Federal Court of Appeal | Cour d'appel fédérale

Date: 20221128

Docket: A-298-21

Citation: 2022 FCA 206

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

BETWEEN:

THE ATTORNEY GENERAL OF CANADA

Appellant

and

HASSAN ALMREI

Respondent

Heard at Ottawa, Ontario, on October 4, 2022.

Judgment delivered at Ottawa, Ontario, on November 28, 2022.

REASONS FOR JUDGMENT BY: BOIVIN J.A.

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

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PUBLIC REASONS FOR JUDGMENT

This is a public version of confidential reasons for judgment issued to the parties. There are no redactions from the confidential reasons for judgment.

BOIVIN J.A.

I. Introduction

[1] This is an appeal from an Order rendered by Mosley J. of the Federal Court (the Designated Judge) (2021 FC 1153) on October 28, 2021 finding, as a question of law, that summaries of information protected by human source privilege pursuant to section 18.1 of the *Canadian Security Intelligence Service Act*, R.S.C, 1985, c. C-23 (CSIS Act) may be authorized by a judge of the Federal Court seized of an application made under paragraph 18.1(4)(*a*) in the context of civil proceedings, where that summary does not contain information that would identify or tend to identify a human source.

[2] The present appeal is brought by the Attorney General of Canada (AGC) on grounds that the Designated Judge, in rendering the Order, erred in his interpretation of section 18.1.

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

II. Background

[4] The proceeding underlying this appeal is a civil action initiated by Mr. Hassan Almrei against the Government of Canada in the Ontario Superior Court. As part of his civil action, Mr. Almrei seeks redress for alleged breaches of his rights under the *Canadian Charter of Rights and Freedoms*, Part 1 of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c. 11 (the Charter). More particularly, Mr. Almrei claims that the Government of Canada committed a civil wrong by way of negligent investigation and false imprisonment.

[5] Mr. Almrei's claims against the Government of Canada were brought subsequent to security certificate proceedings initiated against him under the former *Immigration Act,* R.S.C. 1985, c. I-27 and the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (IRPA). The first security certificate was issued in 2001 and later struck down by the Supreme Court of Canada in *Charkaoui, Re,* 2007 SCC 9, [2007] 1 S.C.R. 350. The second certificate, issued in 2008, was found to be unreasonable and quashed by the Federal Court in *Almrei, Re*, 2009 FC 1263, [2011] 1 F.C.R. 163. In the interim, Mr. Almrei was detained for almost eight years.

[6] In the course of the discovery process for the underlying civil action before the Ontario Superior Court, Mr. Almrei was provided with documents that were partially redacted. Mr. Almrei was also provided with transcripts of the *in camera* and *ex parte* proceedings related to the 2008 certificate which were likewise also partially redacted. The redactions made to the documents provided to Mr. Almrei were based on claims of national security and human source privilege.

[7] Mr. Almrei subsequently sought disclosure of the redacted information through two parallel applications filed before the Federal Court. The first application was filed under paragraph 38.04(2)(*c*) of the *Canada Evidence Act*, R.S.C. 1985, c. C-5 (CEA) in file DES-3-17. The second application was filed under paragraph 18.1(4)(*a*) in file DES-1-18, whereby Mr. Almrei sought relief in the form of summaries of the information over which section 18.1 privilege has been claimed by the AGC. His request for the said information did not seek to identify the human source nor did it seek to have the identity of the human source inferred.

[8] On January 12, 2021, the Designated Judge directed that the application under paragraph 18.1(4)(*a*) would be heard prior to the motion pertaining to section 38 of the CEA.

[9] The *amici curiae* filed a motion seeking a declaration that section 18.1 allows the issuance of summaries of information protected under section 18.1 privilege if the said summaries do not identify or allow an inference of the identity of the human source (non-identifying summaries). The AGC opposed that motion. The Designated Judge granted the amici's motion and found that section 18.1 allowed the Federal Court to authorize the issuance of such summaries.

[10] The present appeal solely concerns the Designated Judge's legal finding with respect to the issuance of summaries pursuant to section 18.1.

III. The Designated Judge's Order

[11] As noted, the Designated Judge reached the conclusion that section 18.1 allows the issuance of summaries, in the context of civil proceedings, that do not disclose the identity of a human source or from which the identity of a human source cannot be inferred.

[12] In so doing, the Designated Judge recalled that the purpose of human source privilege as provided for by section 18.1 is to protect the life and security of human sources by keeping their identities confidential. Although the Designated Judge found that, on its face, the prohibition on disclosure of identifying information is absolute, he emphasized the importance of reading the

CSIS Act as a whole (at paras. 18, 19 and 44). Relying on the wording of subsection 18.1(2), he was of the view that the human source privilege is not truly an absolute one as the prohibition on disclosure only applies where the production of information may be compelled for proceedings before a court or a tribunal and hence, does not "extend to disclosures by the Service for other purposes" (at paras. 43–44).

[13] The Designated Judge compared section 18.1 to other legislative schemes that, unlike section 18.1, explicitly provide for the issuance of summaries, such as section 38 of the CEA (at paras. 45–47). On this basis, the Designated Judge concluded that, contrary to other legislative schemes, both section 18.1 and section 38 of the CEA extend to proceedings before other tribunals or courts. He was of the view that the disclosure of such summaries may be more critical in providing such "external courts" with "as much information as possible to ensure an appropriate outcome" (at para. 47). The Designated Judge was further of the view that such an interpretation of section 18.1 was in the interests of justice and not contrary to the purpose of the CSIS Act.

[14] The Designated Judge accordingly found that it was open to interpret section 18.1 in such a way as to preserve the legislative intent of Parliament to protect the identities of human sources while nonetheless permitting disclosure of summaries of information to aid trial courts, in the context of civil proceedings, as long as such summaries are non-identifying:

> […] the Court may authorize the disclosure of information that is derived, extracted, described and/or summarized from information protected by s 18.1 where an application is made to a judge pursuant to paragraph 18.1(4)(a) of the *CSIS Act* and the judge determines that it is not information that discloses the identity of a human source or from which the identity of a human source could be inferred.

(Designated Judge's Decision at para. 52)

IV. Issue

[15] There is only one issue in this appeal: Did the Designated Judge correctly interpret section 18.1 of the CSIS Act in finding that it allows a designated judge of the Federal Court to issue summaries in the context of civil proceedings?

V. Standard of Review

[16] In the present case, the Designated Judge was seized with a motion to provide an interpretation with respect to section 18.1. This is a question of law, and as such, the standard of review applicable is correctness (*Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235).

VI. Legislation

[17] The relevant sections of the CSIS Act under consideration in this appeal are the following:

…	[…]
Definitions	**Définitions**
2 In this Act,	**2** Les définitions qui suivent s'appliquent à la présente loi.
…	[…]
human source means an individual who, after having received a promise of confidentiality, has provided, provides or is likely to provide	***source humaine*** Personne physique qui a reçu une promesse d'anonymat et qui, par la suite, a fourni, fournit ou pourrait vraisemblablement

information to the Service; (source humaine)

…

Purpose of section — human sources

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.

Prohibition on disclosure

(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.

Exception — consent

(3) The identity of a human source or information from which the identity of a human source could be inferred may be disclosed in a proceeding referred to in subsection (2) if the human source and the Director consent to the disclosure of that information.

Application to judge

(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:

fournir des informations au Service. (human source)

[…]

Objet de l'article — sources humaines

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.

Interdiction de communication

(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.

Exception — consentement

(3) L'identité d'une source humaine ou une information qui permettrait de découvrir cette identité peut être communiquée dans une instance visée au paragraphe (2) si la source humaine et le directeur y consentent.

Demande à un juge

(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 a 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.
…	[…]
Order — disclosure to establish innocence	**Ordonnance de communication pour établir l'innocence**
(8) If the judge grants an application made under paragraph (4)(b), the judge may order the disclosure that the judge considers appropriate subject to any conditions that the judge specifies.	(8) Si le juge accueille la demande présentée au titre de l'alinéa (4)b), il peut ordonner la communication qu'il estime indiquée sous réserve des conditions qu'il précise.
Effective date of order	**Prise d'effet de l'ordonnance**
(9) If the judge grants an application made under subsection (4), any order made by the judge does not take effect until the time provided to appeal the order has expired or, if the order is appealed and is confirmed, until either the time provided to appeal the judgement confirming the order has expired or all rights of appeal have been exhausted.	**(9)** Si la demande présentée au titre du paragraphe (4) est accueillie, l'ordonnance prend effet après l'expiration du délai prévu pour en appeler ou, en cas d'appel, après sa confirmation et l'épuisement des recours en appel.
…	[…]

VII. Analysis

A. *Section 18.1 of the CSIS Act*

[18] Section 18.1 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 *Harkat*, the Supreme Court held that the common law police informer privilege does not extend to CSIS human sources.

[19] Since its enactment, section 18.1 has been judicially considered in three instances. First, in *Canada (Attorney General) v. Almalki*, 2016 FCA 195, [2017] 2 F.C.R. 44 [*Almalki*], our Court determined that section 18.1 creates an absolute class privilege to the benefit of individuals with the status of "human source", whether acquired before or after section 18.1 came into force. Second, in *X (Re)*, 2017 FC 136, [2017] 4 F.C.R. 391 [*X (Re)*] the Federal Court (Noël J.) found that the class privilege provided for in section 18.1 is not applicable to designated judges. Designated judges are therefore not barred from seeing information protected under that provision. Finally, in *Section 18.1 of the Canadian Security Intelligence Service Act, R.S.C. 1985, c. C-23, as Amended (Re)*, 2018 FCA 161, [2019] 2 F.C.R. 333 [*Re Section 18.1 of the CSIS Act*] our Court held that an order for disclosure of information protected by section 18.1 cannot be made by a court of its own motion. An application has to be brought under subsection 18.1(4).

[20] At issue in the present appeal is the interpretation of section 18.1 and, more particularly, whether it allows for the issuance of summaries, even non-identifying ones. This issue must be resolved by applying the principles of statutory interpretation. The proper approach is what has been described as the unified textual, contextual and purposive approach: *Rizzo & Rizzo Shoes*

Ltd. (Re), [1998] 1 S.C.R. 27, 154 D.L.R. (4th) 193 at para. 21; *Canada Trustco Mortgage Co. v. Canada*, 2005 SCC 54, [2005] 2 S.C.R. 601 at para. 10; *Tran v. Canada (Public Safety and Emergency Preparedness)*, 2017 SCC 50, [2017] 2 S.C.R. 289 at para. 23; *Bayer Cropscience LP v. Canada (Attorney General)*, 2018 FCA 77, 155 C.P.R. (4th) 99 at para. 67. Consistent with 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" (E. A. Driedger, *Construction of Statutes* (2nd ed., 1983) at p. 87). This approach must be kept in mind in addressing the submissions of the AGC and the *amici*. (*Re Section 18.1 of the CSIS Act*).

[21] Both the AGC and the *amici* agree, as they must, that section 18.1 creates an absolute class privilege for CSIS human sources (*Almalki* at paras. 38–39). However, the AGC and the *amici* disagree on the issue of whether summaries of privileged information are allowed under section 18.1 or whether such summaries would amount to an exception to the class privilege. The Designated Judge conceded that "on a plain reading of the statute, […] the Court may not authorize the issuance of a summary that would identify a human source". In his view, the "more problematic" issue arises when "the Court is considering whether the identity of a human source 'could be inferred' from redacted information which is claimed to be 'identifying information'" (Designated Judge's decision at paras. 19–20).

[22] In this regard, the AGC submits that the CSIS Act does not provide jurisdiction to issue summaries, even non-identifying ones, unless it makes express reference to "summaries", which is not the case under section 18.1. The Designated Judge, it is argued, erred when he found that

the Federal Court may authorize, in the context of civil proceedings, the issuance of non-identifying summaries that may be "derived, extracted, described and/or summarized from information protected under s. 18.1 *CSIS Act*" (Memorandum of Fact and Law of the AGC at para. 11).

[23] For their part, the *amici* do not question the importance of ensuring that the identity of a human source remains confidential but insist that, in requesting summaries, they seek nothing beyond what the law permits, which is disclosure of information that would not directly or indirectly identify a human source. In other words, they seek, to the extent possible, summaries that would convey the tenor of the redacted information without revealing potentially identifying details. Such information, the *amici* contend, is not covered by the privilege and its disclosure under paragraph 18.1(4)(*a*) is not prohibited as it falls outside the ambit of subsection 18.1(2) of the CSIS Act (Memorandum of Fact and Law of the *Amici Curiae* at paras. 15, 31, 32, 36 and 37).

[24] It is recalled that the purpose of the class privilege provided for at section 18.1 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" (subsection 18.1(1)). Indeed, information protected by section 18.1 is exceptionally sensitive in nature and the risks posed by its disclosure can be fatal to a human source. It follows that the spectre of inadvertent disclosure of such sensitive information cannot be underestimated and courts have repeatedly emphasized that the smallest disclosed detail can be sufficient to reveal the identity of an informer (*R v. Leipert*, [1997] 1 S.C.R. 281, 143 D.L.R. (4th) 38 at paras. 18 and 28;

R v. Pilbeam, 2018 MBCA 128, 369 C.C.C. (3d) 437 at para. 33; *R v. McKay*, 2016 BCCA 391, 342 C.C.C. (3d) 58 at para. 152). Parliament was patently aware of the risks associated with disclosure of human source information and the importance of its protection when it urgently introduced Bill C-44 (*An Act to amend the Canadian Security Intelligence Service Act and other Acts*), just a few months following the decision of the Supreme Court of Canada in *Harkat*.

[25] A human source is defined at section 2 of the CSIS Act and means "an individual who, after having received a promise of confidentiality, has provided, provides or is likely to provide information to the Service". The privilege can be waived if the human source and the Director both consent to the disclosure of the source's identity ((subsection 18.1(3) CSIS Act).

[26] Under subsection 18.1(2), the disclosure of information subject to privilege is prohibited. Furthermore, if the information is found by the Designated Judge not to be subject to privilege, its disclosure can be ordered (at paragraph 18.1(4)(*a*)). Also, if the proceeding is a prosecution of an offence, the information is subject to privilege but can be disclosed, with conditions, in order to establish the innocence of the accused (at paragraph 18.1(4)(*b*) and subsection 18.1(8)).

[27] In summary, Parliament's intention was clear when it adopted section 18.1: a designated judge seized of an application under this provision can either (i) prohibit the disclosure of the privileged information; (ii) order the disclosure of the information, if it is not subject to privilege; and, (iii) in the context of a criminal prosecution, the information remains subject to privilege but can be disclosed, with conditions, in order to establish the innocence of the accused. The language used by Parliament with respect to section 18.1 is clear and consistent with its intent

and purpose—that is, to ensure that the identity of a human source is kept confidential in order to protect their life and security. Indeed, absent solid guarantees with respect to confidentiality, not many people would accept to serve as a human source for the Service (Legislative Summary of Bill C-44, Library of Parliament, 2014).

[28] Significantly, section 18.1 was intended to be more restrictive than section 38 of the CEA (*Re Section 18.1 of the CSIS Act* at para. 37). Our Court in *Almalki* explicitly confirmed that section 18.1 no longer allows the application of section 38 of the CEA which offered a more liberal application of the privilege as it included a balancing of public interests:

> 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 [section 18.1] 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.
>
> (*Almalki* at para. 60)

[29] It follows that if Parliament had intended to allow a designated judge to issue summaries of information under section 18.1, akin to the ones contemplated in section 38 of the CEA, I am of the opinion that it would have expressly mentioned it in the CSIS Act. Yet, it chose not to.

[30] I note that the *amici* argue that the absence of an express reference to "summaries" at paragraph 18.1(4)(*a*), rather than the non-identifying nature of the information, is not, in and of itself, determinative. In support of their position, the *amici* contend that the AGC in this case advances a view that is in fact contrary to what it has argued in a prior case. Specifically, the *amici* refer to the decision in *X (Re)* at para. 18. The AGC, in that case, responding to an

argument that section 18.1 was unconstitutionally rigid, submitted that section 18.1 "does not prevent the issuance of summaries of the information that do not identify the source". The *amici* therefore submit that the AGC's position in this appeal is not only contradictory but amounts to "180-degree reversal" and this Court should take note of it as no explanation was provided in the AGC's Memorandum of Fact and Law with respect to this "volte-face".

[31] While this might be the case, it is within the purview and discretion of a party to change positions for a variety of reasons that arise in the context of specific litigation and a party assumes the inherent risks and consequences that may be incurred in other files pursuant to a change of position. During the hearing before this Court, counsel for the AGC explained that the argument advanced in *X (Re)* was provided during oral argument in response to a question by a designated judge. Counsel for the AGC did not attempt to justify the position taken in *X (Re)* from the one before this Court and merely admitted that the argument put forth in the present case indeed represents a reversal of position from the one argued in *X (Re)*, but that its former position must be viewed in its proper context. Indeed, the previous position advanced by the AGC on the availability of summaries under section 18.1 was only noted and not endorsed by the Federal Court in *X (Re)* as the constitutionality of section 18.1 was not at stake. In any event, the *amici* acknowledged the AGC's new position and further, the AGC's new position, which marks a departure from his former position, has no bearing in the present case.

B. *The bifurcation schemes contemplated in section 18.1 of the CSIS Act and section 38 of the CEA*

[32] At this juncture, it is recalled that both section 18.1, on the one hand, and section 38 of the CEA, on the other, include a bifurcation scheme based on a division of responsibilities between the Federal Court and other courts of the provinces in certain matters. Specifically, in *R. v. Ahmad*, 2011 SCC 6, [2011] 1 S.C.R. 110, the Supreme Court of Canada confirmed that the existence of such a "two-court system" is constitutionally valid.

[33] In the present case, the Designated Judge supported his finding regarding section 18.1 on the operation of the bifurcation scheme in both section 18.1 and section 38 of the CEA. The Designated Judge reasoned that if section 38 of the CEA contemplates a bifurcation scheme and allows for summaries, the bifurcation scheme in section 18.1 must, in the same way, permit the issuance of summaries.

[34] In making this finding, the Designated Judge first noted that section 38 of the CEA, more specifically subsection 38.06(2), expressly empowers a designated judge to authorize disclosure of information in the form of summaries. He also quite rightly observed that there "is no similar provision in CSIS Act s 18.1" akin to the ones in the CEA (Designated Judge's decision at para. 14). Yet, the Designated Judge nonetheless made the following assumption regarding the impact of bifurcation under section 18.1, on the one hand, and section 38 of the CEA, on the other: because both provisions extend to proceedings before other tribunals or courts—here the Superior Court of Ontario—the bifurcation process under both provisions should be interpreted in the same manner. In other words, according to the Designated Judge, section 18.1 should operate like section 38 of the CEA and allow for summaries:

> […]. In my view, the fact that these two schemes extend the Court's jurisdiction to external courts, including the provincial superior trial courts which otherwise

> have unfettered authority to compel disclosure, means that summaries may be more critical in providing those courts as much information as possible to ensure an appropriate outcome.
>
> (Designated Judge's Decision at para. 47)

[35] I am of the view that the Designated Judge erred in making that assumption. As noted by the AGC, the Designated Judge's assumption and reasoning not only ignore the words of section 18.1 but could also result in an import of the balancing test between the usefulness of the information and the public interest contemplated at section 38 of the CEA, into section 18.1. To do so is improper given our Court's finding that section 18.1 in fact "deprives the respondents of the benefit of the more liberal version of the privilege set out in section 38 of the *CEA*" (*Almalki* at para. 60).

C. *Section 18.1 compared to other legislative schemes*

[36] The intention of Parliament not to allow a designated judge to issue summaries in the context of section 18.1 is further supported by the fact that, when Parliament contemplates such summaries in legislation, in the context of national security, it does so expressly: for example, IRPA, para. 83(1)(*e*); *Prevention of Terrorist Travel Act*, S.C. 2015, c. 36, s.42, ss. 4(*c*) and 6(*c*); *Secure Air Travel Act*, S.C. 2015, c.20, s.11, para. 16(*c*) (the *legislative schemes*). In the present case, the Designated Judge was cognizant of the express language provided for in several legislative schemes regarding the issuance of summaries. The Designated Judge nonetheless attempted to understate the express references to "summaries" in these legislative schemes by restricting his analysis to a comparison with section 38 of the CEA and the "few steps", in the words of the Designated Judge, which it contemplates:

> […] first it [section 38 CEA] requires a preliminary determination of relevance of the information to the underlying proceedings. Second, there must be a finding of injury to national security, defence or international relations if the information is disclosed. The presiding judge may then consider whether the public interest in disclosure outweighs that of non-disclosure. The Court may order, subject to conditions, the release of the information in whole or in part or in the form of a summary or written admission of facts.
>
> (Designated Judge's Decision at para. 46)

[37] On this basis, the Designated Judge distinguished the various other legislative schemes—which include express references to summaries—by finding that such summaries are of a different nature than those contemplated in section 38 of the CEA. He found that they do not contain sensitive information and they all involve "either applications for judicial review or appeals in the Federal Court of decisions made by a Minister or other government official and govern the disclosure of information during those proceedings in the interest of fairness" (Designated Judge's decision at para. 47).

[38] I am of the view that the Designated Judge's distinction was misplaced. Indeed, the purpose of the summaries in the other legislative schemes at issue is to inform interested parties of the case the government holds against them without disclosing sensitive information, whereas the issuance of summaries under section 38 of the CEA is conditional to a finding that the disclosure of the underlying information would be injurious to national security (subsection 38.06(2) CEA). This difference explains, in and of itself, the absence of the "few steps" mechanism—referred to by the Designated Judge in connection with section 38 of the CEA—in the other legislative schemes.

[39] I note that the *amici* insist that Parliament's decision not to expressly provide for the possibilities of summaries in section 18.1 does not always mean that summaries cannot be allowed by designated judges. For instance, the *amici* refer to the IRPA, arguing that although section 87 of the IRPA, unlike section 83, does not explicitly authorize a judge to provide a summary, the Federal Court nonetheless held that it may exercise its discretion under section 87 to do so (Memorandum of Fact and Law of the *Amici Curiae* at para. 43; *Karahroudi v. Canada (Citizenship and Immigration),* 2016 FC 522, [2017] 1 F.C.R. 167 at para. 26; *Soltanizadeh v. Canada (Citizenship and Immigration*), 2018 FC 114, 289 A.C.W.S. (3d) 599 at para. 34 (reversed, 2019 FCA 202, but not on that point)).

[40] I am unpersuaded by this argument. Contrary to section 38 of the CEA, a "non-sensitive" summary, as the one provided in the context of section 87 of the IRPA, is intended to inform the individual of the nature of the government's case. In other words, when the Federal Court provides a "non-sensitive" summary pursuant to section 87, in the absence of an express provision, it does so in the interest of fairness—akin to the other legislative schemes. This argument accordingly fails as well.

D. *Parliament's express exception to the section 18.1 privilege*

[41] Although the prohibition on disclosure of the identity of a human source in section 18.1 is absolute, Parliament expressly envisaged one exception in the limited context of criminal proceedings. This exception can be triggered in the context of an application made to a designated judge under paragraph 18.1(4)(*b*) when an accused's innocence is at stake. Pursuant to subsection 18.1(8), if the designated judge grants the application, the designated judge has

discretion to order a disclosure “that the judge considers appropriate subject to any conditions that the judge specifies”. In my opinion, that discretion as to the form of disclosure could include the issuance of summaries.

[42] The Designated Judge interpreted the interaction between paragraph 18.1(4)(*b*) and subsection 18.1(8) as a “clear statement” that Parliament intended to provide the Federal Court with control regarding the manner in which information can be disclosed “even where it may be identifying” (Designed Judge’s decision at para. 38). Moreover, the Designated Judge dismissed the AGC’s argument that summaries, including the attempt to craft non-identifying ones, could nonetheless pose a serious danger of harm and death to CSIS human sources and, as a consequence, impact the Service’s ability to recruit.

[43] In support of his reasoning, the Designated Judge drew parallels with criminal proceedings. He explained that summaries of information protected by informer privilege are “carefully craft[ed]” in criminal courts without compromising the privilege. The reformulation of redacted information in a criminal context is achieved by the Crown with the assistance of the police in order to ensure that summaries do not inadvertently identify the informant (Designated Judge’s decision at para. 40). The Designated Judge then reasoned that, in a designated proceeding, counsel for the AGC, with the assistance of members of CSIS and the *amici*, could achieve the same result and provide the Federal Court with carefully crafted non-identifying summaries, thus minimizing the risk of inadvertent disclosure (Designated Judge’s decision at para. 40). The *amici* submit that the Designated Judge was correct to refer to the experience of criminal courts in cases involving informer privilege in support of his interpretation of section

18.1. They further contend that the use of informer privilege summaries in criminal proceedings demonstrates that the risk of inadvertent disclosure of a human source is "manageable".

[44] With respect, I am of the view that the Designated Judge's comparison with criminal proceedings is again misplaced: the summaries in criminal courts referred to by the Designated Judge are provided when the right of an accused to make full answer and defence is engaged. This is not the case in the present matter. There are meaningful differences in the kinds of fairness interests engaged in civil and criminal proceedings, and the principles applicable in the latter should not be simply transferred into the former. In the present case, the proceeding is civil and the right to disclosure is limited by section 18.1 and must give way to the privilege contemplated by Parliament. The Designated Judge's comparison must accordingly be rejected.

[45] In this regard, I recall that pursuant to section 18.1, when an underlying procedure is civil in nature, like the one in the present case, "the only remedies available to a party filing an application under section 18.1 are a declaration that (1) an individual is not a human source, and (2) information is not information from which the identity of a human source could be inferred" (paragraph 18.1(4)(*a*) (Memorandum of Fact and Law of the AGC at para. 47)). I also reiterate that, as indicated above, the sole exception envisaged by Parliament allowing a designated judge discretion with respect to the form of the order is when innocence is at stake (paragraph 18.1(4)(*b*) and subsection 18.1(8)).

[46] Finally, I note that the Designated Judge was concerned that "the Respondent [AGC] will seek to protect broad swaths of information on the strengths of its claims that disclosure would

tend to identify human sources when read by an informed observer". However, section 18.1 includes a complete mechanism which safeguards against such abuses (*Re Section 18.1 of the CSIS Act* and *X (RE)*).

[47] Before concluding, the Designated Judge referred to section 19 of the CSIS Act for the proposition that a CSIS human source does not enjoy absolute anonymity. He observed that, pursuant to section 19, the Director of CSIS retains a broad discretion and can, for operational purposes, disclose the identity of a source. On this point, it suffices to say that the sharing of information in the context of operations should not be compared with the class privilege pursuant to section 18.1, which applies to the context of legal proceedings. Indeed, the sharing of information between international partners as part of operations is done with the understanding that it will not be disclosed (*Canada (Attorney General*) *v. Telbani*, 2014 FC 1050, 251 A.C.W.S. (3d) 457) whereas the disclosure of information in the context of legal proceedings will result in public disclosure.

VIII. Conclusion

[48] In conclusion, the Designated Judge erred in law in deciding that, pursuant to section 18.1, the Federal Court can authorize disclosure of a summary of information by human source privilege in the context of civil proceedings. In doing so, he ignored the words and the purpose of the statute as well as the intention of Parliament.

[49] I would therefore allow the appeal and, rendering the decision that the Designated Judge should have rendered, I would declare that section 18.1 of the CSIS Act does not allow the issuance of summaries, including non-identifying ones, in the context of civil proceedings.

[50] These public reasons were first released on a classified basis on November 28, 2022 to ensure compliance with national security requirements prior to public release.

"Richard Boivin"
J.A.

"I agree.
Yves de Montigny J.A."

"I agree.
René LeBlanc J.A."

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

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