

CANADA / JUDGMENT

## Canada (Attorney General) v. Bilali-Mtemi

2025 FC 223

COURT

Federal Court

DECIDED

5 February 2025

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Canada (Attorney General) v. Bilali-Mtemi

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Date: 20250205

Docket: DES-7-24

Citation: 2025 FC 223

[ENGLISH TRANSLATION]

Ottawa, Ontario, February 5, 2025

PRESENT: Madam Justice Gagné

BETWEEN:

THE ATTORNEY GENERAL OF CANADA

Applicant

and

GASTON BILALI-MTEMI and

THE DIRECTOR OF PUBLIC PROSECUTIONS

Respondents

## AMENDED ORDER AND REASONS

I. Overview [1] Mr. Gaston Bilali-Mtemi has been charged with threatening to commit a violent attack against the personnel of the United Nations Organization Stabilization Mission in the Democratic Republic of the Congo [MONUSCO] that was likely to endanger their life or liberty, contrary to paragraph 424.1(a) of the Criminal Code, RSC 1985, c C-46. His trial before the Court of Québec's Criminal Division will be held from March 26 to 28, 2025.

- [2] MONUSCO is located in a zone of acute conflict in eastern Democratic Republic of the Congo [Congo]; the Union nationale pour la libération du Congo (National Union for the Liberation of the Congo) [UNLC], of which Mr. Bilali-Mtemi is President, threatened to attack MONUSCO if it did not cease all its operations and leave Congo territory. As Mr. Bilali-Mtemi is a Canadian citizen living in Quebec, MONUSCO's arms embargo cell [AEC], on behalf of the United Nations [UN], provided the Royal Canadian Mounted Police [RCMP] with information gathered as part of its investigation into the threat against MONUSCO and the UNLC's purchase of firearms.
- [3] Broadly speaking, the Director of Public Prosecutions asserts that Mr. Bilali-Mtemi not only wrote the threatening letter to MONUSCO, but also posted it to the UNLC's Facebook page.
- [4] The Attorney General of Canada [AGC] is now seeking to protect some of the information received from MONUSCO, the United States' Federal Bureau of Investigation [FBI], and the Canadian Security Intelligence Service [Service]. To this end, the AGC filed with this Court a notice of application under subsection 38.04(1) of the Canada Evidence Act, RSC 1985, c C-5 [CEA], requesting that it confirm the prohibition on the disclosure of this information.
- [5] The Court retained Nellie Benoit and Anil Kapoor to act as amici curiae. In accordance with the rule applicable in this regard, the amici curiae met with the accused before reviewing the classified documents at issue in this application and talked to him about the defence he intends to present to the Court of Québec.
- [6] Through his counsel, Mr. Bilali-Mtemi confirmed that he was waiving the holding of a public hearing and his right to make representations as part of this application.

[7] The amici curiae have raised no objections regarding the prohibition on the disclosure of the information received from the FBI and the Service, and the Court is of the opinion that, on the basis of the evidence, disclosing this information would harm Canada's international relations and/or national security; as a result, it is appropriate to confirm the prohibition on the disclosure of the redacted Service and FBI information. These reasons therefore only relate to the documents received from MONUSCO.

II. Facts [8] MONUSCO is a peacekeeping mission established by the UN Security Council. Its goal is to end the armed conflict occurring primarily in eastern Congo.

[9] MONUSCO's mission is to protect civilians, humanitarian personnel, and human rights personnel facing threats of physical violence and to support the Congolese government in its stabilization and peacebuilding efforts. MONUSCO is authorized to take the necessary steps to achieve its mandate. However, not everyone welcomes its presence in the Congo.

[10] The UNLC was formed in 2018. It defines itself as a political party whose objective is to liberate the country from foreign invaders. On April 11, 2021, the UNLC sent a letter signed by Mr. Bilali-Mtemi in which it threatened to attack MONUSCO premises and personnel to get them to stop all their operations and leave the Congo within 30 days. The prosecution's position is that Mr. Bilali-Mtemi posted this letter to the "UNLC Congo" Facebook page on April 14, 2021. The UNLC also allegedly posted other threats to its Facebook page. The prosecution also argues that the letters, Facebook posts and Mr. Bilali-Mtemi's other messages are part of a series of threats aimed at intimidating MONUSCO by asserting that the UNLC had military capabilities and the public support to attack MONUSCO.

[11] MONUSCO's AEC investigated the UNLC's threat and ||| |||. Almost all the information consolidated in the summary report of the AEC's investigation comes from people who provided statements to Mr. Raymond Debelle, the AEC investigator. The AGC contends that the statements from these individuals were received in confidence, in accordance with the UN's duty of confidentiality to these third parties, and with the assurance that their security would not be compromised.

[12] In February 2022, Mr. Debelle sent the summary report to the RCMP liaison officer located in the region. This report was then forwarded to the RCMP's Sensitive and International Investigations unit, which launched Projet Active; the work undertaken as part of this initiative led to the laying of the criminal charges against Mr. Bilali-Mtemi.

[13] In March 2023, when the RCMP was about to disclose the evidence in accordance with the principle established in *R v Stinchcombe*, [1991] 3 SCR 326 [Stinchcombe], the RCMP, in order to comply with the third-party rule applicable in respect of international information sharing, contacted the UN's Office of Legal Affairs to determine and confirm the nature of the information that the UN was seeking to protect. The UN confirmed that it was asking that four types of information be kept confidential, namely, information that would:

- (i) jeopardize the security of certain individuals;
- (ii) violate the UN's duty of confidentiality to a third party;
- (iii) compromise the confidential nature of the UN's decision-making process; and
- (iv) undermine the efficiency of the UN's current and future operations.

[14] In light of the instructions it received, the RCMP redacted the documents from MONUSCO and submitted everything to the UN's Office of Legal Affairs, which confirmed its acceptance following a few discussions between the two organizations.

[15] The AGC is asking the Court to issue an order confirming the prohibition on the disclosure of the redacted information in the prosecution's evidence sent to Mr. Bilali-Mtemi.

III. Issues [16] This application raises the following issues:

A. Is section 38 of the CEA engaged in the circumstances of this case, and does the third-party rule apply to the information MONUSCO sent to the RCMP?

If so, is the redacted information relevant to Mr. Bilali-Mtemi's defence?

If the information is relevant, would its disclosure injure Canada's international relations and national security?

If so, is there any public interest in disclosure that outweighs in importance the public interest in non-disclosure (balancing exercise)?

IV. Analysis A. Is section 38 of the CEA engaged in the circumstances of this case, and does the third-party rule apply to the information MONUSCO sent to the RCMP? [17] In an approach that is not without interest, the amici curiae allege that section 38 of the CEA does not apply to information sent by the victim of an alleged crime for the purposes of making a complaint to a competent police force.

[18] The amici curiae mainly argue that it is section 37 of the CEA rather than section 38 that applies to the information from MONUSCO. I do not share their opinion.

[19] In my view, the issue is not to what end an international organization sent the information to Canadian authorities, but rather to whom that information belongs, what it consists of, and what conditions the holder of the information imposed as regards its disclosure.

[20] On cross-examination by the RCMP representative, the amici curiae noted that when Mr. Debelle had sent the summary report to the RCMP liaison officer, no conditions had been attached to any potential disclosure. On that basis, they concluded that because the purpose of the communication had been to file a complaint with the Canadian law enforcement organization, it was implied that the information could be disclosed as part of a criminal trial.

- [21] First, this conclusion put forward by the amici curiae does not account for the fact that the word [translation] “RESTRICTED” appears at the bottom of each page of the AEC’s summary report and that some of the documents the AEC sent explicitly ask the RCMP to protect the identity of certain sources; from the moment the RCMP reviewed this information, this was certainly indicative of its sensitive nature and of the issues surrounding its disclosure.
- [22] Second, even if the amici curiae are correct and the third-party rule did not apply upon initial communication, I consider that section 38 was engaged and that the third-party rule applied from the moment the RCMP investigator asked the UN’s Office of Legal Affairs how it should handle the information received from MONUSCO and the investigator received clear instructions concerning the non-disclosure of certain information. Injury stemming from its disclosure therefore relates to Canada’s international relations and national security.
- [23] Parliament has expressly provided that the scheme of section 38 takes precedence over that of section 37 when one of the three categories of public interest—Canada’s international relations, national security, and national defence—comes into play.
- [24] Furthermore, Parliament considered it necessary to protect information of a type that, if it were disclosed to the public, would injure Canada’s international relations. This protection is distinct from the protections relating to national defence or national security (*Canada (Attorney General) v Almalki*, 2010 FC 1106 at para 79 [Almalki]), though it is closely linked to the notion of national security. Canada’s ability to ensure its protection fundamentally depends on its international relations with its closest allies and its relationships with foreign intelligence and policing agencies (*Canada (Attorney General) v Canada (Commission of Inquiry into the Actions of Canadian Officials in Relation to Maher Arar and Maher Arar)*, 2007 FC 766 at paras 77–80 [Arar]).
- [25] The Court must identify the public interest to protect and not the nature of the transmitted information or even the reason for its transmission. Even if the third-party rule did not set conditions with respect to information sharing when the information was communicated to the RCMP, it is now setting conditions regarding the disclosure of the information because the holder of that information is requesting that it be kept confidential. The UN asked the RCMP not to disclose four types of information, and disregarding that request would violate the third-party rule and cause injury to Canada’s international relations and national security. If it was the RCMP that initiated the communication and requested instructions from the UN, I consider it necessary to make this finding.
- [26] Canada is a net importer of security information (*Charkaoui v Canada (Citizenship and Immigration)*, 2007 SCC 9 at para 68), and a loss of confidence in its institutions’ ability to abide by the will of foreign organizations and agencies that provide it with such information undermines its ability to protect its interests and security.

[27] As I have found that section 38 is engaged in the circumstances of this case, it is therefore necessary to proceed with the three-step analysis laid out by the Federal Court of Appeal in *Canada (Attorney General) v Ribic*, 2003 FCA 246 [Ribic].

B. Is the redacted information relevant to Mr. Bilali-Mtemi's defence? [28] The relevance of the information must be analyzed in light of the teachings in *Stinchcombe*; therefore, the issue is whether the information in question might be reasonably useful to Mr. Bilali-Mtemi's defence.

[29] The amici curiae acknowledge that the UN information that could compromise the confidential nature of its decision-making process and undermine the efficiency of its current and future operations is not relevant. On the other hand, the AGC is not challenging the relevance of the information that would: (i) jeopardize the security of certain individuals; and (ii) violate the UN's duty of confidentiality to a third party. The analysis of the second and third Ribic factors will therefore centre on this type of information.

C. Would the disclosure of the information at issue injure Canada's international relations and national security? [30] In *Arar*, this Court recognized the sacrosanct nature of the third-party rule and underscored that the rule is premised on mutual confidence, reliability and trust. Both states (their typical intelligence and law enforcement agencies and departments, organizations and officials) and international organizations (such as the UN) rely on the third-party rule to ensure the steady flow of information (*Arar* at para 70; *Almalki* at paras 79–80). This rule applies whether or not the transmitted information leads to the laying of criminal charges in Canada.

[31] The extent of the injury flowing from an unauthorized disclosure can obviously be difficult to assess. However, it is recognized that 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 (*Almalki* at para 80).

[32] In the present matter, MONUSCO, which is made up of UN member states, shared certain information with the RCMP, a Canadian agency. It did so to, in particular, fulfill its general mandate of peacebuilding and peacekeeping in the Congo. As a result, information was shared between the UN and a member state that maintain international relations.

[33] The amici curiae refer the Court to the Supreme Court's decision in *R v Campbell*, [1999] 1 SCR 565 [Campbell] in support of their argument that the RCMP cannot be equated with the Government of Canada for the purposes of applying the third-party rule. Yet the circumstances in *Campbell* do not allow for such a finding. In that matter, the accused was seeking, in particular, a stay of proceedings on the ground that the RCMP officials had, as part of their investigation, wrongfully committed crimes. Commenting on the Crown's defence, Justice Binnie indicated that its attempt to equate the RCMP with the Crown for immunity purposes had to fail. However, Justice Binnie added that it is possible that the RCMP, in one or another of its roles, could be acting in an agency relationship with the Crown. Indeed, one of these roles is protecting Canada's international relations.

[34] That said, the UN's main concern is that the individuals who collaborated in the investigation carried out by MONUSCO's AEC would be subjected to reprisals and attacks by the UNLC and other militant groups should their identities be disclosed. In fact, the AEC had concluded that the UNLC presented a real and substantial risk to the security of MONUSCO personnel and of individuals perceived as having collaborated with it. The UN's concern is therefore legitimate, and the disclosure of this sensitive information, which would jeopardize the security of certain individuals, would undermine the UN's and its member states' confidence in Canada's ability to protect the information it is sent, in light of the instructions received.

[35] Given these circumstances, the injury to Canada's international relations and national security has been established.

D. Is there any public interest in disclosure that outweighs in importance the public interest in non-disclosure (balancing exercise)? [36] Subsection 38.06(2) of the CEA provides that when it has been concluded that the disclosure of information would be injurious to Canada's international relations, national security or national defence, it must be determined whether the public interest in disclosure of the injurious information outweighs in importance the public interest in non-disclosure of this information. This is a balancing exercise in respect of conflicting interests.

[37] At this stage of the analysis, the burden is on the party seeking the disclosure of information (Ribic at paras 21–22).

[38] First, and with respect, the amici curiae are conflating the interests at issue when they make an analogy between the types of information that the UN requested not be disclosed and police informer privilege. This privilege is in no way at issue here. Consequently, the cited case law on police informer privilege, as well as that on the exception applicable to the agent provocateur, is not relevant in this case.

[39] What is at issue and of public interest is that the information comes from a foreign organization with which Canada maintains international relations and that this organization expressly requested the non-disclosure of certain information.

[40] The amici curiae argue that there is confusion regarding the identity of the third party(ies) to whom the rule applies. I disagree. It is the UN, an international organization made up of member states. Canada maintains international relations both with the UN and its member states, though it has closer relations with certain member states than it has with others.

[41] In terms of the public interest in disclosure, the amici curiae invoke the right to make full answer and defence, the right to disclosure of the evidence to ensure a fair trial, and the open court principle.

- [42] Information that is [translation] “of some use to the defence” must be within the meaning adopted by the Supreme Court in *R v Egger*, [1993] 2 SCR 451, namely, information that can be used in meeting the case for the Crown, in advancing a defence, or otherwise in making a decision which may affect the conduct of the defence such as, for example, whether to call evidence.
- [43] Justice John Norris indicates the following in *Canada (Attorney General) v Ortis*, 2022 FC 142 [Ortis]:
- [78] If the information relates to an element of the offence, the designated judge should consider the potential value of the information for raising a reasonable doubt about that element. A reasonable doubt is a doubt that is based on reason and common sense, a doubt that is logically connected to the evidence or absence of evidence: see *R v Lifchus*, [1997] 3 SCR 320 at para 36. ...
- [44] The amici curiae essentially have an interest in the information provided by two individuals, ||| at the time of the facts and an important witness to the facts alleged against Mr. Bilali-Mtemi; and ||| |||. The amici curiae argue that this information is of use to Mr. Bilali-Mtemi’s defence, though they have not provided much detail.
- [45] Regarding |||, the amici curiae rely on the following evidence in support of disclosing the information this person provided:
- Ø |||;
- Ø |||;
- Ø | Mr. Bilali-Mtemi was President of the UNLC, |||;
- Ø ||| | |||;
- Ø |||;
- Ø Elements related to the unlc689@gmail.com email address were used to corroborate the source of the April 11, 2021 [translation] “ultimatum letter” addressed to MONUSCO;
- Ø ||| ;
- Ø Two of the three threats alleged against Mr. Bilali-Mtemi were uttered through the UNLC’s Facebook account;
- Ø |||; and
- Ø |||.

[46] With respect to |||, the amici curiae point to the following evidence in favour of disclosing the information this person provided:

Ø|||; and

Ø|||.

[47] In my opinion, only the fact that Mr. Debelle asked ||| in order to go get additional information is reasonably useful to the defence. However, and in light of all the information before me, I consider that the potential value of all the information provided by ||| is only speculative. As a result, this is insufficient to overcome the injury to international relations or national security (Ortis at para 79).

[48] Furthermore, the information provided by ||| tends to incriminate rather than exonerate Mr. Bilali-Mtemi because it reiterates the threats made against MONUSCO and explains how the UNLC plans to concretely follow up on them.

[49] Therefore, I am of the view that this information's potential value in supporting the defence does not allow for a finding that the injury to the public interest that would result from non-disclosure outweighs the injury to the public interest that would result from disclosure. Overall, this information has little to no impact on Mr. Bilali-Mtemi's defence.

[50] For example, part of the information provided by ||| ||| ||| |||. Again, this information tends to incriminate Mr. Bilali-Mtemi regarding other offences he committed that are not at issue in the underlying case, such as |||. Moreover, the Crown has waived the use of this information, which would cast an even more negative light on the alleged offence.

[51] The only information relevant to Mr. Bilali-Mtemi's defence is the fact that ||| ||| |||. Mr. Bilali-Mtemi has this information. He referenced it as part of the statement he made to the RCMP when he was arrested. Also, the information provided by MONUSCO contains nothing about this.

V. Conclusion [52] For the foregoing reasons, I confirm the AGC's application respecting the redacted information in the documents that are the subject of this application.

ORDER in DES-7-24

THIS COURT ORDERS as follows:

The Attorney General of Canada's application is granted;

The prohibition on the disclosure of the redacted information in the documents that are the subject of this application is confirmed under subsection 38.06(3) of the Canada Evidence Act;

The amici curiae will be able to consult the classified version of this order and reasons at the Federal Court's Designated Proceedings Registry;

The Attorney General of Canada, in consultation with the amici curiae, will propose a public version of this order and reasons within 20 days following its issuance, for the purposes of disclosure to the respondent;

The classified version of this order and reasons will not be part of the public record; and

No costs are awarded.

*"Jocelyne Gagné"*

Judge

Certified true translation

Melissa Paquette, Senior Jurilinguist

FEDERAL COURT

SOLICITORS OF RECORD

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DES-7-24

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GAGNÉ J

DATED:

FEBRUARY 5, 2025

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