts (*Bronskill* at para 131). The fact that the frank or critical opinion may be embarrassing cannot, by itself, validate the use of the exemptions to disclosure under the Act. However, I do not agree with Professor Imai that for there to exist a reasonable expectation of probable harm to Canada's international relations from the disclosure of frank and critical opinions, the circumstances surrounding the expression of such opinions must be tantamount to a heightened level of engagement as between Canada and the state or international entity that the opinions are directed at, a situation similar to that which exists in active military operations; the prospect of harm to Canada's international relations does not necessarily have a

temporal or situational component and may need to be evaluated in the context of Canada's ongoing, possibly emerging, involvement and long-term relationship with the state or international entity in question.

[51] Having reviewed the redacted portions of the disclosure material and having considered the confidential statements found in Ms. Lafave's affidavit and the *in camera, ex parte* representations of the Minister, I am satisfied that there exists a reasonable expectation of probable harm to Canada's international relations if the redacted information is released.

[52] The affidavit of Ms. Lafave confirms internal consultations during the processing of the ATIA request between the ATIP analyst and the Latin America and Caribbean Bureau of Global Affairs [NLD branch] about how more information could be released in response to the ATIA request. Ms. Lafave also confirmed, during her cross-examination, that subject matter experts were consulted. The NLD branch indicated that it would not support the release of the relevant information as the information related to confidential discussions the NLD branch had had with relevant counterparts, including the OAS, the Commission, governments and private sector counterparts. I would tend to think that any objections to disclosure by the NLD branch, or recommendations by subject matter experts which tended to support the decision not to disclose, would relate specifically to the issue of harm to Canada's international relations if the redacted information is released.

[53] In any event, and after reviewing the redacted information and confidential information, and hearing the Minister *ex parte* and *in camera*, it is evident to me that the evidence provides a

clear and direct link, beyond speculation, between the information and the prospective harm; in my view, there is more than a mere possibility that the release of such information will lead to the eroding of confidence in Canada's ability to properly manage sensitive information and information provided to Canada on a confidential basis by or in relation to states and international organizations and will weaken Canada's ability to conduct its international affairs.

[54] I am persuaded that any reasonable person would be convinced that the stated harm would result from the release of the information, and accordingly, I am satisfied that Global Affairs had reasonable grounds on which to refuse to disclose the redacted information for which reliance was based upon subsection 15(1) of the Act.

(2) Balancing the public interest in favour of disclosure—Global Affairs turned its mind to the exercise of discretion under subsection 15(1) of the Act and reasonably exercised its discretion not to disclose

[55] As I have determined that there exists a reasonable expectation of probable harm to Canada's international relations if the redacted information is released, I now turn to consider a second aspect of the application of subsection 15(1) of the Act: notwithstanding that disclosing the information could injure international affairs, should the record nonetheless be released (*Criminal Lawyers' Assn.* at para 48).

[56] As regards the issue of whether Global Affairs turned its mind to the exercise of its discretion to release information caught by subsection 15(1) of the Act, the Minister again points to Ms. Lafave's evidence of the internal consultations with the NLD branch about how more information could be released in response to the ATIA request as well with the subject matter

experts. However, the NLD branch simply indicated that it would not support the release of the relevant information as the information. I do not read the relevant portions of Ms. Lafave's affidavit as suggesting that Global Affairs turned its mind to the exercise of its discretion, but rather simply as support for the first part of the test under subsection 15(1) of the Act, that there is a reasonable expectation of probable harm to Canada's international affairs if the information was to be disclosed. Similarly, I read Ms. Lafave's testimony during her cross-examination in the same way as regards consultations with subject matter experts. This portion of the evidence may support a reasonable expectation that disclosure would result in probable harm, but it does not assist on the issue of whether Global Affairs turned its mind to the exercise of discretion as to whether to nonetheless disclose the information.

[57] That said, I do consider the fact that there has been further and continuous disclosure over the years by Global Affairs to Professor Imai—six in total, including the most recent further disclosure of previously redacted information which occurred, as mentioned earlier, days prior to the hearing before me—as suggesting that Global Affairs recognized its overriding discretion favouring release; the OIC report specifically mentions that information initially redacted on the basis of subsection 15(1) of the Act was, after further consideration by Global Affairs, released to Professor Imai. As was the case in *Attaran*, I too find this compelling evidence that Global Affairs was conscious of and considered its discretion to disclose information.

[58] On the whole, I am convinced that the evidence suggests that Global Affairs understood that it had a discretion that it could exercise to disclose or not disclose the redacted information pursuant to subsection 15(1) of the Act.

[59] Turning to the issue of whether Global Affairs reasonably exercised its discretion not to disclose the redacted information, the Minister points to the public version of Ms. Lafave's affidavit, which provides that Global Affairs exercised the discretion conferred by section 15(1) to exempt the redacted information from release by:

i. determining that the information could reasonably be expected to be injurious to Canada's ability to conduct international affairs and international relations;

ii. determining that the importance of Canada maintaining its relations with the Government of Guatemala, the Commission and other foreign nations by protecting the information outweighed any reasons to disclose the information;

iii. considering the purpose and function of the Act and the importance of the public's right to access information in the government's control, and

iv. considering all of the factors that would have caused harm to Canada's international relations with other foreign nations or international organizations if the information was released, and in determining that the harm in releasing the information (i.e. breaching the expectation of confidentiality, the sensitive nature of the information, the frank opinions, [redacted] and information received with respect to another foreign nation) outweighed the relevant public and private interests in disclosure. In other words, Global Affairs determined that the public interest protected by section 15(1) was greater than the relevant public and private interests in disclosure of the information; and

v. applying section 25 severability pursuant to the Act so as to release as much information as possible, while maintaining the integrity of the records.

[60] In addition, of significance are the exchanges between the OIC and Global Affairs in December 2017 and January 2018—attached as Exhibits R and S to Ms. Lafave's affidavit—whereby the OIC specifically enquires with Global Affairs as to the factors considered in its exercise of discretion for the application of subsection 15(1) of the Act, and requests that it be provided with any information that Global Affairs may decide to release, going forward, as a result of the Global Affairs' review of its exercise of discretion. Global Affairs responded, outlining such factors, and confirmed that a further release package was to be sent to Professor Imai—the February 2018 Disclosure was sent out shortly thereafter.

[61] Clearly, protecting Canada's ability to engage with the Government of Guatemala, the OAS, the Commission and other states worldwide in the conduct of its relations with those institutions is a factor which must be considered as favouring the non-disclosure of the record. Professor Imai concedes that although it may be fair to say that there is evidence in the record to support the proposition that Global Affairs in fact exercised its discretion, the statement of Ms. Lafave in her affidavit falls short of amounting to support that Global Affairs considered factors tending to favour disclosure as opposed to factors simply favouring non-disclosure; there is no evidence, says Professor Imai, of a weighing of public interest factors favouring disclosure as against factors favouring non-disclosure as set out by the Supreme Court in *Criminal Lawyers' Assn*.

[62] I take Professor Imai's point; other than the references to the "purpose and function of the Act" and the application of section 25 of the Act, the remaining considerations set out in Ms. Lafave's public affidavit as evidencing Global Affairs' exercise of its discretion would tend

to only favour non-disclosure. Professor Imai submits that there is no evidence that Global Affairs, in the exercise of its discretion, considered factors such as the public's access to information, open government, and the encouragement of public debate in the proper functioning of government institutions. In particular, the factors favouring disclosure that should have been considered, says Professor Imai, include:

i. the public debate about regulating Canadian extraction companies operating abroad and Canada's diplomatic support for such companies;

ii. the importance of the information to the debate on the protection of Indigenous rights;

iii. the interest of the Indigenous Mayan villagers in accessing the information;

iv. the public's ability to scrutinize Canada's conduct against its corporate social responsibility policies; or

v. the propriety of Canada's conduct in interfering with the Commission's proceedings.

[63] According to Professor Imai, there is a clear public interest in disclosing the information that is subject to redaction by Global Affairs: disclosure will allow the public to scrutinize Canada's conduct against its corporate social responsibility policies and will advance the public debate about regulating its extraction companies operating abroad. Professor Imai submits that Global Affairs was aware of this broader policy context and that he raised it repeatedly before the OIC. Despite this fact, says Professor Imai, there is no meaningful consideration of the public interest in disclosing the information anywhere in the record.

[64] In fact, during her cross-examination, Ms. Lafave—who incidentally was assigned as the Senior ATIP Analyst to Professor Imai's file on February 7, 2018, three weeks prior to the release of the February 2018 Disclosure—admitted not being able to point to any part of the record which would establish that Global Affairs, in considering not to exempt the redacted information from disclosure, considered either the public debate about regulating extraction companies, the importance of such information to Canada's position respecting the rights of Indigenous people, or the specific interests of the Mayan villagers who were affected by the mine.

[65] Professor Imai submits that by failing to consider virtually any public interest factors which would favour disclosure, and in particular the importance of the information to public debate, policy development and scrutiny, Global Affairs acted unreasonably and erred in law. In short, Professor Imai argues that Global Affairs has not met its burden of establishing that it considered and balanced the public interest components which favour disclosure prior to invoking subsection 15(1) of the Act.

[66] I would add to Professor Imai's argument that even the references in Ms. Lafave's public affidavit to the purpose and function of the Act and the application of section 25 fall short as evidence that Global Affairs considered factors tending to favour disclosure in the exercise of its discretion under subsection 15(1) of the Act. The simple statement that Global Affairs considered the purpose and function of the Act and the importance of the public's right to access information in the government's control is insufficient, without corroborating support, to avoid

falling into the category of “boilerplate statements” referred to in *OIC v PM* at paragraphs 82–90 and in *Attaran* at paragraphs 35 and 36; it is of little assistance in this case.

[67] In addition, there is nothing to suggest that Global Affairs was not simply fulfilling its mandatory severance obligations under section 25 of the Act in parceling the redactions as it did. I have not been persuaded that compliance with section 25 of the Act, without anything further, is evidence that Global Affairs also considered factors favouring disclosure in the exercise of its discretion.

[68] However, as was the case earlier, much of the evidence is to be found in the confidential evidence, and the Minister submits that while all of the factors favouring disclosure may not be explicitly set out in the record, the Court may find them implicit in Global Affairs’ analysis (*OIC v PM* at paras 82 and 83). The Minister argues that it is reasonable for the Court to find that the analysis was premised on the assumption that factors tending toward public disclosure were present. The Minister adds that Global Affairs’ exercise of discretion is not rendered unreasonable simply because it did not enumerate the specific factors the applicant suggests were relevant.

[69] That may be so, and inferences may be drawn, however I am mindful that the Court cannot equate inference with speculation and that “[a]n inference cannot be drawn where the evidence is equivocal in the sense that it is equally consistent with other inferences or conclusions” (*Attaran* at para 34). At the end of the day, inference results from a process of reasoning, a logical consequence or reasonable deduction from established unequivocal

evidence, while conjecture and speculation require a leap of faith (*Osmond v Newfoundland (Workers' Compensation Commission)* (2001), 200 Nfld & PEIR 203; *Attaran* at para 32 to 34). As stated by the Federal Court of Appeal in *Attaran* at paragraphs 35 and 36:

> [35] In the present case, there is nothing in the public or the *ex parte* record before the Court, including the affidavits filed on behalf of the respondent, which expressly demonstrates that the decision-maker considered the existence of her discretion. However, the absence of such evidence is not determinative of the issue. The same situation existed in *Telezone* where the Court examined the record before it, including internal departmental documents, in order to be satisfied that the decision-maker understood that there was a discretion to disclose documents.
>
> [36] Conversely, just as the absence of express evidence about the exercise of discretion is not determinative, the existence of a statement in a record that a discretion was exercised will not necessarily be determinative. To find such a statement to be conclusive of the inquiry would be to elevate form over substance, and encourage the recital of boilerplate statements in the record of the decision-maker. In every case involving the discretionary aspect of section 15 of the Act, the reviewing court must examine the totality of the evidence to determine whether it is satisfied, on a balance of probabilities, that the decision-maker understood that there was a discretion to disclose and then exercised that discretion. This may well require the reviewing court to infer from the content of the record that the decision-maker recognized the discretion and then balanced the competing interests for and against disclosure, as discussed by the Court in *Telezone* at paragraph 116.
>
> [Emphasis added.]

[70] As to the factors that Global Affairs considered in favour and against disclosure, the evidence in the public record includes an email sent in January 2016 by the ATIP analyst to the OIC investigator setting out the rationale and factors considered in processing Professor Imai's ATIA request. Factors identified which would tend to favour disclosure included the fact that the issues surrounding the operation of the Marlin Mine have been in the public domain for some

time—public information considered by Global Affairs included the audio recordings from the Commission hearings—as well as the fact that while at the time of the January 2016 email the mine continued in operation, it has been generally without conflict, at least from the perspective of Global Affairs. In addition, as outlined, a number of non-government organizations strongly objected to the reversal of the Commission's decision, questioned the credibility of the Commission, and accused it of buckling under pressure from the Government of Guatemala. Professor Imai was correct to say that Global Affairs was aware at the time of the broader policy context surrounding his ATIA request as it referenced such context in its exchanges with the OIC. In addition, aspects of the information released to Professor Imai as part of his ATIA request referenced human rights abuses in Guatemala and also detailed allegations against Goldcorp in respect of the claims of harm to the Mayan communities affected by the Marlin Mine.

[71] In addition, in the exchanges between the OIC and Global Affairs in December 2017 and January 2018, Exhibit S, which is the response of Global Affairs to the OIC, Global Affairs makes specific mention of Professor Imai's right of access to the redacted information—a factor favouring disclosure—being outweighed by the factors which favoured non-disclosure. In the end, I am satisfied that Global Affairs did identify and weigh factors which would tend to favour disclosure of the record.

[72] Finally, Professor Imai argues that Global Affairs did not consider the passage of time in its assessment of the risk of harm to Canada's international relations in the event of disclosure and only assessed such risk as it may have existed in 2014 when it received the ATIA request. In

particular, Professor Imai argues that there is no evidence in the public record that Global Affairs exercised its discretion to nonetheless release information on the specific situation of this case or considered issues such as the fact that the Commission hearings wrapped up in 2010, that there was significant negative press coverage in Canada and internationally of the Marlin Mine and the Commission's decision as late as May 2015, including at the time of Professor Imai's ATIA request, that the Marlin Mine ceased operating in 2017, that Goldcorp has stopped operating in Guatemala entirely, that Goldcorp was purchased by Newmont Corporation in April 2019 and no longer exists as a corporate entity, and that we have had multiple governments in Canada since 2010.

[73] However, the evidence, in this case the Request Summary Report filed as Exhibit A to the affidavit of Ms. Lafave, specifically includes a reference to documents that were previously not disclosed being considered for disclosure because of the passage of time—a factor weighing in favour of disclosure. Under the circumstances, Professor Imai has not persuaded me to remit the matter back to Global Affairs simply to consider whether the passage of time alone justifies disclosure of any part of the redacted information. Professor Imai is free to submit a new access request if he so chooses.

[74] Also, I am not convinced that the history of Goldcorp's evolving corporate status would weigh heavily in the exercise of Global Affairs' discretion under subsection 15(1) of the Act. At stake under this exemption is harm to Canada's ability to conduct its international affairs, and I am not convinced that the status of the mine or the developing corporate status of Goldcorp, and even less so the fact that different governments have come and gone in Canada since 2010 as

argued by Professor Imai, would be at the forefront of Global Affairs' exercise of discretion pursuant to subsection 15(1) of the Act.

[75] It is certainly open to the Court to reasonably infer that all factors, including those which favoured disclosure, were duly considered in the exercise of discretion in refusing to disclose information, and the exercise of discretion is not unreasonable on account of the decision-maker not specifically identifying certain factors favouring disclosure that a requester deems relevant (*OIC v PM* at paras 82–90). It is also not necessary for the government to provide a detailed list of facts it considered in coming to its decision not to disclose.

[76] Having considered, in addition, the confidential record and having also heard the Minister *ex parte* and *in camera*, I find that there were reasonable grounds on which Global Affairs could refuse disclosure; there is sufficient evidence either expressly on the record or evidence that may be inferred from the record, that Global Affairs reasonably exercised its discretion in deciding to exempt the information by balancing the relevant public and private interest factors favouring disclosure against the public interest factors militating in favour of the non-disclosure of the information. In addition, Global Affairs' decision to refuse disclosure in application of subsection 15(1) of the Act was transparent and intelligible, and thus reasonable.

B. *Paragraph 20(1)(c) of the Act*

[77] Having determined that subsection 15(1) of the Act has properly been applied to the information in the February 2018 Disclosure as outlined in the table above, that section 19 has properly been applied to the information in documents 2(a) and (b) and 4(b) and (d), and with the

information in document 12(b) having already been disclosed to Professor Imai, what remains to be reviewed is the information in document 6(b), to which paragraphs 20(1)(c) and 21(1)(b) of the Act have been applied.

[78] Subsection 20(1) provides as follows:

Third party information	**Renseignements de tiers**
20(1) Subject to this section, the head of a government institution shall refuse to disclose any record requested under this Part that contains	20(1) Le responsable d'une institution fédérale est tenu, sous réserve des autres dispositions du présent article, de refuser la communication de documents contenant :
. . .	[…]
(c) information the disclosure of which could reasonably be expected to result in material financial loss or gain to, or could reasonably be expected to prejudice the competitive position of, a third party;	c) des renseignements dont la divulgation risquerait vraisemblablement de causer des pertes ou profits financiers appréciables à un tiers ou de nuire à sa compétitivité;

[79] Paragraph 20(1)(c) is an injury-based mandatory exemption where once the information is determined to fall within the class, disclosure must be refused. Paragraph 20(1)(c) is subject to remedy under section 49 of the Act, which provides:

Order of Court where no authorization to refuse disclosure found	**Ordonnance de la Cour dans les cas où le refus n'est pas autorisé**
49 Where the head of a government institution refuses to disclose a record requested under this Part or a part thereof on the basis of a provision of this Part not	49 La Cour, dans les cas où elle conclut au bon droit de la personne qui a exercé un recours en révision d'une décision de refus de communication totale ou

referred to in section 50, the Court shall, if it determines that the head of the institution is not authorized to refuse to disclose the record or part thereof, order the head of the institution to disclose the record or part thereof, subject to such conditions as the Court deems appropriate, to the person who requested access to the record, or shall make such other order as the Court deems appropriate.	partielle d'un document fondée sur des dispositions de la présente partie autres que celles mentionnées à l'article 50, ordonne, aux conditions qu'elle juge indiquées, au responsable de l'institution fédérale dont relève le document en litige d'en donner à cette personne communication totale ou partielle; la Cour rend une autre ordonnance si elle l'estime indiqué.

[80] Under section 49 of the Act, a reviewing Court must determine on a *de novo* basis whether the exemption has been correctly applied and if the government institution was "authorized to refuse to disclose" the information under the exemption claimed, taking into consideration the evidence of the parties, which can include evidence that was not before the government institution at the time of the original decision (section 44.1 of the Act; *Merck Frosst* at para 53). Moreover, the Court shows no deference to a government institution's views but rather applies a correctness standard in its review of the applicability of the exemption (*Canada (Information Commissioner) v Canada (Commissioner of the Royal Canadian Mounted Police)*, 2003 SCC 8 at para 19; *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 at paras 10, 16 and 17). If the Court determines that the government institution was not authorized to refuse to disclose the information under an exemption claimed, it may substitute its own decision and order disclosure of the information, subject to any conditions it may impose (*Commissioner v Defence* at para 22).

[81] As for the standard of proof, there must be a reasonable expectation of probable harm; the risk of harm must be well beyond the merely possible or speculative, but it need not be proved on the balance of probabilities that disclosure will in fact result in such harm. In other words, the party seeking non-disclosure need not show on a balance of probabilities that the harm will in fact come to pass if the records are disclosed, but must nonetheless do more than show that such harm is simply possible (*Merck Frosst* at paras 192 to 196, 204 and 206).

[82] Professor Imai argues, and I agree, that it is for the Minister to demonstrate a reasonable likelihood of injury arising from disclosure in order to trigger the exemption. In this case, as the reasonable expectation of probable harm must relate to Goldcorp, Professor Imai argues that it cannot be said that financial harm could reasonably result in material financial loss or gain to, or could reasonably be expected to prejudice the competitive position of, a company that no longer exists and in the context of a mine that closed in 2017. I should also mention that Newmont Corporation was invited to participate in these proceedings and the confidentiality motion, and chose not to do so.

[83] Professor Imai argues that the snapshot of time for the determination of injury should be the present, as I am conducting a *de novo* review and am able to consider information not before the ATIP analyst who made the determination at the time of the ATIA request in 2014 not to disclose the information under paragraph 20(1)(c) of the Act. I disagree. Although it is open to the Court to consider evidence not before the decision-maker at the time, the fact remains that the present proceedings relate to the propriety of the refusal to disclose information as part of the February 2018 Disclosure. Even assuming that Global Affairs had to consider the evolving status

of Goldcorp in its assessment—a proposition to which I do not necessarily subscribe—and regardless of the snapshot of time being the time the ATIA request was reviewed in 2014 or the issuance of the February 2018 Disclosure, at the time of the disclosure in February 2018, not only was it not clear whether Global Affairs was aware of the mine's closure—assuming that was even relevant—but Goldcorp was still very much alive and active with operations at the Marlin Mine and in Central America.

[84] Having viewed the redacted information in document 6(b) and having considered the relevant portions of the confidential affidavit of Ms. Lafave as well as the confidential background information of the ATIP analyst at the time and the redacted portions of the response by Global Affairs to the OIC of January 5, 2018 attached thereto, I am convinced that disclosure of the information at the time would have reasonably been expected to result, beyond a mere possibility, in material financial loss to Goldcorp and prejudice its competitive position in the areas where the company was operating in Central America, including its existing position at the time in Guatemala.

[85] Although the evidence does indicate that there was conscientious consideration given by Global Affairs to the application of paragraph 20(1)(c), I accept that Ms. Lafave was not able, on cross-examination, to point to any particular mine in Central America other than the Marlin Mine which was considered by Global Affairs in its decision to redact the information, and that nothing in the evidence has been shown to suggest that the expressed concerns of Global Affairs with disclosure were ever verified with Goldcorp. That being said, refusal to disclose without consultation with Goldcorp was one of the options available to Global Affairs (*Merck Frosst* at

paras 71 and 73). In any event, I am nonetheless convinced following my review of the information in document 6(b) and the remaining information with respect to its redaction that Goldcorp's ongoing financial and competitive position would likely have been compromised had the information been disclosed; the matter seems self-evident to me and I suspect to Global Affairs as well.

[86] That said, the last sentence of the redacted information in document 6(b) seems to have already been made available to Professor Imai via a previous disclosure request. The Minister seems to have no objection for this Court to order the release of that last sentence. The difficulty seems to be that the February 2018 Disclosure has already been made, and as set out by this Court in *Recall Total Information Management Inc v Canada (National Revenue)*, 2015 FC 848, it is not open to the decision-maker to change its mind, although the Minister could change her position in the course of litigation. Under the circumstances, and although open to me to order the release of that part of the redacted information, I see no reason to do so; the information is already in the hands of Professor Imai (see also *Recall Total Information Management Inc v Canada (National Revenue)*, 2015 FC 1128 at para 6).

[87] As I have determined that Global Affairs properly applied paragraph 20(1)(c) of the Act to the information in document 6(b), I need not consider the application of paragraph 21(1)(b) of the Act to the same information. Under the circumstances, I find that Global Affairs properly exercised its duty not to disclose, and was authorized to refuse to disclose, the information in document 6(b) identified in the table above.

VI. Conclusion and costs

[88] Considering my decision as regards the application of subsection 15(1), section 19 and paragraph 20(1)(c) of the Act, I need not consider the remaining overlapping exemptions which purportedly support the non-disclosure of the record to Professor Imai. I would therefore dismiss the present application.

[89] As for costs, having reviewed the written submissions of the parties, I exercise my discretion by awarding costs to be paid by Professor Imai to the Minister in the amount of $5 000.

JUDGMENT in T-1170-19

THIS COURT ORDERS that:

1. The application for judicial review is dismissed, with costs in the amount of $5 000 payable by the applicant to the respondent.

"Peter G. Pamel"
Judge

Annex

Access to Information Act, RSC 1985, c A-1

Information obtained in confidence	**Renseignements obtenus à titre confidentiel**
13(1) Subject to subsection (2), the head of a government institution shall refuse to disclose any record requested under this Part that contains information that was obtained in confidence from	13(1) Sous réserve du paragraphe (2), le responsable d'une institution fédérale est tenu de refuser la communication de documents contenant des renseignements obtenus à titre confidentiel :
(a) the government of a foreign state or an institution thereof;	a) des gouvernements des États étrangers ou de leurs organismes;
(b) an international organization of states or an institution thereof;	b) des organisations internationales d'États ou de leurs organismes;
. . .	[…]
International affairs and defence	**Affaires internationales et défense**
15(1) The head of a government institution may refuse to disclose any record requested under this Part that contains information the disclosure of which could reasonably be expected to be injurious to the conduct of international affairs, the defence of Canada or any state allied or associated with Canada or the detection, prevention or suppression of subversive or hostile activities, including, without restricting the generality of the foregoing, any such information	15(1) Le responsable d'une institution fédérale peut refuser la communication de documents contenant des renseignements dont la divulgation risquerait vraisemblablement de porter préjudice à la conduite des affaires internationales, à la défense du Canada ou d'États alliés ou associés avec le Canada ou à la détection, à la prévention ou à la répression d'activités hostiles ou subversives, notamment :

(a) relating to military tactics or strategy, or relating to military exercises or operations undertaken in preparation for hostilities or in connection with the detection, prevention or suppression of subversive or hostile activities;

a) des renseignements d'ordre tactique ou stratégique ou des renseignements relatifs aux manœuvres et opérations destinées à la préparation d'hostilités ou entreprises dans le cadre de la détection, de la prévention ou de la répression d'activités hostiles ou subversives;

(b) relating to the quantity, characteristics, capabilities or deployment of weapons or other defence equipment or of anything being designed, developed, produced or considered for use as weapons or other defence equipment;

b) des renseignements concernant la quantité, les caractéristiques, les capacités ou le déploiement des armes ou des matériels de défense, ou de tout ce qui est conçu, mis au point, produit ou prévu à ces fins;

(c) relating to the characteristics, capabilities, performance, potential, deployment, functions or role of any defence establishment, of any military force, unit or personnel or of any organization or person responsible for the detection, prevention or suppression of subversive or hostile activities;

c) des renseignements concernant les caractéristiques, les capacités, le rendement, le potentiel, le déploiement, les fonctions ou le rôle des établissements de défense, des forces, unités ou personnels militaires ou des personnes ou organisations chargées de la détection, de la prévention ou de la répression d'activités hostiles ou subversives;

(d) obtained or prepared for the purpose of intelligence relating to

d) des éléments d'information recueillis ou préparés aux fins du renseignement relatif à :

(i) the defence of Canada or any state allied or associated with Canada, or

(i) la défense du Canada ou d'États alliés ou associés avec le Canada,

(ii) the detection, prevention or suppression of subversive or hostile activities;

(ii) la détection, la prévention ou la répression d'activités hostiles ou subversives;

(e) obtained or prepared for the purpose of intelligence respecting foreign states, international organizations of states or citizens of foreign states used by the Government of Canada in the process of deliberation and consultation or in the conduct of international affairs;

e) des éléments d'information recueillis ou préparés aux fins du renseignement relatif aux États étrangers, aux organisations internationales d'États ou aux citoyens étrangers et utilisés par le gouvernement du Canada dans le cadre de délibérations ou consultations ou dans la conduite des affaires internationales;

(f) on methods of, and scientific or technical equipment for, collecting, assessing or handling information referred to in paragraph (d) or (e) or on sources of such information;

f) des renseignements concernant les méthodes et le matériel technique ou scientifique de collecte, d'analyse ou de traitement des éléments d'information visés aux alinéas d) et e), ainsi que des renseignements concernant leurs sources;

(g) on the positions adopted or to be adopted by the Government of Canada, governments of foreign states or international organizations of states for the purpose of present or future international negotiations;

g) des renseignements concernant les positions adoptées ou envisagées, dans le cadre de négociations internationales présentes ou futures, par le gouvernement du Canada, les gouvernements d'États étrangers ou les organisations internationales d'États;

(h) that constitutes diplomatic correspondence exchanged with foreign states or international organizations of states or official correspondence exchanged with Canadian diplomatic missions or consular posts abroad; or

h) des renseignements contenus dans la correspondance diplomatique échangée avec des États étrangers ou des organisations internationales d'États, ou dans la correspondance officielle échangée avec des missions diplomatiques ou des postes consulaires canadiens;

(i) relating to the communications or

i) des renseignements relatifs à ceux des réseaux de

cryptographic systems of Canada or foreign states used	communications et des procédés de cryptographie du Canada ou d'États étrangers qui sont utilisés dans les buts suivants :
(i) for the conduct of international affairs,	(i) la conduite des affaires internationales,
(ii) for the defence of Canada or any state allied or associated with Canada, or	(ii) la défense du Canada ou d'États alliés ou associés avec le Canada,
(iii) in relation to the detection, prevention or suppression of subversive or hostile activities.	(iii) la détection, la prévention ou la répression d'activités hostiles ou subversives.
. . .	[…]
Third party information	**Renseignements de tiers**
20(1) Subject to this section, the head of a government institution shall refuse to disclose any record requested under this Part that contains	20(1) Le responsable d'une institution fédérale est tenu, sous réserve des autres dispositions du présent article, de refuser la communication de documents contenant :
. . .	[…]
(b) financial, commercial, scientific or technical information that is confidential information supplied to a government institution by a third party and is treated consistently in a confidential manner by the third party;	b) des renseignements financiers, commerciaux, scientifiques ou techniques fournis à une institution fédérale par un tiers, qui sont de nature confidentielle et qui sont traités comme tels de façon constante par ce tiers;
. . .	[…]
(c) information the disclosure of which could reasonably be expected to result in material financial loss or gain to, or	c) des renseignements dont la divulgation risquerait vraisemblablement de causer des pertes ou profits financiers

could reasonably be expected to prejudice the competitive position of, a third party;

appréciables à un tiers ou de nuire à sa compétitivité;

. . .

[…]

Advice, etc.

21(1) The head of a government institution may refuse to disclose any record requested under this Part that contains

Avis, etc.

21(1) Le responsable d'une institution fédérale peut refuser la communication de documents datés de moins de vingt ans lors de la demande et contenant :

(a) advice or recommendations developed by or for a government institution or a minister of the Crown,

a) des avis ou recommandations élaborés par ou pour une institution fédérale ou un ministre;

(b) an account of consultations or deliberations in which directors, officers or employees of a government institution, a minister of the Crown or the staff of a minister participate,

b) des comptes rendus de consultations ou délibérations auxquelles ont participé des administrateurs, dirigeants ou employés d'une institution fédérale, un ministre ou son personnel;

. . .

[…]

Review by Federal Court — complainant

41(1) A person who makes a complaint described in any of paragraphs 30(1)(a) to (e) and who receives a report under subsection 37(2) in respect of the complaint may, within 30 business days after the day on which the head of the government institution receives the report, apply to the Court for a review of the matter that is the subject of the complaint.

Révision par la Cour fédérale : plaignant

41(1) Le plaignant dont la plainte est visée à l'un des alinéas 30(1)a) à e) et qui reçoit le compte rendu en application du paragraphe 37(2) peut, dans les trente jours ouvrables suivant la réception par le responsable de l'institution fédérale du compte rendu, exercer devant la Cour un recours en révision des

questions qui font l’objet de sa plainte.

Review by Federal Court — government institution

41(2) The head of a government institution who receives a report under subsection 37(2) may, within 30 business days after the day on which they receive it, apply to the Court for a review of any matter that is the subject of an order set out in the report.

Révision par la Cour fédérale : institution fédérale

41(2) Le responsable d’une institution fédérale qui reçoit le compte rendu en application du paragraphe 37(2) peut, dans les trente jours ouvrables suivant la réception du compte rendu, exercer devant la Cour un recours en révision de toute question dont traite l’ordonnance contenue dans le compte rendu.

Review by Federal Court — third parties

41(3) If neither the person who made the complaint nor the head of the government institution makes an application under this section within the period for doing so, a third party who receives a report under subsection 37(2) may, within 10 business days after the expiry of the period referred to in subsection (1), apply to the Court for a review of the application of any exemption provided for under this Part that may apply to a record that might contain information described in subsection 20(1) and that is the subject of the complaint in respect of which the report is made.

Révision par la Cour fédérale : tiers

41(3) Si aucun recours n’est exercé en vertu des paragraphes (1) ou (2) dans le délai prévu à ces paragraphes, le tiers qui reçoit le compte rendu en application du paragraphe 37(2) peut, dans les dix jours ouvrables suivant l’expiration du délai prévu au paragraphe (1), exercer devant la Cour un recours en révision de l’application des exceptions prévues par la présente partie pouvant s’appliquer aux documents susceptibles de contenir les renseignements visés au paragraphe 20(1) et faisant l’objet de la plainte sur laquelle porte le compte rendu.

Review by Federal Court — Privacy Commissioner

41(4) If neither the person who made the complaint nor the head of the institution makes an application under this section within the period for doing so, the Privacy Commissioner, if he or she receives a report under subsection 37(2), may, within 10 business days after the expiry of the period referred to in subsection (1), apply to the Court for a review of any matter in relation to the disclosure of a record that might contain personal information and that is the subject of the complaint in respect of which the report is made.

Révision par la Cour fédérale : Commissaire à la protection de la vie privée

41(4) Si aucun recours n'est exercé en vertu des paragraphes (1) ou (2) dans le délai prévu à ces paragraphes, le Commissaire à la protection de la vie privée qui reçoit le compte rendu en application du paragraphe 37(2) peut, dans les dix jours ouvrables suivant l'expiration du délai prévu au paragraphe (1), exercer devant la Cour un recours en révision de toute question relative à la communication d'un document susceptible de contenir des renseignements personnels et faisant l'objet de la plainte sur laquelle porte le compte rendu.

Respondents

41(5) The person who applies for a review under subsection (1), (3) or (4) may name only the head of the government institution concerned as the respondent to the proceedings. The head of the government institution who applies for a review under subsection (2) may name only the Information Commissioner as the respondent to the proceedings.

Défendeur

41(5) La personne qui exerce un recours au titre des paragraphes (1), (3) ou (4) ne peut désigner, à titre de défendeur, que le responsable de l'institution fédérale concernée; le responsable d'une institution fédérale qui exerce un recours au titre du paragraphe (2) ne peut désigner, à titre de défendeur, que le Commissaire à l'information.

Deemed date of receipt

41(6) For the purposes of this section, the head of the government institution is deemed to have received the

Date réputée de réception

41(6) Pour l'application du présent article, le responsable de l'institution fédérale est réputé avoir reçu le compte

report on the fifth business day after the date of the report.

. . .

Order of Court where no authorization to refuse disclosure found

49 Where the head of a government institution refuses to disclose a record requested under this Part or a part thereof on the basis of a provision of this Part not referred to in section 50, the Court shall, if it determines that the head of the institution is not authorized to refuse to disclose the record or part thereof, order the head of the institution to disclose the record or part thereof, subject to such conditions as the Court deems appropriate, to the person who requested access to the record, or shall make such other order as the Court deems appropriate.

Order of Court where reasonable grounds of injury not found

50 Where the head of a government institution refuses to disclose a record requested under this Part or a part thereof on the basis of section 14 or 15 or paragraph 16(1)(c) or (d) or 18(d), the Court shall, if it determines that the head of the institution did not have reasonable grounds on which to refuse to disclose the record or part thereof, order

rendu le cinquième jour ouvrable suivant la date que porte le compte rendu.

[…]

Ordonnance de la Cour dans les cas où le refus n’est pas autorisé

49 La Cour, dans les cas où elle conclut au bon droit de la personne qui a exercé un recours en révision d’une décision de refus de communication totale ou partielle d’un document fondée sur des dispositions de la présente partie autres que celles mentionnées à l’article 50, ordonne, aux conditions qu’elle juge indiquées, au responsable de l’institution fédérale dont relève le document en litige d’en donner à cette personne communication totale ou partielle; la Cour rend une autre ordonnance si elle l’estime indiqué.

Ordonnance de la Cour dans les cas où le préjudice n’est pas démontré

50 Dans les cas où le refus de communication totale ou partielle du document s’appuyait sur les articles 14 ou 15 ou sur les alinéas 16(1)c) ou d) ou 18d), la Cour, si elle conclut que le refus n’était pas fondé sur des motifs raisonnables, ordonne, aux conditions qu’elle juge indiquées, au responsable de l’institution fédérale dont

the head of the institution to disclose the record or part thereof, subject to such conditions as the Court deems appropriate, to the person who requested access to the record, or shall make such other order as the Court deems appropriate.

relève le document en litige d'en donner communication totale ou partielle à la personne qui avait fait la demande; la Cour rend une autre ordonnance si elle l'estime indiqué.

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-1170-19
STYLE OF CAUSE:	SHIN IMAI v HER MAJESTY THE QUEEN IN THE RIGHT OF CANADA as represented by the MINISTER OF FOREIGN AFFAIRS
PLACE OF HEARING:	HELD BY VIDEOCONFERENCE
DATE OF HEARING:	MARCH 2 AND MARCH 16, 2021
PUBLIC JUDGMENT AND REASONS:	PAMEL J.
DATED:	DECEMBER 29, 2021

APPEARANCES:

Yana Sobiski Luke Hildebrand	FOR THE APPLICANT
Dhara Drew Kyla Pedersen	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Major Sobiski Moffatt LLP Kenora, Ontario	FOR THE APPLICANT
Attorney General of Canada Winnipeg, Manitoba	FOR THE RESPONDENT