

Federal Court



Cour fédérale

Date: 20240515

Docket: DES-5-23

Citation: 2024 FC 716

Ottawa, Ontario, May 15, 2024

PRESENT: The Honourable Mr. Justice Fothergill

BETWEEN:

THE ATTORNEY GENERAL OF CANADA

Applicant

and

PATRICK GORDON MACDONALD

Respondent

and

THE DIRECTOR OF PUBLIC PROSECUTIONS

Respondent

ORDER

UPON the Application of the Attorney General of Canada [AGC] pursuant to s 38.04(1) of the *Canada Evidence Act*, RSC 1985, c C-5 [CEA] for an Order confirming the prohibition of

disclosure of information contained in documents referred to in a notice given by counsel for the Public Prosecution Service of Canada [PPSC] to the AGC pursuant to s 38.01(1) of the CEA;

AND CONSIDERING that:

- (a) on July 4, 2023, Mr. Macdonald was charged with offences pursuant to ss 83.18, 83.19 and 83.02 of the *Criminal Code*, RSC, 1985, c C-46 (Ontario Court of Justice Court File No 4011 998 23 1140453500);
- (b) on September 14, 2023, counsel for the PPSC provided notice to the AGC pursuant to s 38.01(1) of the CEA that sensitive or potentially injurious information may be disclosed in connection with the criminal proceeding against Mr. Macdonald; and
- (c) on March 18, 2024, the Court appointed Mr. Harout Haladjian as *amicus curiae* in this Application;

AND UPON reading the materials filed, including the classified affidavits submitted on behalf of the AGC, and hearing from counsel for the AGC and the *amicus curiae* during an *in camera, ex parte* hearing on May 2, 2024;

AND CONSIDERING that Mr. Macdonald and his counsel have communicated to the *amicus curiae* their theory of the defence and the categories of information that may be of

interest to them, and have indicated that no public hearing is required and take no position on the Application;

AND CONSIDERING that counsel for the AGC and the *amicus curiae* have made a joint submission to the Court with their recommendations respecting the disposition of the Application;

AND CONSIDERING that, 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 in issue should be confirmed (*Canada (Attorney General) v Meng*, 2020 FC 844 at para 71);

AND CONSIDERING the tripartite test to determine whether the Court should maintain the confidentiality of information the disclosure of which is alleged to be injurious to international relations, national defence or national security (*Ribic v Canada* (2003), 185 CCC (3d) 129 (FCA)), namely:

- (a) whether the information the AGC seeks to protect is relevant to the underlying proceeding;
- (b) if so, whether disclosure of the information would be injurious to international relations, national defence or national security; and

- (c) if so, whether the public interest in disclosure outweighs in importance the public interest in non-disclosure;

AND UPON being satisfied that:

- (a) the materiality of the information in issue to the underlying proceeding is not always evident, but its potential relevance may be inferred from the disclosure of the documents to Mr. Macdonald in accordance with *R v Stinchcombe*, [1991] 3 SCR 326; the threshold requirement for disclosure in the context of a criminal trial and the threshold applied at the first step of the *Ribic* test are both quite low (*Canada (Attorney General) v Ortis*, 2022 FC 142 at para 74);
- (b) courts should accord deference to decisions of the executive in matters of national security, national defence and international relations, as the executive is considered to have greater knowledge and expertise in such matters; but the AGC nevertheless has the burden to prove that disclosure would be injurious to international relations, national defence or national security (*Canada (Attorney General) v Canada (Commission of Inquiry into the Actions of Canadian Officials in Relation to Maher Arar)*, 2007 FC 766 at paras 46-48);
- (c) disclosure of the information in issue would be injurious to national security, insofar as it tends to reveal: (i) the names and contact information of personnel employed by the Department of National Defence and Canadian Armed Forces

[DND/CAF], the Canadian Security and Intelligence Service [CSIS], and the Financial Transactions and Reports Analysis Centre of Canada [FINTRAC]; (ii) the identities of individuals, groups or issues of investigative interest; and (iii) confidential techniques and capabilities;

- (d) disclosure of the summaries of information jointly proposed by counsel for the AGC and the *amicus curiae* will not be injurious to international relations, national defence or national security, and will provide meaningful disclosure to Mr. Macdonald;
- (e) given the tenuous materiality of the information in issue to the underlying criminal proceeding, the public interest in disclosure does not outweigh in importance the public interest in non-disclosure; and
- (f) some of the information in issue cannot be summarized in a manner that would prevent injury to national security if disclosed;

THIS COURT ORDERS that:

1. The attached table summarizing the information in issue shall be disclosed pursuant to s 38.06(2) of the CEA for use in the underlying criminal proceeding.

2. In all other respects, the application of the AGC pursuant to s 38.04 of the CEA to prohibit the disclosure of information is granted, and the prohibition of disclosure is confirmed pursuant to s 38.06(3) of the CEA.

“Simon Fothergill”

Judge

ATTACHMENT

| No. | AGC ID | Public Summary |
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| 1 | AGC0001 | The redacted information identifies the name of DND/CAF member. |
| 2 | AGC0002 | The redacted information identifies the name, email address and phone number of a DND/CAF member. |
| 3 | AGC0003 | The redacted information identifies the names and email addresses of DND/CAF members, including the member who made the weapons assessment. |
| 4 | AGC0004 | The redacted information identifies the names of DND/CAF members, including the member who made the weapons assessment. |
| 5 | AGC0005 | The redacted information identifies the phone number of a FINTRAC employee. |
| 6 | AGC0006 | The redacted information identifies the phone number of a FINTRAC employee. |
| 7 | AGC0007 | The redacted information identifies the phone number extension of a DND/CAF member. |
| 8 | AGC0008 | The redacted information identifies the phone number of a DND/CAF member. |
| 9 | AGC0009 | The redacted information identifies the name of a DND/CAF member. |
| 10 | AGC0010 | The redacted information identifies the phone number of a FINTRAC employee. |
| 11 | AGC0011 | The redacted information identifies the name of a DND/CAF member. |
| 12 | AGC0012 | The redacted information identifies the names of DND/CAF members, including the member who made the weapons assessment. |
| 13 | AGC0013 | The redactions refer to a period of time within the CSIS investigation. |
| 14 | AGC0014 | The redacted information identifies the name of a DND/CAF member who made the weapons assessment. |
| 15 | AGC0015 | The redacted information identifies the names and email addresses of FINTRAC employees. |
| 16 | AGC0016 | The redacted information identifies the name and phone number of a FINTRAC employee. |
| 17 | AGC0017 | The redactions refer to a period of time within the CSIS investigation. |
| 18 | AGC0018 | Part of the redacted information identifies the name of a DND/CAF member who made the weapons assessment. Disclosure of the remaining redacted information would be injurious to national security, and the public interest in non-disclosure outweighs in importance the public interest in disclosure. |

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| 19 | AGC0019 | Part of the redacted information describes a CSIS investigative technique. Disclosure of the remaining redacted information would be injurious to national security, and the public interest in non-disclosure outweighs in importance the public interest in disclosure. |
| 20 | AGC0020 | Part of the redacted information identifies the name and email address of a CSIS employee. The redactions also relate to the response to the deconfliction process. |
| 21 | AGC0021 | The redacted information identifies the names of CSIS employees. |
| 22 | AGC0022 | Part of the redacted information identifies the name and email addresses of CSIS employees. The redactions also relate to the response to the deconfliction process. |
| 23 | AGC0023 | The redacted information identifies the names of CSIS employees. |
| 24 | AGC0024 | Part of the redacted information identifies the name and email address of a CSIS employee. The redactions also relate to the response to the deconfliction process. |
| 25 | AGC0025 | The redacted information identifies the names of CSIS employees. |
| 26 | AGC0026 | Part of the redacted information identifies the name and email address of a CSIS employee. The redactions also relate to the response to the deconfliction process. |
| 27 | AGC0027 | The redacted information identifies the names of CSIS employees. |
| 28 | AGC0028 | Part of the redacted information identifies the name and email address of a CSIS employee. The redactions also relate to the response to the deconfliction process. |
| 29 | AGC0029 | The redacted information identifies the names of CSIS employees. |
| 30 | AGC0030 | Part of the redacted information identifies the name and email address of a CSIS employee. The redactions also relate to the response to the deconfliction process. |
| 31 | AGC0031 | The redacted information identifies the names of CSIS employees. |
| 32 | AGC0032 | The redacted information identifies the name of a DND/CAF member who made the weapons assessment. |
| 33 | AGC0033 | The redacted information identifies the names and email addresses of CSIS employees as well as administrative procedures. |
| 34 | AGC0034 | The redacted information identifies the name of a CSIS employee. |
| 35 | AGC0035 | The redacted information identifies the name of a CSIS employee. |
| 36 | AGC0036 | The redacted information identifies the names of CSIS employees. |
| 37 | AGC0039 | The redacted information identifies the names and email addresses of CSIS employees. |

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| 38 | AGC0040 | Part of the redacted information identifies the names and email address of a CSIS employee. The redactions also relate to the response to the deconfliction process. |
| 39 | AGC0041 | The redacted information identifies the names of CSIS employees. |
| 40 | AGC0044 | The redacted information identifies the name of a CSIS employee. |
| 41 | AGC0045 | The redacted information identifies the names and email addresses of CSIS employees as well as administrative procedures. |
| 42 | AGC0046 | Part of the redacted information identifies the names and an email address of CSIS employees. The redactions also relate to the response to the deconfliction process. |
| 43 | AGC0047 | The redacted information identifies the name of a CSIS employee. |
| 44 | AGC0048 | Disclosure of the redacted information would be injurious to national security, and the public interest in non-disclosure outweighs in importance the public interest in disclosure. |
| 45 | AGC0049 | The redactions relate to the response to the deconfliction process. |
| 46 | AGC0050 | The redacted information identifies the names of DND/CAF members, including the member who made the weapons assessment. |
| 47 | AGC0051 | The redacted information identifies a CSIS phone number, internal procedures and administrative methodologies. |
| 48 | AGC0052 | The redacted information identifies a CSIS phone number, internal procedures and administrative methodologies. |
| 49 | AGC0053 | The redacted information identifies the name and email address of a CSIS employee. |
| 50 | AGC0054 | The redacted information identifies the name and email address of a CSIS employee. |
| 51 | AGC0055 | The redacted information identifies the name and email address of a CSIS employee. |
| 52 | AGC0056 | The redacted information describes a CSIS Technique. |
| 53 | AGC0057 | The redacted information identifies the names and email addresses of CSIS employees as well as administrative procedures. |
| 54 | AGC0058 | The redacted information identifies the name of a CSIS employee. |
| 55 | AGC0059 | The redacted information identifies the names and email addresses of CSIS employees as well as administrative procedures. |
| 56 | AGC0060 | The redacted information identifies the name of a CSIS employee. |
| 57 | AGC0061 | The redacted information identifies the name of a DND/CAF member who made the weapons assessment. |

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| 58 | AGC0062 | The redacted information identifies the name of a DND/CAF member who made the weapons assessment. |
| 59 | AGC0063 | The redacted information identifies the name of a DND/CAF member who made the weapons assessment. |
| 60 | AGC0064 | Part of the redacted information identifies the names and email addresses of CSIS employees. The redactions also relate to the response to the deconfliction process. |
| 61 | AGC0065 | The redacted information identifies the names of CSIS employees. |
| 62 | AGC0066 | Part of the redacted information identifies the names and email addresses of CSIS employees. The redactions also relate to the response to the deconfliction process. |
| 63 | AGC0067 | The redacted information identifies the names of CSIS employees. |
| 64 | AGC0068 | Part of the redacted information identifies the names and email addresses of CSIS employees. The redactions also relate to the response to the deconfliction process. |
| 65 | AGC0069 | The redacted information identifies the names of CSIS employees. |
| 66 | AGC0070 | The redacted information identifies the name of a DND/CAF member who made the weapons assessment. |
| 67 | AGC0071 | The redacted information identifies the email address of a CSIS employee. |
| 68 | AGC0072 | The redacted information identifies the name and phone number of a FINTRAC employee. |
| 69 | AGC0073 | The redacted information identifies the phone number of a FINTRAC employee. |
| 70 | AGC0074 | The redacted information identifies the phone number of a FINTRAC employee. |
| 71 | AGC0075 | The redacted information identifies the phone number of a FINTRAC employee. |
| 72 | AGC0076 | The redacted information identifies the name and phone number of a FINTRAC employee. |
| 73 | AGC0077 | The redacted information identifies the phone number of a FINTRAC employee. |
| 74 | AGC0078 | The redacted information identifies the name of a FINTRAC employee. |
| 75 | AGC0079 | The redacted information identifies the name and phone number of a FINTRAC employee. |
| 76 | AGC0080 | The redacted information identifies the phone number of a FINTRAC employee. |
| 77 | AGC0081 | The redacted information identifies the phone number of a FINTRAC employee. |

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| 78 | AGC0082 | The redacted information identifies the name and phone number of a FINTRAC employee. |
| 79 | AGC0083 | The redacted information identifies the name and phone number of a FINTRAC employee. |
| 80 | AGC0084 | The redacted information identifies the name and phone number of a FINTRAC employee. |
| 81 | AGC0085 | The redacted information identifies the phone number of a FINTRAC employee. |
| 82 | AGC0086 | The redacted information identifies the name and phone number of a FINTRAC employee. |
| 83 | AGC0087 | The redacted information identifies the phone number of a FINTRAC employee. |
| 84 | AGC0088 | The redacted information identifies the name and phone number of a FINTRAC employee. |
| 85 | AGC0089 | The redacted information identifies the phone number of a FINTRAC employee. |
| 86 | AGC0090 | The redacted information identifies the name and phone number of a FINTRAC employee. |
| 87 | AGC0091 | The redacted information identifies the phone number of a FINTRAC employee. |
| 88 | AGC0092 | The redacted information identifies the phone number of a FINTRAC employee. |
| 89 | AGC0093 | The redacted information identifies the name and phone number of a FINTRAC employee. |
| 90 | AGC0094 | The redacted information identifies the phone number of a FINTRAC employee. |
| 91 | AGC0095 | The redacted information identifies the name and phone number of a FINTRAC employee. |
| 92 | AGC0096 | The redacted information identifies the names of CSIS employees. |
| 93 | AGC0097 | The redacted information identifies the name and phone number of a FINTRAC employee. |
| 94 | AGC0098 | The redacted information identifies the names of DND/CAF members, including the member who made the weapons assessment. |
| 95 | AGC0099 | The redacted information identifies the name of a DND/CAF member. |
| 96 | AGC0127 | The redacted information identifies phone numbers of a DND/CAF member. |
| 97 | AGC0129 | The redacted information identifies the name of a DND/CAF member. Disclosure of the remaining redacted information would be injurious to |

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| | | national security, and the public interest in non-disclosure outweighs in importance the public interest in disclosure. |
| 98 | AGC0130 | The redacted information identifies the name of a DND/CAF member. |
| 99 | AGC0131 | The redacted information identifies the name of a DND/CAF member. |
| 100 | AGC0132 | The redacted information identifies the name of a DND/CAF member who made the weapons assessment. |
| 101 | AGC0133 | The redacted information identifies the name of a DND/CAF member who made the weapons assessment. |
| 102 | AGC0134 | The redacted information identifies the name of a DND/CAF member who made the weapons assessment. |
| 103 | AGC0135 | The redacted information identifies the name of a DND/CAF member who made the weapons assessment. |
| 104 | AGC0136 | The redacted information identifies the name of a DND/CAF member who made the weapons assessment. |
| 105 | AGC0137 | The redacted information identifies the name of a DND/CAF member who made the weapons assessment. |
| 106 | AGC0138 | The redacted information identifies the name of a DND/CAF member who made the weapons assessment. |
| 107 | AGC0139 | The redacted information identifies the name of a DND/CAF member who made the weapons assessment. |
| 108 | AGC0140 | The redacted information identifies the name of a DND/CAF member who made the weapons assessment. |
| 109 | AGC0141 | The redacted information identifies the name of a DND/CAF member who made the weapons assessment. |
| 110 | AGC0142 | The redacted information identifies the name of a DND/CAF member who made the weapons assessment. |
| 111 | AGC0143 | The redacted information identifies the name of a DND/CAF member who made the weapons assessment. |
| 112 | AGC0144 | The redacted information identifies the name of a DND/CAF member who made the weapons assessment. |
| 113 | AGC0145 | The redacted information identifies the name of a DND/CAF member who made the weapons assessment. |
| 114 | AGC0146 | The redacted information identifies the name of a DND/CAF member who made the weapons assessment. |
| 115 | AGC0147 | The redacted information identifies the name of a DND/CAF member who made the weapons assessment. |
| 116 | AGC0148 | The redacted information identifies the name of a DND/CAF member who made the weapons assessment. |

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| 117 | AGC0149 | The redacted information identifies the name of a DND/CAF member who made the weapons assessment. |
| 118 | AGC0150 | The redacted information identifies the names of CSIS employees. |
| 119 | AGC0151 | Disclosure of the redacted information would be injurious to national security, and the public interest in non-disclosure outweighs in importance the public interest in disclosure. |
| 120 | AGC0152 | The redactions relate to the response to the deconfliction process. |
| 121 | AGC0153 | The redactions relate to the response to the deconfliction process. |
| 122 | AGC0154 | Part of the redacted information identifies the names and an email address of CSIS employees. The redactions also relate to the response to the deconfliction process. |