Federal Court of Appeal  Cour d'appel fédérale

Date: 20180830

Docket: CONF-3-18

Citation: 2018 FCA 161

CORAM: **BOIVIN J.A.**
DE MONTIGNY J.A.
LASKIN J.A.

IN THE MATTER OF AN ORDER MADE WITH RESPECT TO
SECTION 18.1 OF THE *CANADIAN SECURITY INTELLIGENCE SERVICE ACT*,
R.S.C. 1985, c. C-23, AS AMENDED

Heard at Ottawa, Ontario, on June 4, 2018.

Judgment delivered at Ottawa, Ontario, on August 30, 2018.

REASONS FOR JUDGMENT BY: BOIVIN J.A.

CONCURRED IN BY: DE MONTIGNY J.A.
LASKIN J.A.

Federal Court of Appeal  Cour d'appel fédérale

Date: 20180830

Docket: CONF-3-18

Citation: 2018 FCA 161

CORAM: **BOIVIN J.A.**
DE MONTIGNY J.A.
LASKIN J.A.

IN THE MATTER OF AN ORDER MADE WITH RESPECT TO SECTION 18.1 OF THE *CANADIAN SECURITY INTELLIGENCE SERVICE ACT*, R.S.C. 1985, c. C-23, AS AMENDED

REASONS FOR JUDGMENT

BOIVIN J.A.

[1] The Attorney General of Canada (the Attorney General) appeals from an Order of Mosley J. of the Federal Court (the Designated Judge). In that Order, the Designated Judge required the Attorney General to file affidavit evidence to justify privilege claims she had made pursuant to section 18.1 of the *Canadian Security Intelligence Service Act*, R.S.C. 1985, c. C-23, as amended (the CSIS Act) which addresses the protection of human sources. These privilege claims were made over information contained in a visa officer's certified tribunal record (CTR) related to an individual's application for permanent residence in Canada. The individual was aware that information in the CTR was redacted under section 18.1 of the CSIS Act, but did not

bring an application under subsection 18.1(4) of that Act to challenge the claim of privilege. Therefore, the Attorney General appeals the Designated Judge's Order on the basis that it was issued without jurisdiction.

[2] For the reasons set out below, I would allow the appeal.

I. Background

[3] The proceeding underlying this matter is a judicial review application filed by an individual whose application for permanent residence in Canada was denied. This denial was the result of a visa officer's assessment that he was inadmissible to Canada pursuant to paragraphs 41(*a*) and 34(1)(*d*) of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (the IRPA).

[4] The individual obtained leave to institute a judicial review application against the visa officer's decision. Accordingly, the visa officer sent the CTR to the Federal Court, to the Minister of Citizenship and Immigration (the Minister), and to the individual.

[5] The CTR contained redactions. The accompanying covering letter indicated that the redactions were made pursuant to section 87 of the IRPA, as well as pursuant to section 18.1 of the CSIS Act. The letter did not specify which redactions were subject to which privilege.

[6] In anticipation of the judicial review hearing, the Attorney General brought a motion on behalf of the Minister, pursuant to section 87 of the IRPA, for the non-disclosure of redacted information contained in the CTR. Among the material filed in support of this motion was an affidavit sworn by a CSIS officer (the first CSIS Affiant).

[7] The Designated Judge scheduled an *ex parte* and *in camera* hearing for the section 87 proceedings. Ahead of that hearing, the Designated Judge required to see the redacted section 18.1 information. The Attorney General provided the Designated Judge with the unredacted information over which she was claiming privilege pursuant to section 18.1 of the CSIS Act.

[8] During the section 87 hearing, the Designated Judge heard from the first CSIS Affiant. The Designated Judge expressed his reservations as to the appropriateness of the section 18.1 CSIS Act privilege claims, and asked the first CSIS Affiant for justification. The first CSIS Affiant was not, however, in a position to speak to the section 18.1 redactions.

[9] During the section 87 hearing, the Attorney General expressed the view that the Designated Judge should not be testing the appropriateness of the privilege claims made under section 18.1 of the CSIS Act. In her view, the Designated Judge could only do so if seized of an application brought under subsection 18.1(4) of the CSIS Act and no such application was filed.

[10] The Designated Judge emphasized during the section 87 hearing, however, that the individual did not know which redactions were subject to section 87 of the IRPA and which ones

were subject to section 18.1 of the CSIS Act. Therefore, the individual was in a difficult position to bring a challenge to those privilege claims pursuant to subsection 18.1(4).

[11] As a result, the Designated Judge issued the Order. He adjourned the section 87 hearing; he ordered the Minister to file an affidavit from another CSIS official with sufficient knowledge of the relevant facts to justify the basis of the section 18.1 CSIS Act privilege claims in the CTR; and he further ordered the Minister to make that affiant available to the Court to provide *viva voce* evidence, if necessary.

[12] The Attorney General appealed the Order. Notwithstanding her appeal, the Attorney General complied with the Order by filing an affidavit by a CSIS officer with knowledge of the relevant facts (the second CSIS Affiant). The Designated Judge reviewed the second CSIS Affiant's affidavit, after which he issued a direction indicating that he was satisfied of the basis for the section 18.1 CSIS Act privilege claims and would not require oral testimony from the second CSIS Affiant.

[13] The Designated Judge's direction gave the Attorney General the opportunity to seek an adjournment of the judicial review hearing pending the outcome of the present appeal. She did not seek such an adjournment, and the judicial review hearing went ahead as planned. The matter has now been disposed of by the Federal Court [redacted]

[14] No special advocate or *amicus curiae* appeared before the Designated Judge during the section 87 hearing (Transcript of the Section 87 Hearing, Appeal Book, Tab 18). On appeal, an

amicus curiae was appointed by this Court to assist it in determining the appeal. The *amicus* later withdrew and was replaced by a second *amicus curiae* who made written representations and appeared before the Court at the hearing. The *amicus*' submissions were limited to the issue on appeal, namely whether the impugned Order was made within jurisdiction.

II. Issue

[15] The sole issue before our Court is whether the Designated Judge had jurisdiction to issue the Order under appeal.

III. Analysis

A. *Preliminary Matter — Mootness*

[16] At the hearing of this appeal, our Court raised the question of whether the appeal had become moot. The Attorney General's Notice of Appeal asks this Court to set aside the Order, since she has complied with it in full. In oral submissions, both the Attorney General and the *amicus* argued that this appeal raises an important jurisdictional question and that this Court should exercise its residual discretion to decide the matter.

[17] I agree. While the general rule is that a court should not decide a matter once it has become moot, a court retains residual discretion to decide the matter if it is warranted in the circumstances: *Borowski v. Canada (Attorney General)*, [1989] 1 S.C.R. 342 [*Borowski*]. Having

reviewed the factors enumerated in *Borowski*, and bearing in mind the agreed position of the Attorney General and the *amicus*, I am of the view that the issue raised in this appeal is of sufficient importance such that this Court should decide the matter notwithstanding its mootness.

[18] Therefore, I shall proceed to address the matter on its merits.

B. *Standard of Review*

[19] The question raised in this appeal is a question of law, reviewable on the standard of correctness (*Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235).

C. *Does a Designated Judge have jurisdiction to require evidentiary justification for a privilege claim made under section 18.1 of the CSIS Act absent an application brought under subsection 18.1(4) of that Act?*

[20] The question of whether the Designated Judge had jurisdiction to issue the impugned Order must be answered, first and foremost, by applying the principles of statutory interpretation. The Attorney General has put considerable emphasis on her submission that section 18.1 of the CSIS Act is a complete statutory code which is intended to provide a comprehensive regulation of the CSIS human source privilege to the exclusion of any other law (see, for example, Memorandum of Fact and Law of the Attorney General at paras. 32-43). [redacted] this straightforward argument does not dispose of the matter. Since the statute does not provide an

explicit answer to the question posed in this appeal, this Court must still resort to principles of statutory interpretation to arrive at an answer [redacted]

[21] The Attorney General in her submissions has also argued that the Federal Court does not have implied jurisdiction or plenary jurisdiction to issue the impugned Order. In my view, these are secondary considerations and they will briefly be addressed at the end of these reasons.

[22] Although the proceeding which gave rise to this appeal was a non-disclosure application under section 87 of the IRPA, the statutory provision at issue before our Court is section 18.1 of the CSIS Act. More particularly, it is subsections 18.1(1), (2) and (4) that are under consideration. These provisions read as follows:

Purpose of section — human sources	**Objet de l'article — sources humaines**
18.1 (1) The purpose of this section is to ensure that the identity of human sources is kept confidential in order to protect their life and security and to encourage individuals to provide information to the Service.	**18.1 (1)** Le présent article vise à préserver l'anonymat des sources humaines afin de protéger leur vie et leur sécurité et d'encourager les personnes physiques à fournir des informations au Service.
Prohibition on disclosure	**Interdiction de communication**
(2) Subject to subsections (3) and (8), no person shall, in a proceeding before a court, person or body with jurisdiction to compel the production of information, disclose the identity of a human source or any information from which the identity of a human source could be inferred.	**(2)** Sous réserve des paragraphes (3) et (8), dans une instance devant un tribunal, un organisme ou une personne qui ont le pouvoir de contraindre à la production d'informations, nul ne peut communiquer l'identité d'une source humaine ou toute information qui permettrait de découvrir cette identité.
…	[…]

Application to judge	**Demande à un juge**
(4) A party to a proceeding referred to in subsection (2), an *amicus curiae* who is appointed in respect of the proceeding or a person who is appointed to act as a special advocate if the proceeding is under the *Immigration and Refugee Protection Act* may apply to a judge for one of the following orders if it is relevant to the proceeding:	**(4)** La partie à une instance visée au paragraphe (2), l'*amicus curiae* nommé dans cette instance ou l'avocat spécial nommé sous le régime de la *Loi sur l'immigration et la protection des réfugiés* peut demander à un juge de déclarer, par ordonnance, si une telle déclaration est pertinente dans l'instance :
(*a*) an order declaring that an individual is not a human source or that information is not information from which the identity of a human source could be inferred; or	*a*) qu'une personne physique n'est pas une source humaine ou qu'une information ne permettrait pas de découvrir l'identité d'une source humaine;
(*b*) if the proceeding is the prosecution of an offence, an order declaring that the disclosure of the identity of a human source or information from which the identity of a human source could be inferred is essential to establish the accused's innocence and that it may be disclosed in the proceeding.	*b*) dans le cas où l'instance est une poursuite pour infraction, que la communication de l'identité d'une source humaine ou d'une information qui permettrait de découvrir cette identité est essentielle pour établir l'innocence de l'accusé et que cette communication peut être faite dans la poursuite.

[23] The proper approach to statutory interpretation is the modern approach, otherwise described as the unified textual, contextual and purposive approach: *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27 at para. 21; *Canada Trustco Mortgage Co. v. Canada*, 2005 SCC 54, [2005] 2 S.C.R. 601 at para. 10; *Tran v. Canada*, 2017 SCC 50, [2017] 2 S.C.R. 289 at para. 23; *Bayer Cropscience LP v. Canada (Attorney General)*, 2018 FCA 77 at para. 67. Following this approach, "the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention

of Parliament" (Driedger, *Construction of Statutes* (2nd ed., 1983) at p. 87). This approach must be kept in mind in addressing the submissions of the Attorney General and the *amicus*.

[24] With regard to the text of section 18.1 – except for the challenge mechanism provided for in subsection 18.1(4) – there is nothing in the wording of section 18.1 that explicitly confers jurisdiction on a designated judge to inquire further into the basis of privilege claims made thereunder. According to the Attorney General, therefore, a subsection 18.1(4) application is the "condition precedent" that engages a designated judge's jurisdiction to inquire further into the basis of a section 18.1 CSIS Act privilege claim. In other words, the Attorney General argues that the only forum in which she will be required to lead evidence in support of a section 18.1 privilege claim is a hearing held pursuant to subsection 18.1(7) of the Act and such a hearing will not take place absent a subsection 18.1(4) application.

[25] The *amicus*, for his part, disagrees with this interpretation. He argues that "[n]othing in s[ubsection] 18.1(4) can properly be read as ousting the Court's authority to require an evidentiary basis for the claim of privilege" (Memorandum of Fact and Law of the *Amicus Curiae* at para. 43). There is nothing inconsistent, he argues, in allowing the individuals listed in subsection 18.1(4) to challenge the claims of privilege while preserving the designated judge's residual discretion to test the basis of those claims whether or not such a challenge is brought.

[26] Furthermore, says the *amicus*, Parliament knows how to speak when it intends to preclude a court from testing, of its own motion, the basis of a privilege claim. Sections 38.13 and 39 of the *Canada Evidence Act*, R.S.C. 1985, c. C-5 (CEA) are, in his view, examples of the

clear language Parliament uses to oust a court's jurisdiction to inquire into the propriety of a privilege claim. No such language is found in section 18.1 of the CSIS Act. Therefore, there is no suggestion in that provision that the Attorney General's assertion of the privilege is meant to be dispositive absent a challenge.

[27] Let me first underscore that contrasting section 18.1 of the CSIS Act with other statutory provisions that govern privilege claims invoked by the state is a helpful aid to statutory interpretation in this case. [redacted] It is equally helpful to compare the CSIS Act with provisions in the IRPA.

[28] With that in mind, I agree with the *amicus* that the absence of prohibitive language such as is found in sections 38.13 and 39 of the CEA weighs in favour of a finding that a designated judge has jurisdiction to inquire into a section 18.1 CSIS Act privilege claim notwithstanding the CSIS Act's silence on the matter. However, as I will explain, further considerations prevent me from reaching that conclusion.

[29] For ease of reference, subsections 38.13(1)(8), 38.131(1)(8)(9) and 39(1) of the CEA are reproduced, in relevant part, below:

Certificate of Attorney General of Canada	**Certificat du procureur général du Canada**
38.13 (1) The Attorney General of Canada may personally issue a certificate that prohibits the disclosure of information in connection with a proceeding for the purpose of protecting information obtained in	**38.13 (1)** Le procureur général du Canada peut délivrer personnellement un certificat interdisant la divulgation de renseignements dans le cadre d'une instance dans le but de protéger soit des renseignements obtenus à titre

confidence from, or in relation to, a foreign entity as defined in subsection 2(1) of the *Security of Information Act* or for the purpose of protecting national defence or national security. The certificate may only be issued after an order or decision that would result in the disclosure of the information to be subject to the certificate has been made under this or any other Act of Parliament.

…

Restriction

(8) The certificate and any matters arising out of it are not subject to review or to be restrained, prohibited, removed, set aside or otherwise dealt with, except in accordance with section 38.131.

…

Application for review of certificate

38.131 (1) A party to the proceeding referred to in section 38.13 may apply to the Federal Court of Appeal for an order varying or cancelling a certificate issued under that section on the grounds referred to in subsection (8) or (9), as the case may be.

…

Varying the Certificate

(8) If the judge determines that some of the information subject to the certificate does not relate either to information obtained in confidence from, or in relation to, a foreign entity as defined in subsection 2(1) of the *Security of Information Act*, or to

confidentiel d'une entité étrangère — au sens du paragraphe 2(1) de la *Loi sur la protection de l'information* — ou qui concernent une telle entité, soit la défense ou la sécurité nationales. La délivrance ne peut être effectuée qu'après la prise, au titre de la présente loi ou de toute autre loi fédérale, d'une ordonnance ou d'une décision qui entraînerait la divulgation des renseignements devant faire l'objet du certificat.

[…]

Restriction

(8) Le certificat ou toute question qui en découle n'est susceptible de révision, de restriction, d'interdiction, d'annulation, de rejet ou de toute autre forme d'intervention que sous le régime de l'article 38.131.

[…]

Demande de révision du certificat

38.131 (1) Toute partie à l'instance visée à l'article 38.13 peut demander à la Cour d'appel fédérale de rendre une ordonnance modifiant ou annulant un certificat délivré au titre de cet article pour les motifs mentionnés aux paragraphes (8) ou (9), selon le cas.

[…]

Modification du certificat

(8) Si le juge estime qu'une partie des renseignements visés par le certificat ne porte pas sur des renseignements obtenus à titre confidentiel d'une entité étrangère — au sens du paragraphe 2(1) de la *Loi sur la protection de l'information* — ou qui

national defence or national security, the judge shall make an order varying the certificate accordingly.	concernent une telle entité ni sur la défense ou la sécurité nationales, il modifie celui-ci en conséquence par ordonnance.
Cancelling the certificate	**Révocation du certificat**
(9) If the judge determines that none of the information subject to the certificate relates to information obtained in confidence from, or in relation to, a foreign entity as defined in subsection 2(1) of the *Security of Information Act*, or to national defence or national security, the judge shall make an order cancelling the certificate.	**(9)** Si le juge estime qu'aucun renseignement visé par le certificat ne porte sur des renseignements obtenus à titre confidentiel d'une entité étrangère — au sens du paragraphe 2(1) de la *Loi sur la protection de l'information* — ou qui concernent une telle entité ni sur la défense ou la sécurité nationales, il révoque celui-ci par ordonnance.
…	[…]
Objection relating to a confidence of the Queen's Privy Council	**Opposition relative à un renseignement confidentiel du Conseil privé de la Reine pour le Canada**
39 (1) Where a minister of the Crown or the Clerk of the Privy Council objects to the disclosure of information before a court, person or body with jurisdiction to compel the production of information by certifying in writing that the information constitutes a confidence of the Queen's Privy Council for Canada, disclosure of the information shall be refused without examination or hearing of the information by the Court, person or body.	**39 (1)** Le tribunal, l'organisme ou la personne qui ont le pouvoir de contraindre à la production de renseignements sont, dans les cas où un ministre ou le greffier du Conseil privé s'opposent à la divulgation d'un renseignement, tenus d'en refuser la divulgation, sans l'examiner ni tenir d'audition à son sujet, si le ministre ou le greffier attestent par écrit que le renseignement constitue un renseignement confidentiel du Conseil privé de la Reine pour le Canada.

[30] As can be seen from the above, subsection 38.13(1) and section 38.131 of the CEA, which allow the Attorney General to withhold disclosure of information by issuing a certificate, explicitly provide that the only mechanism to challenge such a certificate is an application by a

party made pursuant to section 38.131. Subsection 38.131(8) provides a restriction on a designated judge's power to inquire further into the basis for a privilege claim, the tenor of which is not found anywhere in section 18.1 of the CSIS Act.

[31] Section 39, for its part, is even more extreme and prohibits any inquiry by a judge under any circumstances. It is clear that no such language appears in section 18.1 of the CSIS Act.

[32] As our Court has now twice noted, Parliament is presumed to know about these provisions and the mechanisms they create (*Canada (Attorney General) v. Almalki*, 2016 FCA 195 at para. 67 [*Almalki*]; [redacted] In interpreting section 18.1 of the CSIS Act, this Court must give effect to Parliament's choice not to use language similarly restrictive to that found in those provisions.

[33] As indicated above, although the foregoing analysis weighs in favour of a finding that the Federal Court has jurisdiction to issue an Order such as the one under appeal, that is not the end of the matter. While the *amicus* has ably argued that the absence of prohibitive language in section 18.1 favours a finding that a designated judge does have jurisdiction, the Attorney General has submitted that the absence of permissive language favours the opposite conclusion. Indeed, she argues, Parliament uses words like "the judge may, on the judge's own motion", as found in paragraph 83(1)(*c*) of the IRPA, when it wishes to confer jurisdiction, such that the absence of such language in section 18.1 of the CSIS Act must be taken to mean that a designated judge lacks jurisdiction. Paragraph 83(1)(*c*) of the IRPA reads as follows:

Protection of information	**Protection des renseignements**
83 (1) The following provisions apply	**83 (1)** Les règles ci-après s'appliquent

to proceedings under any of sections 78 and 82 to 82.2: …	aux instances visées aux articles 78 et 82 à 82.2 : […]
(*c*) at any time during a proceeding, the judge may, on the judge's own motion — and shall, on the request of the Minister — hear information or other evidence in the absence of the public and of the permanent resident or foreign national and their counsel if, in the judge's opinion, its disclosure could be injurious to national security or endanger the safety of any person; …	*c*) il [le juge] peut d'office tenir une audience à huis clos et en l'absence de l'intéressé et de son conseil — et doit le faire à chaque demande du ministre — si la divulgation des renseignements ou autres éléments de preuve en cause pourrait porter atteinte, selon lui, à la sécurité nationale ou à la sécurité d'autrui; […]

[34] Therefore, comparing section 18.1 of the CSIS Act to similar provisions in the CEA and the IRPA is helpful, but not determinative. It is necessary to consider the circumstances in which section 18.1 of the CSIS Act was enacted to better ascertain Parliament's intention.

[35] Section 18.1 of the CSIS Act is a relatively new provision. It was enacted on April 23, 2015 by the *Protection of Canada from Terrorists Act*, S.C. 2015, c. 9. It is generally understood that the provision was enacted in response to the Supreme Court of Canada's decision in *Canada (Citizenship and Immigration) v. Harkat*, 2014 SCC 37, [2014] 2 S.C.R. 33 [*Harkat*], in which the majority of the Court held that common law police informer privilege did not extend to CSIS human sources (para. 80). The Court emphasized, however, that the IRPA — in that case, section 83 was at issue — would generally protect the identity of CSIS human sources from public disclosure (para. 83). In fact, contrary to the special advocates' submissions in that case, the Court held that the absence of a balancing approach to disclosure, such as the one found in section 38.06 of the CEA, did not render the IRPA scheme unconstitutional (para. 66).

[36] Prior to the enactment of section 18.1, then, the issue of non-disclosure of CSIS human source information was dealt with under the provisions applicable to the underlying proceeding: section 83 of the IRPA for security certificates; section 87 of the IRPA for judicial review proceedings in immigration matters; and section 38 of the CEA for criminal and other proceedings. This Court in *Almalki* had the following to say about the effect the enactment of section 18.1 of the CSIS Act would have on a proceeding involving section 38 of the CEA:

> [60] Thus, when one considers the historical context and the legislative evolution of section 38 of the *CEA* and of section 18.1 of the *CSIS Act*, it is evident that the new provision deprives the respondents of the benefit of the more liberal version of the privilege set out in section 38 of the *CEA* pursuant to which the question of the identity of sources and information tending to identify them was dealt with up until now.

[37] Indeed, section 18.1 was intended to be more restrictive than section 38 of the CEA. As the Attorney General has pointed out, our Court noted in *Almalki* that the enactment of section 18.1 of the CSIS Act had the effect of precluding the Federal Court from assessing CSIS human source information within the framework of section 38 of the CEA (paras. 37 and 39). The Attorney General submits that section 18.1 would similarly preclude the Federal Court from dealing with CSIS human source information in a proceeding under section 87 of the IRPA. The *amicus* does not dispute that position (Memorandum of Fact and Law of the *Amicus Curiae* at para. 46).

[38] I also agree. A designated judge's jurisdiction to inquire further into the basis for privilege claims made under section 18.1 of the CSIS Act must be rooted in that Act. Hence, the plain text of section 18.1 does not provide a clear answer. Nor does comparing it with similar provisions dealing with the subject of evidentiary privileges claimed by the Crown.

[39] However, considering the context in which section 18.1 was enacted, I can only conclude that subsection 18.1(4) of the CSIS Act restricts a designated judge's ability to require evidence in support of a section 18.1 privilege claim where no application has been brought. In my view, this conclusion is consistent with Parliament's intention to impose stricter safeguards on human source information than is provided by either of the CEA or the IRPA.

[40] Although that conclusion is sufficient to dispose of this appeal, further commentary is warranted in the circumstances of this case.

[41] As mentioned earlier in relation to the background to this appeal, the Order under review was issued by the Designated Judge because he had serious concerns about the foundation for the privilege claims made by the Attorney General under section 18.1. The Designated Judge was provided with the unredacted section 18.1 material, which seems to have now become the practice following the Federal Court's decision by Noël J. in *X (Re)* (2017 FC 136).

[42] The Attorney General has argued before us that the unredacted section 18.1 material was provided to the Designated Judge only to provide the necessary context to decide the Minister's section 87 IRPA motion, and not to allow him to test the basis for the section 18.1 claims (Reply Memorandum of the Attorney General at para. 23). With respect, that is unconvincing.

[43] Parliament cannot have intended to provide designated judges with information over which section 18.1 CSIS Act privilege is claimed, only to leave them powerless to inquire further if the basis for those privilege claims is not apparent on the face of the record (Memorandum of

Fact and Law of the *Amicus Curiae* at para. 53). They must have the ability to do something when faced, as the Designated Judge in this case was faced, with a section 18.1 privilege claim that does not, at least on a *prima facie* basis, appear well-founded.

[44] The appropriate course of action in such a case is, in my view, to appoint an *amicus curiae* or a special advocate for the purpose of providing a different perspective than that of the Attorney General on the issue of section 18.1 privilege claims.

[45] Firstly, both the Attorney General and the *amicus* before our Court agreed that this was a possible course of action. Indeed, section 87.1 of the IRPA explicitly contemplates the appointment of a special advocate in relation to judicial review applications. The Attorney General and the *amicus* also agreed that a designated judge cannot quash the claim of privilege absent an application under subsection 18.1(4). Therefore, if the Designated Judge was unsatisfied with the justification provided pursuant to the Order under appeal, then the next step would have to be to appoint an *amicus* or a special advocate. In that respect, the Attorney General has suggested that there was no useful purpose to the Order (Memorandum of Fact and Law of the Attorney General at para. 57). The *amicus*, for his part, submits that a designated judge should have jurisdiction to issue such an order to help decide whether it is necessary to appoint an *amicus* or special advocate, because that will avoid additional expenses and delays. I do not agree.

[46] Two competing considerations lead to the above conclusion. On the one hand, the party to the underlying proceeding had access to a statutory remedy which he or she refused to use,

and some weight should be given to that choice. On the other hand, designated judges must retain some supervisory power over the government's claims of privilege and cannot be bound by a party's choice, which, as I will explain, may not even have been consciously made.

[47] These considerations have caused me to find that the appointment of an *amicus* or of a special advocate strikes the best balance between the need to give effect to the statutory scheme as it is written, and the need for designated judges to maintain control over their own processes (Memorandum of Fact and Law of the *Amicus Curiae* at para. 58) and to fulfill their roles as "gatekeepers" (see *Harkat* at para. 46). Before expanding further on each of these considerations, I note in passing that, while section 87 of the IRPA incorporates by reference almost all the elements of section 83, it does not import the requirement to name a special advocate; that does not mean a designated judge cannot still choose to do so. As stated earlier, no *amicus* or special advocate appeared before the Designated Judge during the section 87 hearing. It was only on appeal that an *amicus* was appointed by this Court.

[48] I now turn to the first consideration. The fact that the party to the underlying proceeding had access to a statutory remedy, and refused to avail himself of that remedy, must, in my view, carry some weight. The Attorney General agrees that, in all but the most exceptional cases, the party to the underlying proceeding will have notice of the fact that some information has been withheld pursuant to section 18.1 of the CSIS Act. [redacted] If a party who had knowledge of the privilege claims was entitled by statute to challenge them, and chose not to do so, the designated judge must give some import to that choice even if, in his or her own view, such a challenge

would have been successful. As stated by [redacted] and also by the *amicus* (Memorandum of Fact and Law of the *Amicus Curiae* at para. 60), there might be many reasons why a party prefers not to challenge the Attorney General's claim of privilege under section 18.1 of the CSIS Act. Moreover, empowering designated judges to test the foundation of section 18.1 privilege claims of their own motion in all cases would entice the underlying parties to abdicate their responsibility to take control of their own proceeding. Indeed, parties would have little incentive ever to institute a subsection 18.1(4) challenge if they knew they could entirely rely and depend on the designated judge to test the privilege claim on their behalf. I do not believe subsection 18.1(4) was drafted with such an intention.

[49] This, however, brings me to the second — and competing — consideration. Although a party's choice not to institute a subsection 18.1(4) challenge is to bear some weight, it should not be entirely dispositive. Indeed, a designated judge should not be strictly bound in all cases by a party's choice not to institute a subsection 18.1(4) challenge. A designated judge will generally not know why the party chose not to launch a subsection 18.1(4) challenge, or whether this choice was even a conscious one. In this case, the only notice given to the party of the fact that section 18.1 CSIS Act privilege claims were made was a brief mention of this fact in the cover letter to the CTR. Moreover, and as noted by the Designated Judge, a party will often be in a difficult position to determine whether to bring a subsection 18.1(4) challenge, not knowing what the basis for such a challenge might be or even how much material is subject to section 18.1 privilege as opposed to another privilege. The fact that the individual in this case was represented by counsel in the underlying judicial review matter does not make the party's position much easier. Counsel did not have access to that material, either.

[50] Given that the underlying party may not know how much information is subject to the section 18.1 CSIS Act privilege, or where in the record such information is located, this Court suggested at the hearing that the Attorney General's position would incentivize a party to bring a subsection 18.1(4) application in all cases. The Attorney General took no issue with that incentive, and argued that subsection 18.1(4) could provide effective redress in all cases — whether section 18.1 applied to only a few words, or whether it covered several pages in the record. She suggested that a subsection 18.1(4) application simply puts the Attorney General to the strict proof of the basis for the section 18.1 privilege claims. This suggestion was based on the presumption that only the designated judge would have access to the unredacted section 18.1 information — not even the *amicus* or special advocate would have access to it.

[51] I cannot accept that view. I do not believe Parliament intended to require designated judges to allow overreaching privilege claims to pass them by simply because the underlying party did not challenge them. I maintain this belief no matter how easy it may be for a party to bring a statutory challenge. As stated above, however, the recourse must be rooted in the statute.

[52] The *amicus* submits that nothing in section 18.1 of the CSIS Act relieves CSIS of the burden of establishing a *prima facie* basis of a privilege claim made thereunder. In my view, that is a step too far. Indeed, section 18.1 of the CSIS Act is more restrictive than section 38 of the CEA or section 87 of the IRPA, precisely because section 18.1 does not place the burden on the state to justify the privilege. That is one of the most salient differences between section 18.1 of the CSIS Act and the other provisions. I do not believe, however, that this removal of the onus means that the hands of a designated judge are completely tied when a party — for some

unknown reason — neglects to put the Attorney General to the strict proof of the foundation for the privilege by invoking subsection 18.1(4).

[53] Likewise, I do not accept the view that only the designated judge can have access to the unredacted section 18.1 information. The purpose of appointing an *amicus* or a special advocate is so that the designated judge may benefit from a different perspective than that of the government. It logically follows that this will require them to have access to the unredacted section 18.1 CSIS Act material.

[54] If the *amicus* or special advocate views the section 18.1 material and concludes that it is properly subject to the section 18.1 CSIS Act privilege, then he or she will decline to bring an application pursuant to subsection 18.1(4). The designated judge will not have jurisdiction to require further evidence of the basis for the privilege, notwithstanding that he or she may still believe it is ill-founded. Presumably these cases will be rare. If they arise, however, the underlying party's right to full and fair disclosure has been given as much effect as possible within the limits of the statute. The party declined to challenge the privilege, and a second person appointed to consider whether the privilege should be challenged also so declined.

[55] If, on the other hand, the *amicus* or special advocate views the information and believes the privilege claims to be ill-founded, then he or she can institute a subsection 18.1(4) challenge. The designated judge will have full jurisdiction to inquire further into the basis for the claims. This will mean that the designated judge can issue an order such as the one under appeal. The Attorney General may even provide justification of her own motion in response to the

subsection 18.1(4) application. If the designated judge is unsatisfied with the evidentiary justification provided, then he or she can issue one of the orders in paragraphs 18.1(4)(*a*) or (*b*).

[56] The *amicus* put forth the argument that this mechanism is unduly cumbersome. Indeed, the amicus argues, there would be no need to appoint an *amici* and special advocates if the designated judge was satisfied on the basis of the evidence that such appointments were unnecessary (Memorandum of Fact and Law of the *Amicus Curiae* at para. 63). That is what happened in the case at bar: an affidavit was provided to the Designated Judge and he was satisfied.

[57] There are three short responses to this concern. First, while a less cumbersome framework will generally be preferable, it remains that whatever framework is chosen must be authorized by the statute. Second, the appointment of an *amicus* or of a special advocate in cases such as the one at bar gives some meaning to the fact that no subsection 18.1(4) application was brought by a party or a listed person in respect of the underlying proceeding. Third, it ensures that the designated judge benefits from a perspective opposite that of the government, thus keeping the designated judge in a more adjudicative, rather than inquisitorial role.

[58] The above analysis has dealt with situations in which a designated judge has access to unredacted information subject to privilege under section 18.1 of the CSIS Act and has concerns that the privilege is not properly claimed. Two other possibilities exist. The designated judge may view the information and be satisfied that the privilege applies. Likewise, the designated judge may never come across the information at all. I shall address each of these possibilities.

[59] If a designated judge views the information as subject to privilege under section 18.1 of the CSIS Act and has no concerns about the appropriateness of the privilege claim, then, in my view, the matter will end there. The underlying party had access to a statutory remedy and did not invoke it. Further, if a designated judge agrees that the privilege claim does apply then he has no obligation to appoint an *amicus* or a special advocate. The *amicus* has raised this very argument, and I am in agreement (Memorandum of Fact and Law of the *Amicus Curiae* at para. 52).

[60] It is possible, too, that no designated judge will ever become privy to the information. Indeed, at the hearing before our Court, a question arose as to what would happen if the section 18.1 CSIS Act privilege claims were made before a "court, person or body with jurisdiction to compel the production of information" other than a designated judge of the Federal Court (see subsection 18.1(2)). No designated judge would come across the information.

[61] Upon reflection, it would appear that such instances will be rare. Any information besides CSIS human source information which the Attorney General seeks to withhold based on national security concerns will have to be dealt with under the CEA or the IRPA. Thus, unless the only privilege she claims is under section 18.1 of the CSIS Act, she will find herself before a designated judge of the Federal Court.

[62] Should such an instance arise, however, the "court, person or body" will not have viewed the unredacted section 18.1 material. They will be in no better position than the underlying party to know whether the privilege is properly claimed; nor will they have any basis on which to

decide whether to appoint an *amicus* or a special advocate for the purposes of challenging the privilege under subsection 18.1(4). While each case will have to be decided on its own merits, I would suggest that in such an instance the underlying party will need to be more vigilant in terms of deciding whether to bring an application under subsection 18.1(4) of the CSIS Act, since otherwise the redacted information will never come before a designated judge.

[63] [redacted] I would think it imprudent to task a court, tribunal or body which has not seen the unredacted section 18.1 information with appointing an *amicus* or a special advocate to challenge the privilege claims over that information.

[64] Finally, I will comment only briefly on implied jurisdiction and plenary powers. With respect to implied jurisdiction, the Attorney General argues that the test is stringent: *Canada (Human Rights Commission) v. Canadian Liberty Net*, [1998] 1 S.C.R. 626. The fact that the Designated Judge thought it desirable to test the basis of the section 18.1 privilege claims is not sufficient to found jurisdiction. The *amicus*, for his part, had argued that overbroad section 18.1 claims constitute an abuse of process, which a designated judge has plenary powers to address.

[65] As stated at the outset, regard should first be given to the principles of statutory interpretation. The Attorney General herself has submitted that the existence of plenary powers

should be assessed in accordance with the principles of statutory interpretation (Memorandum of Fact and Law of the Attorney General at para. 67, citing *Canada Transit Company v. Windsor (City)*, 2015 FCA 88 at para. 19, appeal allowed on other grounds: 2016 SCC 54, [2016] 2 S.C.R. 617). The *amicus* in oral arguments also agreed that the principal exercise required of this Court was one of statutory interpretation. With this in mind, I do not find that the arguments respecting either implied jurisdiction or plenary powers would cause me to reach a different conclusion from that at which I have arrived following the foregoing analysis. Accordingly, there is no need to expand on that matter.

IV. Disposition

[66] For these reasons, I would allow the appeal. The Attorney General having complied in full with the Designated Judge's Order, the appropriate remedy is to declare that the Order was made in excess of jurisdiction.

[67] These public reasons were first released on a classified basis on August 31, 2018 to ensure compliance with national security requirements prior to public release.

"Richard Boivin"
J.A.

"I agree
Yves de Montigny J.A."

"I agree
J.B. Laskin J.A."

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	CONF-3-18
STYLE OF CAUSE:	IN THE MATTER OF AN ORDER MADE WITH RESPECT TO SECTION 18.1 OF THE *CANADIAN SECURITY INTELLIGENCE SERVICE ACT*, R.S.C. 1985, c. C-23 AS AMENDED
PLACE OF HEARING:	OTTAWA, ONTARIO
DATE OF HEARING:	JUNE 4, 2018
REASONS FOR JUDGMENT BY:	BOIVIN J.A.
CONCURRED IN BY:	DE MONTIGNY J.A. LASKIN J.A.
DATED:	AUGUST 30, 2018

APPEARANCES:

Derek Rasmussen Lorne Ptack	FOR THE APPELLANT
Owen M. Rees	*AMICUS CURIAE*

SOLICITORS OF RECORD:

Nathalie G. Drouin Deputy Attorney General of Canada	FOR THE APPELLANT
CONWAY BAXTER WILSON LLP Ottawa, Ontario	*AMICUS CURIAE*