Federal Court  Cour fédérale

~~**SECRET**~~

Date: 20250704

Docket: DES-11-24

Citation: 2025 FC 1190

Ottawa, Ontario, July 4, 2025

PRESENT: The Honourable Madam Justice Aylen

BETWEEN:

ATTORNEY GENERAL OF CANADA

Applicant

and

THE CANADIAN TRANSIT COMPANY

Respondent

ORDER AND REASONS

[1] The Attorney General of Canada [AGC] has commenced the within application seeking an order, pursuant to subsection 38.06(3) of the *Canada Evidence Act*, RSC 1985, c C-5 [*CEA*], confirming the prohibition of disclosure of information contained in documents referred to in two notices delivered pursuant to subsection 38.01(1) of the *CEA*. The AGC asserts that the disclosure of the information would be injurious to international relations.

[2] The information at issue is contained in twenty-one documents that were disclosed by the AGC to the Respondent, the Canadian Transit Company [CTC], in a civil action in the Ontario Superior Court of Justice bearing Court File No. CV-12-446428. The CTC describes the underlying proceeding in its written submissions as follows:

> 3. CTC and its parent company, Detroit International Bridge Company [DIBC], are the private owners of the Ambassador Bridge. The Underlying Litigation relates to Canada's multiple and ongoing attempts to seize for itself the bridge and associated toll business. After a failed attempt to directly seize ownership of the bridge, Canada has been attempting to do so indirectly. It is building a competing bridge just two miles from the Ambassador Bridge, even though there is not enough traffic to support two bridges. It is panning to divert the traffic from the Ambassador Bridge to its own competing bridge and in so doing, take CTC's toll business. To use its own words, the government intends to "siphon off" CTC's traffic to its own bridge.
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> 4. In furtherance of this goal, Canada has used its regulatory authority to advance its own competing bridge, free of regulatory barriers, and has erected and misused its regulatory authority to delay and thwart CTC's plans to update and modernize the Ambassador Bridge. CTC's plans involved building a replacement span next to the existing historic span to allow the 100-year-old bridge to better meet modern needs. CTC and DIBC underwent more than a decade-long regulatory process in both the United States and Canada to get environmental and other approvals for the project. At no time through this decade-long process was the idea of demolishing the historic Ambassador Bridge span raised. On the contrary, the U.S. permit expressly required DIBC to maintain the iconic and historic span.
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> 5. Yet, in 2017, when Canada finally approved CTC's permit for the project, it imposed a term that required CTC to demolish the historic span once the replacement span was built (the "Demolition Condition"). It did so with no prior notice, without consulting with the United States, and with full knowledge that this put CTC in the impossible position of being unable to comply with both its U.S. and Canadian permits simultaneously. In the Underlying Litigation, the CTC claims that the Demolition Condition was not imposed for *bona fide* reasons, but was an attempt to ensure CTC's

> modernization would fail, in order to favour the completion of the government's competing bridge. Canada (unsurprisingly) claims that the Demolition Condition was a valid exercise of its discretion and denies that there is a conflict with the U.S. permit.
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> [Emphasis in original. Footnote omitted.]

[3] Canada's competing bridge is now known as the Gordie Howe International Bridge [GHIB].

[4] Each of the twenty-one documents at issue was assigned an AGC number ranging from AGC 0001 through AGC 0021. The AGC has confirmed that it lifted the section 38 claims in relation to AGC 0001, as well as portions of the section 38 claims in each of AGC 0006, 0010, 0011 and 0015, pursuant to its own statutory authority. As such, no determinations need be made in relation to those claims.

[5] The remaining twenty documents consist of multiple drafts and iterations of the same document or are related documents in terms of their subject matter and redactions. These include documents that summarize a July 9, 2019, meeting between Transport Canada and the U.S. Department of State regarding the Ambassador Bridge; an April 2018 briefing note to Canada's Minister of Transport in preparation for meetings with senior U.S. officials; notes for a meeting with the U.S. Secretary of Homeland Security; an undated briefing note for a meeting between Michigan Governor Rick Snyder and the Canadian Minister of Transport; and versions of a memorandum for the Prime Minister of Canada providing an update on the status and steps involved in the GHIB project in 2008 and 2011.

[6] The CTC opposes the application in its entirety and requests that the Court deny the AGC's request for confirmation of the prohibition of disclosure. The CTC notes that all documents that relate to the Demolition Condition, including its origin and justification, are key documents to CTC's case and submits that the majority of the documents at issue on this application expressly relate to the Demolition Condition and Canada's discussions with U.S. officials regarding its imposition, after the U.S. officials raised concerns.

[7] On September 19, 2024, the Court appointed Gib van Ert as *amicus curiae* in this application to assist the Court in performing its statutory obligations under section 38 of the *CEA*. The CTC has communicated to Mr. van Ert the theory of its case and the categories of information that may be of assistance to it.

[8] The AGC and the CTC both filed public affidavits in relation to the application, as well as written submissions. A public hearing of the application was held on February 12 2025.

[9] The AGC also filed classified affidavits, which included copies of the documents containing the information for which injury is claimed, with the redactions at issue in clear, readable format, which were made available to the Court and the *amicus curiae*. An *ex parte, in camera* hearing was held on March 17, 2025, during which the AGC's affiant gave evidence and was cross-examined by the *amicus curiae*. This was followed by a subsequent *ex parte, in camera* hearing on May 8, 2025, during which the Court heard submissions from both the AGC and the *amicus curiae*.

[10] On this application, the Court must determine whether: (a) the prohibition on disclosure should be confirmed pursuant to subsection 38.06(3) of the *CEA* or whether the information, or parts thereof, should be disclosed pursuant to subsection 38.06(1); or (b) in the alternative, whether the information, or parts thereof, should be disclosed subject to conditions to limit any injury to international relations pursuant to subsection 38.06(2) of the *CEA*.

[11] The test to be applied by the Court in making this determination was established by the Federal Court of Appeal in *Ribic v Canada (Attorney General)*, 2003 FCA 246. In *Canada (Attorney General) v Hutton*, 2023 FCA 45 at paragraph 31, the Federal Court of Appeal reiterated the *Ribic* test in the form of the following three questions:

> (a) Is the information sought to be protected relevant to the underlying proceeding?
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> (b) If so, is that information injurious to national security, national defence or international relations?
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> (c) If the answer to (a) and (b) are both "yes", does the public interest in non-disclosure outweigh the public interest in disclosure?

[12] The CTC bears the onus of demonstrating that the redacted information is relevant to an issue in the underlying proceeding [see *Ribic, supra* at para 17].

[13] Under the second prong of the *Ribic* test, the AGC must demonstrate that the redacted information would be injurious to international relations [see *Ribic, supra* at para 20]. The injury must be probable, not simply possible or speculative, and must have a factual basis established through concrete and reliable evidence. In short, there must be a reasonable basis for the injury

claim [see *Canada (Attorney General) v British Columbia Civil Liberties Association*, 2024 FC 853 at para 41].

[14] Although some deference is owed to the AGC's assessment of probable injury due to the AGC's expertise and access to the information, the Court must still ensure that non-disclosure is justified [see *Canada (Attorney General) v Tursunbayev*, 2021 FC 719 at para 86].

[15] Under the third prong of the *Ribic* test, the CTC must demonstrate that the public interest in disclosure of the injurious information is greater than the public interest in the non-disclosure (i.e., protection) of the injurious information [see *Ribic, supra* at para 21]. The relevant factors that guide the Court's balancing exercise include, among others, the nature of the public interest sought to be protected; whether the information will probably establish a fact crucial to the case to be made (i.e., the degree of relevance or importance, or the significance or probative value of the information in the underlying proceeding); the nature and extent of the injury, whether there are higher interests at stake (such as human rights issues, the right to make full answer and defence in the criminal context, etc.); whether the information at issue can be summarized; and whether the redacted information is already known to the public and if so, how it became known [see *Canada (Attorney General) v Momin Khawaja*, 2007 FC 490 at paras 74, 93; *Tursunbayev*, *supra* at paras 88–89; *Canada (Attorney General) v Abdelrazik*, 2023 FC 1100 at paras 66–69].

[16] Where the Court concludes that the public interest favours disclosure, the Court may authorize the disclosure in the form and under the conditions that are most likely to limit any injury to international relations [see subsection 38.06(2) of the *CEA*].

[17] The AGC and the *amicus curiae* are jointly of the view that:

(a) The prohibition on disclosure should be confirmed in relation to AGC 0002 and AGC 0003 and that no summary should be provided.

(b) In relation to AGC 0004 and AGC 0005, a portion of the redaction should be confirmed.

(c) In relation to AGC 0006, the redaction of the words "position is" should be lifted and the *amicus curiae* is not contesting the redactions from the first paragraph onward that follow the words: "They emphasized".

(d) In relation to AGC 0007, AGC 0008, AGC 0009, AGC 0012, AGC 0013 and AGC 0014, the following summary should be provided: "Discussion unrelated to the GHIB issue."

(e) In relation to AGC 0010 and AGC 0011, the redaction of the words "position is" should be lifted, the balance of the redactions should be confirmed and the following summary should be provided: "Discussion at the meeting focused on the demolition of the bridge. DOS sought clarity on the Canadian rationale for the removal requirement."

[18] Notwithstanding the joint recommendations of the AGC and the *amicus curiae*, the Court must determine, in accordance with the applicable statutory provisions and governing jurisprudence, whether the prohibition of disclosure of the information at issue should be confirmed [see *Canada (Attorney General) v Meng*, 2020 FC 844 at para 71] and/or whether the information at issue, or parts thereof, should be disclosed. Having considered the evidence and submissions before the Court and taking into account the applicable legal principles as set out above, the Court agrees with and adopts the joint position of the AGC and the *amicus curiae* as detailed in paragraph 17.

[19] The remaining redactions at issue are as follows:

(a) A portion of AGC 0004 and AGC 0005, with the AGC seeking to maintain the redaction and the *amicus curiae* proposing that the redaction be lifted.

(b) A portion of AGC 0006, with the AGC seeking to maintain the redaction that follows the words "DOS indicated" and ends prior to the words "They emphasized" and the *amicus curiae* proposing that the redaction be lifted. In the event that the Court determines that a summary should be provided, the AGC and the *amicus curiae* have provided a jointly-proposed summary.

(c) AGC 0015 has three remaining redactions. The first redaction is a series of redactions on page 2 of 4, the second redaction is the first paragraph on page 4 of 4 and the third redaction is in the second paragraph on page 4 of 4. The AGC seeks to maintain all of the redactions and the *amicus curiae* proposes that all of the

redactions be lifted. In the event that Court determines that a summary should be provided in relation to the first and/or second redaction, the AGC and the *amicus curiae* have each provided proposed language for the summary for the first redaction and have agreed on proposed language for any summary of the second redaction.

(d) AGC 0016 (page 27), AGC 0017 (page 25), AGC 0018 (page 27), AGC 0019 (page 25), AGC 0020 (page 25) and AGC 0021 (page 27) have the identical sentence redacted therefrom. The AGC seeks to maintain the redaction and the *amicus curiae* proposes that the redaction be lifted.

[20] Turning to the first prong of the test, the AGC concedes that the redacted information in AGC 0004, AGC 0005, AGC 0006, AGC 0015, AGC 0016, AGC 0017, AGC 0018, AGC 0019, AGC 0020 and AGC 0021 is relevant.

[21] Turning to the second prong of the test, the AGC asserts that disclosure of the redacted information would be injurious to Canada's international relations. Specifically, the AGC asserts that: (a) disclosure of information received in confidence would undermine the trust between government officials and the exchange of free and frank information; (b) disclosure would reveal specific strategies and objectives employed by Canadian officials in the conduct of international affairs; and (c) disclosure of some of the redacted information would be perceived as critical of another government. The AGC asserts that disclosure of such types of information would

negatively impact Canada's ability to pursue its foreign policy objectives, including by compromising the official channels of communication with another government, diminishing Canada's influence in that country and abroad and impeding Canadian officials' ability to report frankly to other officials.

[22] In *Tursunbayev*, *supra*, Justice Noël addressed in detail the meaning and scope of "international relations". He stated:

> [73] There is no legislative definition of "international relations" or "injury to international relations." The jurisprudence also does not give a clear definition of the concept, although there have been some attempts by this Court to broadly define the concept.
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> [74] In *Canada (Attorney General) v Almalki*, [*Almalki*], my colleague Justice Mosley described the concept as being linked to both the impact of disclosure of such information on Canada's relations abroad and the importance of frank exchanges between diplomats. He noted the following:
>
> > 79. The third national interest to be considered is the risk of injury to Canada's international relations. Again, this cannot be read as synonymous with either national defence or national security. Parliament deemed it necessary to protect sensitive information that would harm Canada's relations abroad if it were to be publicly disclosed, in keeping with the accepted conventions on diplomatic confidentiality.
> >
> > 80. This protection extends to the free and frank exchanges of information and opinions between Canada's diplomats and other public officials and their foreign counterparts, without which Canada could not effectively participate in international affairs. Similar protection is contained in mandatory and discretionary terms in the *Access to Information Act*, R.S.C., 1985, c. A-1, ss.13, 15. Absent consent, the head of a government institution shall refuse to disclose any record that contains information that

> was obtained in confidence from the government of a foreign state or an institution thereof (s.13). The head of a government institution may also refuse to disclose any information which may reasonably be expected to be injurious to the conduct of international affairs (s.15).

[75] In *Canada (Attorney General) v Canada (Commission of Inquiry into the Actions of Canadian Officials in Relation to Maher Arar)* (F.C.), [*Arar*], at para 61, I defined information injurious to international relations as "information that if disclosed would be injurious to Canada's relationship with foreign nations."

[76] In *Jose Pereira E Hijos S.A. v Canada (Attorney General)*, [*Pereira*], Justice Nadon determined that the disclosure of certain information would undeniably have a "chilling effect" on Canada's international relations (at para 26). Although he did not define the concept of international relations, he cited at para 19 the following passage from a Certificate that was served upon the plaintiffs by Mr. Brian Buckley, a retired Canadian foreign service officer, to explain the reasons for objecting to the disclosure of certain information:

> 18. Governments of foreign states or institutions or international organizations thereof, and contacts and sources with those states and institutions and international organizations, often provide information concerning international relations under the expressed or implied condition that the information and/or the identities of the sources and contacts be protected from disclosure. Such information may be provided by and received from sources and contacts in Canada and abroad, respecting a wide variety of sensitive matters, including economic and social policies.
>
> 19. The release of such information, and/or the names, titles and other identifying features of continuing contacts and sources of that information, could be injurious to Canada's international relations because it could compromise or impair the trust or confidence of the governments, institutions, international organizations or individuals from which or from whom the information originated, and thereby jeopardize the ability of the Department of

Foreign Affairs and International Trade or the Government of Canada to continue to benefit from such relationships and to conduct diplomatic and consular relations effectively.

20. In addition, it is essential for the effective conduct of diplomatic and consular relations and international negotiations that Canadian officials who obtain information from contacts and sources be permitted to be candid in reporting that information, as well as their opinion, views or recommendations respecting the information and contacts and sources with whom they deal, to or within the Government of Canada. Releasing the identifies of Canadian officials and their sources or contacts together with the opinions, views or recommendations of the officials may in some circumstances compromise or impair the trust or confidence of continuing sources and contacts for those officials and thereby jeopardize the ability of the Department of Foreign Affairs and International Trade of the Government of Canada to continue to benefit from such relationships and to conduct diplomatic and consular relations effectively.

[...]

23. Moreover, the conduct of international negotiations, and of bilateral and multilateral relations more generally, normally require a degree of candor on the part of Canadian and foreign representatives regarding the relative positions, objectives and personalities involved in those negotiations and relations, including criticisms by government officials of the position of their own or other governments or international organizations. Releasing information of this nature could reasonably be expected to have a chilling effect on the degree to which the representatives of Canada and foreign states or international organizations may be forthright in their negotiations and relations, and thereby inhibit the effectiveness, and in some circumstances the continuation, of those negotiations and relations.

> […]
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> [78] It follows that international relations encompass the exchange of information between foreign nations and the ability to conduct such exchanges in an atmosphere of trust to ensure the information is as complete and accurate as possible. Releasing such information could compromise or impair the trust of not only the nation to whom it relates, but of other foreign nations as well. Canada benefits tremendously from these exchanges and it must maintain the trust of all foreign nations to continue to benefit from those. In addition, for international negotiations to be effective, government officials must be able to report that information and their opinion within the Government of Canada in a candid manner without fear that it will be made public.
>
> [79] It would be a challenge to define the concept of international relations in a definitive way. A lot could be lost as a result. In *Canada (Attorney General) v Kamel*, the Federal Court of Appeal informed that concepts like "international relations" and "national security" must have a broad and flexible approach in order to preserve the effectiveness of the law: […]

[23] The *amicus curiae* questions whether the redacted information would remain injurious today, given the age of the documents and in light of publicly known events that have transpired in relation to the GHIB following the date of creation of the documents up until the present. The *amicus curiae* further questions whether sufficient evidence has been provided to establish that certain statements reflected in the documents were in fact made by a foreign government official with an expectation of confidence.

[24] Having considered the evidence provided by the affiant, as well as the submissions of the AGC, the *amicus curiae* and the CTC, I am satisfied that the AGC has demonstrated that disclosure of the remaining redactions at issue would be injurious to international relations. In reaching this

finding, I am particularly mindful of the fact that: (a) the GHIB is not yet fully operational and Canada's relationship with the United States of America has become more difficult to manage; (b) pursuant to subsection 38.06(3.1) of the *CEA*, the rules of evidence are relaxed in section 38 proceedings and the Court is satisfied that the evidence provided by the AGC was sufficiently reliable and appropriate; (c) while information may become public at a later point in time, the disclosure of the fact that the information was conveyed in confidence at an earlier date and disclosure of the context in which that information was conveyed would still result in injury; and (d) while general strategic options available to Canadian officials in conducting international affairs may in and of themselves be public knowledge, the specific strategies employed by Canadian officials, in context and in relation to a particular issue, would result in injury.

[25] Under the third prong of the test, in relation to AGC 0004 and AGC 0005, I am not satisfied that the CTC has demonstrated that the public interest in disclosure of the injurious information is greater than the public interest in the non-disclosure of the injurious information. In reaching this finding, I have balanced the various factors detailed above and note that balancing of the public interests favours non-disclosure given: (a) that the redacted information has minimal, if any, probative value to the issues in the underlying proceeding; (b) the likelihood of injury to Canada's ability to pursue its foreign policy objectives is not insignificant; and (c) the nature of the interests at stake in the underlying proceeding.

[26] In relation to the balance of the documents, I am satisfied that the CTC has demonstrated that the public interest in disclosure of the injurious information is greater than the public interest

in the non-disclosure of the injurious information. I reach this conclusion having taken into consideration, among other things, the extent of the injury and the fact that the information at issue can be summarized. Accordingly, as a condition of disclosure, I am satisfied that disclosure of summaries is warranted as reflected in my Order below.

ORDER in DES-11-24

THIS COURT ORDERS that:

1. On the consent of the AGC, the redaction to the words "position is" in each of AGC 0006, AGC 0010 and AGC 0011 shall be lifted.

2. The following table summarizing the information at issue shall be disclosed pursuant to subsection 38.06(2) of the *Canada Evidence Act*, RSC 1985, c C-5 [*CEA*] for use in the underlying civil action:

No.	AGC ID	Public Summary
1.	AGC 0010 AGC 0011	Discussion at the meeting focused on the demolition of the bridge. DOS sought clarity on the Canadian rationale for the removal requirement.
2.	Page 2 of each of: AGC 0007 AGC 0008 AGC 0009 AGC 0012 AGC 0013 AGC 0014	Discussion unrelated to the GHIB.
3.	AGC 0006	Discussion at the meeting focused on the demolition of the bridge. DOS sought clarity on the Canadian rationale for the removal requirement.
4.	First set of redactions on page 2 of: AGC 0015	The redacted information described an advocacy and engagement strategy involving both a public campaign and outreach by Canadian Ministers, diplomats and other officials, including with government and legislative representatives in Michigan, U.S. administration officials and

		Members of Congress in Washington, D.C. and Ambassador Craft in Ottawa.
5.	Second redaction in the first paragraph of page 4 of: AGC 0015	The redacted information describes the Consul-General's visit to the Michigan state capital on 21 March 2018 to engage with legislative representatives about the GHIB project.

3. Pursuant to subsection 38.06(3) of the *CEA*, the prohibition on disclosure of the balance of the redacted information is confirmed.

4. Counsel for the AGC and the *amicus curiae* shall notify the Court of any proposed redactions to this Order by no later than July 23, 2025.

"Mandy Aylen"
Judge

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FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	DES-11-24
STYLE OF CAUSE:	ATTORNEY GENERAL OF CANADA v THE CANADIAN TRANSIT COMPANY
PLACE OF HEARING:	OTTAWA, ONTARIO
DATE OF HEARING:	FEBRUARY 12, 2025 MARCH 17, 2025 MAY 8, 2025
ORDER AND REASONS:	AYLEN, J.
DATED:	JULY 4, 2025

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